STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 17, 2013
v	No. 311083 Wayne Circuit Court
DANIEL MCCULLOUGH, Defendant-Appellee.	LC No. 11-012362-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

The prosecution appeals by leave granted[1] two orders that suppressed a statement defendant made to police as well as a video reenactment in which defendant participated. We reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

In July 2011, 16-month-old Davion Fisher was taken from his home at 6369 Sparta in the city of Detroit to Children's Hospital by ambulance. Davion lived with his mother, Shawquanda Borom, and defendant, who was Borom's boyfriend. Davion had sustained a skull fracture and later died from his injury. The prosecution alleges that the child was abused by defendant and Borom. Defendant was charged with felony murder, MCL 750.316(1)(b), three counts of first-degree child abuse, MCL 750.136b(2), and one count of second-degree child abuse, MCL 750.136b(3).

This case involves two separate statements. Defendant made the first statement on July 27, 2011, in the Detroit Police Department Child Abuse Unit's offices on Russell Street (the Russell Street statement). The second statement is a videotaped reenactment taken on August 2, 2011, at the home of Borom's mother, Evette Gaddes, where defendant lived with Borom and Davion (the videotaped reenactment). Defendant filed a motion to suppress, primarily arguing that the statements were involuntary. He also briefly stated that he reasonably believed he was

[1] See *People v McCullough*, unpublished order of the Court of Appeals, entered July 26, 2012 (Docket No. 311083).

not free to leave when he made the statements to police. A *Walker*[2] hearing was held over the span of several days.

A. THE RUSSELL STREET STATEMENT

Officer Don Dent is part of the Child Abuse Unit and the officer in charge of Davion's case. He met defendant for the first time on the morning of July 27, 2011, at Children's Hospital. Dent was with Officer Ben Biddle, who is also part of the Child Abuse Unit. The officers were investigating Davion's injuries; at that point in the investigation, Davion was still alive, but was in critical condition and not expected to live. Defendant had been at the hospital for several hours and was aware that Dent and Biddle were police officers.

Dent believed defendant had information about Davion's injuries and may have been present when Davion was abused. Neither Biddle nor Dent took any statements from defendant at the hospital, but a few hours after arriving at the hospital, Dent and Biddle told defendant and Borom that they needed to talk to them in their offices, located at 2929 Russell Street. The officers never told defendant that he had to come with them; defendant never said that he did not want to go. The officers offered to drive defendant and Borom if they could not obtain transportation, but Borom said that her mother, Gaddes, could drive them. Gaddes followed the officers' car to their office building. Dent testified that if Gaddes had stopped following him to their office building, he would have followed her.

At the time, the Child Abuse Unit had office space in a Department of Human Services building. The unit was not located in a police station. There is no detention center in the Russell Street building. When Dent, Biddle, Borom, Gaddes, and defendant arrived at the building, Biddle said, "this door right here" and then entered a code on a keypad by the door to let them all in. Biddle said that there are many social workers walking around the building. In his area, the police officers wear plain clothes, but they still have weapons. The Child Abuse Unit consisted of various cubicles.

Dent did not search defendant, Borom, or Gaddes for weapons, which he would have done if they had been in custody. Dent took a statement from Borom in the lobby and Biddle took a statement from defendant in his office.

Biddle asked defendant how Davion was injured and wrote down defendant's responses. At the end of the interview, Biddle gave defendant the statement to read, review, and make changes if necessary. Defendant then signed the statement. During the interview, defendant was emotional. Officer Biddle did not ask if defendant had eaten anything. He offered defendant something to drink but defendant declined.

[2] See *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Two of the three Court of Appeals judges that granted the application would have also peremptorily reversed the ruling.

Biddle testified that he did not read defendant his constitutional rights because defendant was not under arrest. At that point, the officers were just investigating what happened to Davion; they did not know if a crime had occurred. During the interview, Biddle did not tell defendant that he would be allowed to leave; defendant did not ask if he would be allowed to leave.

After the interview, Biddle walked defendant back to the lobby and gave defendant his card. Biddle told defendant he would be in touch with him. Biddle began his interview with defendant at about 2:30 p.m.; defendant, Borom, and Gaddes, left the building at about 3:20 p.m.

B. THE VIDEOTAPED REENACTMENT

Patricia Tackitt testified that she is Pediatric Mortality Investigator. She works with the Wayne County Medical Examiner's Office, but is actually employed by the Michigan Public Health Institute. On August 2, 2011, Tackitt visited the Gaddes home on Sparta Street in Detroit to investigate and determine the manner and cause of Davion's death for the medical examiner's office. She had received information that Davion sustained several injuries at the home. She received this information from a case registration summary, which Children's Hospital gave the medical examiner's office upon Davion's death. Tackitt testified that she is not a law enforcement officer and does not have arrest powers.

