COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2207 **Cir. Ct. No. 2007JV20**

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

IN THE INTEREST OF JOSEPH L.C.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH L.C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed*.

¶1 NEUBAUER, J.[1] Joseph L.C. appeals from a delinquency adjudication for second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2). Joseph raises two challenges on appeal. First, Joseph contends that his noncustodial inculpatory statements to the police should have been suppressed as not knowingly, intelligently, and voluntarily made. Second, Joseph contends that his due process rights were violated because of lack of specificity in the petition or, in the alternative, that the evidence at the fact-finding hearing was insufficient to establish the conduct alleged in the delinquency petition. We reject Joseph's arguments. We affirm the order.

¶2 Joseph was fourteen years old when the State filed a petition for delinquency under WIS. STAT. ch. 938 alleging that Joseph had sexual contact with a child under the age of sixteen, his younger sister. The petition alleged that there had been ongoing incidents of sexual contact beginning in the year 2000 and continuing up until March 2007. The conduct alleged by Joseph's younger sister occurred on approximately twenty occasions and included what is described in the complaint as "humping," both while clothed and unclothed, and penis-to-mouth contact. During a forty-five minute interview with a police officer and a social worker, which took place at the home of a family friend, Joseph admitted to sexual contact with his younger sister.

¶3 Joseph later moved to suppress his statements as involuntary. The court denied Joseph's motion to suppress, and following a fact-finding hearing, the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

trial court found Joseph to be delinquent. The trial court's delinquency order placed Joseph in an out-of-home facility for a one-year period. Joseph appeals.

DISCUSSION

¶4 We begin by noting that Joseph concedes for purposes of appeal that he was not "in custody" at the time of his interrogation. Joseph raises two appellate issues. First, Joseph contends that his statements to the police were not knowingly, voluntarily or intelligently made and, therefore, should have been suppressed. Second, Joseph argues that the State's failure to reasonably specify a time frame violated Joseph's due process right to notice of the charges against him and, in the alternative, that the evidence was insufficient to establish that Joseph had contact with his sister during the mid-March 2007 time frame alleged in the petition.

Voluntariness

¶5 The issues raised by Joseph on appeal present a mixed question of law and fact. The trial court's findings of evidentiary or historical facts pertaining to the circumstances surrounding the giving of the oral statement will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984). Application of those facts to resolve constitutional questions such as voluntariness, however, requires an independent evaluation. *See* ***id.*** at 715.

¶6 If Joseph's statements were involuntary, the admission of the statements would violate his due process rights under the Fourteenth Amendment of the United States Constitution and article I, section 8 of the Wisconsin Constitution. *See* ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d

407. Both parties cite to the supreme court's decision in ***State v. Jerrell C.J.***, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110, as providing the proper framework for the voluntariness evaluation. ***Jerrell C.J.*** provides:

> The voluntariness of a confession is evaluated on the basis of the totality of the circumstances surrounding that confession. This analysis involves a balancing of the personal characteristics of the defendant against the pressures and tactics used by law enforcement officers….
>
> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id., ¶20 (citations omitted). While coercive or improper police conduct is a "necessary prerequisite" to a finding of involuntariness, the police conduct need not be egregious or outrageous in order to be coercive. ***Id.***, ¶19. Subtle pressures are considered coercive if they exceed the defendant's ability to resist. ***Id.*** The overall inquiry is whether the defendant's statements "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.***, ¶18 (citations omitted)).

¶7 These principles, as applied to a juvenile, require the exercise of special caution when assessing voluntariness of a confession particularly when there is prolonged or repeated questioning or when the interrogation occurs in the

absence of a parent, lawyer, or other friendly adult. ***Id.***, ¶21 (citing ***Hardaway v. Young***, 302 F.3d 757, 762 (7th Cir. 2002)).

¶8 With respect to Joseph's personal characteristics, it is undisputed that he was fourteen years old and in eighth grade at the time of the interview. At the time of the motion hearing, Joseph was in ninth grade and had been recently placed in special education classes. Joseph did not have any prior experience with law enforcement.

¶9 As to the circumstances surrounding the interview, the trial court found: Joseph was in the kitchen of the home of a family friend, his mother was present in the other room, Joseph had requested that his mother not be present for the interview, the officers did not handcuff Joseph or otherwise restrain his liberty, and the officers told Joseph that he was not going to be taken into custody. With respect to coercive activity, the trial court found that "[o]ther than telling him that they did not believe his initial story, and they continued questioning him, [the police] did not engage in any coercive activity."