Tackitt had called Borom before August 2, 2011, in order to set up an appointment for her visit and she told Borom that she needed to speak with both Borom and defendant. Tackitt drove to the home alone in an unmarked car provided by the state. When she arrived, Officer Dent was there as well as at least one evidence technician. Defendant, Borom, Gaddes, and several others were in the living room. Tackitt first spoke with Borom at the dinner table but spent most of her visit interviewing defendant. Although Tackitt never asked defendant if she could speak with him, they eventually spoke in the basement, bathroom, and on the porch because Tackitt understood that Davion had suffered a series of injuries over several days in these areas of the house. In each of these locations, Tackitt asked defendant to explain how Davion was injured.

Tackitt was at the house for more than an hour. Tackitt took pictures and digital video during her conversations with defendant and defendant was very cooperative and responsive. Tackitt did not read defendant his *Miranda*[3] rights; she has never read anyone their *Miranda* rights. She testified that defendant never said that he wanted her to leave, that he wanted her to stop videotaping, or that he did not want her there. He also did not tell any of the police officers that he wanted them to leave. During the time that she spent at the house, she did not see defendant leave, eat anything, drink anything, or use the bathroom. The police officers left when she left.

Dent testified that he arrived at the Gaddes home with Officer Marcel Prude on August 2, 2011, at the same time as Tackitt. Both officers wore plain clothes but had their badges displayed around their necks. Both had their shirts pulled over their weapons. They did not

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

drive a police car to the home, but their car did have police markings on it. Dent asked Officer Eugene Fitzhugh, an evidence technician, to come to the house to take photographs and collect any evidence. Fitzhugh arrived in a van that says Detroit Police Evidence Technician. He was dressed as an evidence technician and was carrying a visible weapon. He had a camera and took photographs.

Dent testified that they went to the reenactment to further investigate how Davion was injured. He did not tell defendant he was coming with Tackitt. The officer was with Tackitt during the entire visit, which lasted a few hours. Prude did not go any further into the home than the living room. He made sure that the other people in the home stayed in the living room and out of Tackitt's way. Dent never told defendant that he was in custody, under arrest, or could not leave. Defendant never told Dent that he did not want to talk or that he wanted an attorney. Dent described defendant's demeanor at the home as easy going and relaxed.

C. TRIAL COURT'S DECISION

On June 12, 2012, the trial court gave an oral opinion, suppressing both defendant's Russell Street statement and the videotaped reenactment. The court stated, "the basis of the suppression certainly would be, according to the defendant's argument, would be that the defendant in each instance was denied his Miranda Warning [sic]." Thus, the court focused entirely on whether defendant was subject to a custodial interrogation when he made the statements at issue; the court did not discuss or rule on whether defendant's statements were voluntary. With respect to the Russell Street statement, the court noted that the police officers told defendant that they needed to talk and separated him for Borom and Gaddes to ask him what happened to Davion. Defendant was 18 years old, had not finished school, and did not have any prior experience with law enforcement. The court also discussed the purpose of the questioning, which was to determine what defendant knew about Davion's injuries. In conclusion, the court stated, "it is totally reasonable for an individual, as the Court just described, to not feel free to leave."

With respect to the videotaped reenactment, the court noted that on the videotape, Officer Dent can be heard asking questions and directing defendant, such as telling him where to place the doll. Defendant was separated from Borom, Gaddes, and the other individuals in the home, and one officer testified that he was there to ensure no one came into the area where the reenactment was occurring. Defendant was not told he could ask the officers to leave. The interview lasted more than an hour. At one point, defendant wanted to use one bathroom and was told by an officer to use the other bathroom[4]. The court also cited *Grand Rapids v Impens*, 414 Mich 667; 327 NW2d 278 (1982), for the proposition that an individual acting with law enforcement must give *Miranda* warnings. The court specifically found that Tackitt is not a law enforcement officer, but said that one of the officers there should have read defendant his *Miranda* warnings. The court again noted defendant's age, lack of experience with police, and

[4] During his closing argument, defense counsel said that defendant was told to use a different bathroom by an officer during the reenactment. However, defendant acknowledges in his appellate brief that this fact was not substantiated by the evidence.

the fact that defendant was a suspect, and concluded that he should have been given his *Miranda* warnings at the reenactment. Finally, the court said that the reenactment never would have taken place without the Russell Street statement.

The prosecution now appeals by leave granted.

II. ANALYSIS

The prosecution argues that defendant was not in custody when he made the two statements at issue and, therefore, the police had no duty to advise him of his *Miranda* rights. We agree.

A trial court's ultimate decision on a motion to suppress evidence is reviewed de novo. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009). The question of whether an individual was subject to custodial interrogation, and thus entitled to *Miranda* warnings, is a mixed question of law and fact; this Court reviews the trial court's findings of fact for clear error but reviews questions of law de novo. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). Factual findings will only be disturbed if this Court is left with "a definite and firm conviction that a mistake was made." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008).

The Fifth Amendment's privilege against self-incrimination requires that a suspect be informed of certain rights before he is subject to a custodial interrogation. *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966); US Const, Am V. However, "*Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of an investigation." *People v Roberts*, 292 Mich App 492, 504; 808 NW2d 290 (2011). Instead, "[c]ustodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Herndon*, 246 Mich App 381, 395-396; 633 NW2d 376 (2001) (internal quotations omitted). The inquiry focuses on whether, under the totality of the circumstances, the defendant would have reasonably believed that he was not free to leave. *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997). "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). However, "an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody," if the officer's views were "somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994).

Relevant factors for determining whether an individual is in custody include the location and duration of the questioning, statements made during the interview, the presence or absence of physical restraints, and the release of the accused at the end of the questioning. *Howes v Fields*, ___ US ___; 132 S Ct 1181, 1189; 182 L Ed 2d 17, 27-28 (2012).

A. RUSSELL STREET STATEMENT

Under the objective circumstances of the interview, we conclude that defendant could not have reasonably believed that he was in custody when he made the Russell Street statement.

In determining that defendant was in custody when he made the statement, the trial court considered defendant's age, education, and experience with law enforcement. The court stated that defendant was directed to come speak with the officers and separated from his companions. Finally, the court focused on the purpose of the questioning.

First, Officer Biddle's purpose for questioning defendant is an improper consideration unless that purpose was conveyed to defendant. *Zahn*, 234 Mich App at 449. It was clear that Biddle was investigating how Davion sustained his injuries. His first question to defendant was "[c]an you tell me how Davion got injured?" Biddle did not tell defendant that they suspected Davion had been abused or that defendant played a role in that abuse. Therefore, the fact that defendant was suspected of wrongdoing is not a proper consideration.

Second, it is well-settled that while an individual's prior experience with law enforcement may be relevant in determining whether a statement was voluntary, it is an improper consideration for ascertaining whether an individual reasonably believed he was in custody. See *Yarborough v Alvarado*, 541 US 652, 668; 124 S Ct 2140; 158 L Ed 2d 938 (2004). Usually, a police officer will not know an individual's interrogation history. *Id.* "[T]he relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative." *Id.*

Finally, the United States Supreme Court has held that a child's age can be a relevant factor in determining if that child is in custody. See *JDB v North Carolina*, __ US __; 131 S Ct 2394, 2402-2406; 180 L Ed 2d 310 (2011). However, when defendant made the statements at issue, he was 18 years old and clearly not a child. The court's consideration of his age was not proper.

When considering the proper factors, the facts do not show that defendant's movement was so restrained that it was comparable to a formal arrest or that defendant's freedom was deprived in any significant manner. Defendant had his own ride to the Russell Street location. The questioning occurred at the Child Abuse Unit's offices, which are located in a Department of Human Services building on Russell Street. The building is not a police station and does not have a detention center. The police officers there wear plain clothes and other workers were in the area. Defendant was interviewed by only one police officer – Officer Biddle – in Biddle's cubicle. The interview lasted only 50 minutes and at its conclusion, defendant was free to leave. Biddle asked defendant general questions and gave defendant the chance to read over his responses and correct any mistakes. Although defendant was emotional, he was also responsive. Defendant never asked to leave or said that he did not want to talk. At the end of the interview, defendant, Borom, and Gaddes left.

Because defendant could not have reasonably believed that he was in custody, the failure to read defendant his *Miranda* warnings before defendant talked to the officer did not render the

statement constitutionally defective. Accordingly, the trial court erred in granting defendant's motion to suppress the evidence.

B. VIDEOTAPED REENACTMENT

Similarly, under the objective circumstances of the situation, we conclude that defendant could not have reasonably believed that he was in custody when he participated in a reenactment of the incident.