¶10 In balancing Joseph's personal characteristics against the pressures and tactics used by the officers, the trial court observed that Joseph was fourteen years old and the interrogation lasted only forty-five minutes—the first ten of which involved a "getting acquainted" type of interview during which the officer and social worker were advising Joseph as to who they were, why they were interviewing him, and talking with him about whether or not his mother could be present. According to the officer, Joseph "did make it known, that he would feel more comfortable" if his mother were not present. The court found that the officer did not employ any prohibited coercive methods and that Joseph's feelings of

being pressured would travel to the weight given to his statements and not to admissibility.

¶11 Joseph points to several facts that he believes support the suppression of his statement: Joseph had been removed from his home the night before the interview and placed in shelter care, his mother and family friend were asked to leave the kitchen when Joseph was questioned, Joseph had no prior contacts with law enforcement and had never been talked to by an officer before this interview, Joseph initially denied the allegations and admitted to them only after repeated questioning, Joseph testified that he felt pressured into answering, and Joseph was in eighth grade at the time of the interview and later began taking special education classes. In addition, Joseph cites the officer's failure to inform him that he was free to leave, that he could refuse to answer her questions, or to advise him in any way of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966).[2]

¶12 While we agree with Joseph that certain of these facts in isolation may weigh in favor of involuntariness, this is not so when evaluated based on the totality of the circumstances. For example, while the officer asked Joseph

[2] Joseph acknowledges that ***Miranda*** warnings were not required because Joseph was not in custody at the time of the interview. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). However, he correctly contends that the failure to advise him of certain rights is appropriately considered by a court when determining voluntariness. *See* ***State v. Hoppe***, 2003 WI 43, ¶56, 261 Wis. 2d 294, 661 N.W.2d 407. We bear this in mind in reviewing the trial court's findings and in evaluating the voluntariness of Joseph's statement.

We also recognize Joseph's frustration with the officer's failure to record his interview. While the supreme court in ***State v. Jerrell C.J.***, 2005 WI 105, ¶58, 283 Wis. 2d 145, 699 N.W.2d 110, exercised its supervisory power to require electronic recordings of all in-custody interrogations of juveniles when feasible, it did not impose that requirement on noncustodial interviews. We therefore reject Joseph's contention that the absence of a recording, in and of itself, should weigh heavily against a finding of voluntariness.

questions repeatedly, the interview itself was not prolonged; while Joseph's mother was not in the room, she was nearby and Joseph did not ask for her assistance at any point. Indeed, in contrasting the facts of this case with those in ***Jerrell C.J.***, we are convinced that the statements in this case were voluntary.

¶13 In ***Jerrell C.J.***, a fourteen-year old boy was taken into custody, transported to the police station, and left alone and handcuffed in an interrogation room for two hours before being questioned by two detectives. ***Jerrell C.J.***, 283 Wis. 2d 145, ¶¶5-6. During the five and one-half hours of interrogation that followed, the detectives repeatedly challenged the juvenile's denial of involvement and refused his repeated requests to contact his parents. ***Id.***, ¶¶7, 10, 11. The supreme court determined that the juvenile's signing of a prepared statement at the end of the lengthy interrogation was not voluntary. ***Id.***, ¶¶11, 36.

¶14 In reaching its decision, the court examined the officers' techniques during the interview—the raised voices, their refusal to believe the juvenile's version of events and their urging of him to "tell a different 'truth.'" ***Id.***, ¶35. The court observed that while it did not appear from the record that the juvenile was suffering from any significant emotional or psychological condition during the interrogation, "we remain concerned that such a technique applied to a juvenile … over a prolonged period of time could result in an involuntary confession." ***Id.*** Here, however, Joseph was not in custody and the interview was not prolonged. Joseph's mother knew in advance that the interview was going to take place, and she was available and in the adjoining room when it did take place.

¶15 The underlying facts as found by the trial court are supported by facts of record and therefore are not clearly erroneous. We are satisfied that those

facts as applied to the law lead to the conclusion that Joseph's statements to the police were made voluntarily.

Sufficiency of the Complaint and Sufficiency of Evidence

¶16 Joseph next argues that the delinquency petition failed to sufficiently state the charges so as to enable Joseph to plead and prepare a defense. Joseph's argument specifically takes issue with the seven-year charging period set forth in the petition. Because Joseph failed to raise this issue before the trial court, it is waived. WIS. STAT. § 938.297(2);[3] ***Day v. State***, 52 Wis. 2d 122, 124-25, 187 N.W.2d 790, 791 (1971) (challenge to sufficiency of criminal complaint waived by failure to advance it prior to trial); ***Sheboygan County v. D.T.***, 167 Wis. 2d 276, 283, 481 N.W.2d 493 (Ct. App. 1992) (same principles which govern the sufficiency of criminal complaints apply in juvenile court proceedings).

¶17 Turning to the sufficiency of the evidence, we give great deference to the fact-finder. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. "[W]hen the trial judge acts as the finder of fact, and when there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the

[3] WISCONSIN STAT. § 938.297(2) provides:

> DEFENSES AND OBJECTIONS BASED ON PETITIONS FOR CITATION. If defenses and objections based on defects in the institution of proceedings, lack of probable cause on the face of the petition or citation, insufficiency of the petition or citation, or invalidity in whole or in part of the statute on which the petition or citation is founded are not raised within 10 days after the plea hearing, they are waived….

We decline Joseph's invitation to exercise our discretion in addressing the sufficiency of the complaint despite waiver. Doing so would permit a defendant to proceed to trial with knowledge of a defect in the petition, and then, depending on the outcome, to raise a challenge to the complaint.

witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983) (citations omitted).

¶18 Joseph's challenges to the sufficiency of the evidence center on the victim's allegations as set forth in the petition and as testified to at the fact-finding hearing. Joseph contends that the victim's testimony at the fact-finding hearing was insufficient to establish the allegations in the petition. We disagree.

¶19 In the April 19, 2007 incident reports attached to and incorporated in the complaint, the victim is reported as stating that the last sexual contact with Joseph occurred approximately one month prior to that date and involved Joseph humping her with his clothes on in exchange for allowing her to play a video game. However, at the fact-finding hearing on January 18, 2008, the victim testified that the last occurrence was approximately two years or possibly one and one-half years prior to the hearing.

¶20 In addition, Joseph points to the victim's statement in the petition that the contact occurred by a bed, while she testified at trial that the contact occurred in the living room. While the victim's recollection as to dates was not precise and the description of the exact location differed, the victim's testimony as to the circumstances surrounding the incident was generally consistent with her earlier statements in the petition, i.e., the conduct occurred at their mother's home, the contact involved "humping" while clothed, and she and Joseph were playing video games when the contact occurred. Although Joseph did not testify at the fact-finding hearing, the officer who interviewed Joseph testified as to Joseph's corroboration of the victim's account regarding sexual contact.

¶21 Finally, the petition alleged that these events occurred between the year 2000 and March 2007. The victim's testimony at trial places the incident within that time frame. Beyond that, although the victim was not able to provide specific dates, she was clear as to a course of conduct, the identity of her assailant, the approximate number of assaults, where they occurred, and why she had delayed in disclosing them. The minor discrepancy regarding the exact location at which the conduct occurred in the most recent incident—either in the living room or by a bed—is not so significant as to undermine the victim's credibility or render the evidence insufficient to support the allegations in the complaint.

¶22 In rendering its determination, the trial court commented on the victim's credibility at length. In considering Joseph's statement to the officers as compared to the victim's account, the court observed: "[B]oth versions of what occurred are very similar and close together, such as one might expect when, in fact, people are making their statements with some reference to the truthfulness of what occurred."

> [T]he Court has considered the credibility of [the victim] here, and has considered her conduct, demeanor, and appearance on the witness stand. Her conduct on the witness stand was exemplary. Her demeanor certainly indicated that she was being truthful. The clearness of her testimony was quite good, and considering her age and the period of time over which these assaults and sexual incidents occurred, according to her testimony, certainly she had the opportunity for knowing the matters that she testified about. She appeared to be relatively intelligent.
>
> No bias or prejudice was shown. No motive was offered as to why she might falsify testimony, except that she might have been angry at her older brother, the other brother, Christopher. But that offer is no explanation as to why she would say something about Joseph, because she was mad at Christopher. That just does not seem to make any sense.

> Furthermore, the Court notes that [the victim], in her testimony, made some admissions that would tend to be what one would normally think would be contrary to her interest, in so much as she acknowledged that, when she wanted some things, from time to time, she initiated the contact, and even though subjecting herself to possible embarrassment by making these acknowledgements, she did so during the course of her testimony. That gives her testimony the "ring of truth", and the Court, therefore, believes that her testimony, in fact, was truthful.
>
> When I weigh all of these factors together, her testimony was reasonable under all of the circumstances, and it certainly gives a clear indication here of the extremely dysfunctional situation in that household. There was inter-sibling sexual contact and intercourse going on in that household.
>
> Therefore, the Court is satisfied that the State has met its burden of proof, and the Court will find that Joseph is delinquent, for having committed second-degree sexual assault of a child, as charged in the petition.

¶23 Because we defer to the trial court's findings as to credibility and because there is sufficient evidence in the record to support the trial court's determination that the conduct occurred, the determination must be upheld. *See* ***id.***

CONCLUSION

¶24 Based on our review of the record, we conclude that Joseph's non-custodial statement to the police was voluntary and, therefore, the trial court did not err in denying his motion to suppress. We further conclude that Joseph waived any challenge to the sufficiency of the complaint by failing to raise it before the trial court. Finally, we are satisfied that the evidence at trial was sufficient to support the trial court's determination that Joseph engaged in the conduct alleged in the petition. We affirm the trial court's order adjudicating him delinquent.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.