In determining whether defendant was in custody during the videotaped reenactment, the trial court again improperly considered defendant's age, education, and inexperience with law enforcement. The court also took into account that defendant was a suspect. These were improper considerations because the determination of whether an individual is in custody must be made on the objective circumstances of the questioning. See *Zahn*, 234 Mich App at 449. The court also said that the videotaped reenactment never would have taken place without the Russell Street statement. But defendant was not in custody during the Russell Street statement, as discussed above. Additionally, Tackitt's visit to the Gaddes home was in no way related to the statement defendant made on July 27, 2011. Tackitt testified that she received a case registration summary from Children's Hospital after Davion died, which indicated that Davion had sustained several injuries at the home. This summary, not defendant's statement, prompted Tackitt to make an appointment with Borom to visit the home and investigate how Davion sustained his injuries.

Nor do the facts show that defendant's movement during the videotaped reenactment was so restrained that it was comparable to a formal arrest. The questioning occurred at the home where defendant lived with Borom and Gaddes. An interrogation in a suspect's home is usually viewed as noncustodial. *Coomer*, 245 Mich App 220. Borom, Gaddes, and several other individuals were in the home. The reenactment had been planned. Tackitt had telephoned Borom to schedule an appointment and asked that defendant be present. Thus, defendant knew that Tackitt was coming over.

The prosecution argues that because Tackitt, who is not a law enforcement agent, oversaw the interview, she did not need to read defendant his *Miranda* rights. The videotape shows that Officer Dent was also an active participant in the interview. He frequently asked defendant questions or directed him to stand in a certain area or demonstrate what happened again. However, who asked defendant the questions is not relevant because the evidence shows that defendant was not in custody; no *Miranda* warnings were required even if all or parts of the interview were conducted by a police officer.

Because defendant could not have reasonably believed that he was in custody, the failure to read defendant his *Miranda* warnings before the reenactment did not render the videotape constitutionally defective. Accordingly, the trial court erred in granting defendant's motion to suppress the evidence.

III. ALTERNATIVE GROUNDS OF AFFIRMANCE

Finally, defendant contends that his motion to suppress rested on two grounds – he was in custody when he made the statements at issue *and* that his statements were involuntary. He

asserts that the trial court limited its decision to the custody issue, and did not address whether defendant's statements were voluntary. Thus, defendant requests this Court to limit its decision to the custody issue if it concludes that the trial court erred, as opposed to broadly concluding that the motion to suppress should have been denied. Defendant asserts that a broad reversal "could preclude further review by this Court under the law of the case doctrine," pursuant to *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

Defendant argued that his statements were involuntary in both his motion to suppress and his closing argument. The trial court did not address the voluntariness issue in its oral opinion. The court began its decision by stating, "the basis of the suppression certainly would be, according to the defendant's argument, would be [sic] that the defendant in each instance was denied his Miranda Warning [sic]." The court focused entirely on whether defendant was subject to a custodial interrogation and concluded that defendant should have been given his *Miranda* warnings.

If an issue is raised before the trial court, this Court can address it even if the trial court did not. *Peterman v State Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Furthermore, an appellee can argue on appeal for alternative grounds of affirmance. *Vanslembrouck v Halperin*, 277 Mich App 558, 565; 747 NW2d 311 (2008). Therefore, we will substantively address the issue of whether defendant's statements were voluntary.

In determining whether a statement or confession was voluntary, a court must consider "the totality of all the surrounding circumstances" and determine whether "the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (internal citations omitted). To determine if a statement is voluntary, the trial court's considerations should include these factors:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

The prosecution has the burden of demonstrating, by a preponderance of the evidence, that a defendant's confession was voluntary. *People v Conte*, 421 Mich 704, 754-55; 365 NW2d 648 (1984).

The evidence shows that defendant's statements were voluntary; his will was not overborne, nor his capacity for self-determination critically impaired. Defendant was 18 years old when he made both statements. There is no evidence that defendant was injured, intoxicated,

drugged, or in ill health, during either statement. Defendant was not physically abused or threatened with abuse.

Specifically, with respect to the Russell Street statement, Officer Biddle asked defendant general questions and defendant replied with narrative answers. The questioning only lasted 50 minutes. Defendant was not detained before the interview, although he had been in police presence for a few hours. With respect to the videotaped reenactment, the interview lasted a few hours. Defendant was very responsive and cooperative and often replied to questions with detailed explanations. In conclusion, there is no evidence that defendant was coerced into making either statement. He was very cooperative and responsive and provided detailed answers to the questions he was asked.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering