

Not Reported in P.3d, 2007 WL 5494597 (Ariz.App. Div. 1)

## Briefs and Other Related Documents

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NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R.Crim. P. 31.24.

Court of Appeals of Arizona,

Division 1, Department E.

In re J.S.

No. 1 CA-JV 06-0205.

Oct. 4, 2007.

Appeal from the Superior Court in Maricopa County; Cause No. JV 541738; The Honorable Louis A. Araneta, Judge. AFFIRMED.

Andrew P. Thomas, Maricopa County Attorney By Linda Van Brakel, Deputy County Attorney, Phoenix, Attorneys for Appellee.

James J. Haas, Maricopa County Public Defender By Eleanor S. Terpstra, Deputy Public Defender, Phoenix, Attorneys for Appellant.

Carol Coghlan Carter, Tempe, Guardian ad Litem for Appellant.

## MEMORANDUM DECISION

NORRIS, Judge.

\*1 ¶ 1 J.S. timely appeals the juvenile court's order adjudicating her delinquent of two counts of sexual misconduct with a minor less than fifteen years of age, class 2 felonies. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 8-235(A) (2007).

¶ 2 On appeal, J.S. argues the juvenile court should not have, first, found her confession voluntary; second, found the three-year-old victim a competent witness; and third, limited defense counsel's cross-examination of a police detective. We disagree with each argument and affirm the juvenile court's adjudication and disposition for the following reasons.

### FACTS AND PROCEDURAL HISTORY

¶ 3 On December 16, 2005, the State filed a petition alleging J.S. had engaged in two counts of sexual conduct with a minor under 15 years of age in violation of A.R.S. § 13-1405. At the time the petition was filed, J.S. was eleven years and eight months old and the victim, C.S., was three years and one month old.

¶ 4 After the petition was filed, the court granted J.S.'s request for a mental competency evaluation. Relying on reports submitted to it by Sara Hill, Ph.D., a clinical psychologist, and Gwen A. Levitt, D.O., a psychiatrist (collectively, the "competency examiners"), the court found J.S. was not legally competent, because she was "too young to fully understand all [her] rights" and needed to learn more about the law so she could help her lawyer in her defense, but could be restored to legal competency. Approximately two months later, the court found J.S. had been restored to legal competency, and set the matter for adjudication.

¶ 5 Before the adjudication hearing, J.S. moved to suppress statements she made to two detectives who interviewed her at school regarding the incident with C.S.FN1 During the school interview, J.S. initially denied having sexual contact with C.S., but,

near the end of the approximately hour long interview, admitted she had licked C.S.'s vaginal area and C.S. had licked her vaginal area. Despite having been advised of, and waiving her Miranda rights, J.S.'s motion argued her statements were involuntary. In addition to moving to suppress the statements to the detectives, J.S. also asked the court to determine whether C.S. was competent to testify at the adjudication.

FN1. The detectives tape recorded the school interview. The interview was transcribed and admitted into evidence. Although the interview transcript states that it contains 43 pages, the copy admitted into evidence at trial contains only 40 pages.

¶ 6 The court held a combined evidentiary hearing on both motions. After considering testimony from the detective, the transcript of the interview, and reports submitted to it by the competency examiners, the court found “based on the totality of the circumstances,” that “the statements made by J.S. to the detective were voluntary.” FN2 And, after questioning C.S., the court found C.S. had “an awareness of the difference between the truth and a lie” and, therefore, was competent to testify.

FN2. In oral argument, J.S.'s counsel asserted the juvenile court ignored the reports of the competency examiners. In our view, the court did not ignore the reports; it had to consider them to find them “not controlling on the issue of whether on November 2, 2005 [J.S.] was capable of waiving her Miranda rights and participating in a voluntary interview.”

¶ 7 At the adjudication hearing, C.S. testified J.S. had “touched [her] privates.” When asked how J.S. had touched her, C.S. responded J.S. had used “[h]er tongue.” C.S. then testified she had “licked [J.S.'s] privates.”

\*2 ¶ 8 The detective also testified at the adjudication hearing, saying, J.S. told him “she had licked [C.S.] and ... [C.S.] then licked her vaginal area.” In addition to this testimony, the court also considered, without objection, the detective's evidentiary hearing testimony as part of the adjudication.

¶ 9 Based on the evidence presented to it, the juvenile court found the State had proven both counts beyond a reasonable doubt and adjudicated J.S. delinquent.

## DISCUSSION

### I. Admissibility of J.S.'s Statements to the Detective

¶ 10 On appeal, J.S. argues her statements to the police detectives were involuntary and, therefore, should have been suppressed. The court determines the voluntariness of a juvenile's confession based on “the totality of the circumstances surrounding the confession.” *In re Andre M.*, 207 Ariz. 482, 485, ¶ 11, 88 P.3d 552, 555 (2004) (citing *State v. Jimenez*, 165 Ariz. 444, 449, 799 P.2d 785, 790 (1990); *State v. Doody*, 187 Ariz. 363, 368, 930 P.2d 440, 445 (App.1997)).

¶ 11 The totality of the circumstances includes consideration of a “defendant's age, education, and intelligence; any advice to defendant of constitutional rights; the length of detention and questioning; and use of physical force.” *In re Timothy C.*, 194 Ariz. 159, 163, ¶ 16, 978 P.2d 644, 648 (App.1998). However, no single factor controls the determination of voluntariness. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973). Absent clear and manifest error, we will not disturb a juvenile court's determination that a juvenile's confession is voluntary. *Maricopa County Juv. Action No. JV-501010*, 174 Ariz. 599, 601, 852 P.2d 414, 416 (App.1993) (citation omitted). As discussed below, we see no clear and manifest error here.

#### A. Police Coercion

¶ 12 J.S. argues her confession was coerced and thus involuntary because the detective who questioned her repeatedly told her she had to tell him what happened, thus leading her to believe she did not have the right to remain silent; her parents were not with her during the school interview; and she had made the functional equivalent of a request to end the interrogation. While “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary,’ “ *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986),

this “is to be determined by an objective evaluation of police conduct and not by defendant's subjective perception of reality.” State v. Carrillo, 156 Ariz. 125, 136-37, 750 P.2d 883, 894-95 (1988).

## 1. Improper Questioning at the School Interview

¶ 13 During the school interview, the detective repeatedly asked J.S. to tell him what happened with C.S. For example, the detective stated

I need you to tell me what happened.

....

I need you to be honest with me. There's no telling a part of the truth here and not telling me the rest of it[.] I need to have the whole story....

\*3 ....

But I need you to tell me the truth and not leave anything out and not hold things back or change the story. I need to know what happened.

Although J.S. argues these questions led her to believe she could not remain silent, we disagree.

¶ 14 There is nothing wrong with a police officer asking a juvenile to explain what occurred or to tell the truth. Cf. People v. Villareal, 131 P.3d 1119, 1123-24 (Colo.App.2005) (aggressive and insistent questioning of an adult by police did not render defendant's statements involuntary); People v. Joyce, 878 P.2d 48, 49-50 (Colo.App.1994) (indication by police officer that an adult defendant was not telling the truth did not render the defendant's statements involuntary). Further, before the detective began to question J.S. about what had happened with C.S., he read her the juvenile Miranda warnings, and had her sign the written form, which advised her of her right to remain silent. He also attempted to verify J.S. was able to

understand him by asking general questions “to try to gain an idea [about] her level of understanding, [and] vocabulary.”

¶ 15 The detective testified, at the suppression hearing, that J.S. appeared to understand his questions; “[s]he gave independent answers,” and did not show any signs of “parroting back” the detective’s questions or simply giving answers the detective wanted to hear. Neither the detective’s testimony at the suppression hearing nor the interview transcript reflects the method used by the detective to question J.S. or the questions he asked J.S. would have led her to believe she did not have the right to remain silent.

## 2. Lack of Parental Presence at the School Interview

¶ 16 The Supreme Court of Arizona has held the exclusion of parents from a juvenile’s police interview can create a coercive environment that would contribute to an involuntariness finding. In *re Andre M.*, 207 Ariz. at 487, ¶ 19, 88 P.3d at 557. However, this factor is viewed as part of the totality of the circumstances and is not, by itself, controlling. See *Jimenez*, 165 Ariz. at 452, 799 P.2d at 793. Additionally, “[t]his factor is mitigated when the juvenile has not requested the presence of [her] parent or another responsible parental figure.” *Id.* (citing *State v. Toney*, 113 Ariz. 404, 407, 555 P.2d 650, 653 (1976)).

¶ 17 Here, the detective asked J.S., as part of the Miranda warnings, if she wanted to have her parents present at the interview. She unequivocally answered, “[n]o.” Thus, we cannot hold J.S.’s lack of parental guidance led her to make an involuntary statement.

## 3. Request to Cease Interview

¶ 18 Under *Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S.Ct. 1602, 1627-28, 16 L.Ed.2d 694 (1966), at any time during an interrogation, if an individual indicates a desire to invoke his or her privilege against self-incrimination, interrogation must cease. This right to cease questioning must be “scrupulously honored.” *Michigan v. Mosely*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). Though J.S. argues she made the functional equivalent of a request to cease the interview, we disagree.

\*4 ¶ 19 During the school interview, the detective informed J.S. that when they had finished talking she would go back to class, finish her school day, and go home. J.S. asserts she then made a request to stop the interview when she said, “( Crying ) ... I wish I could go to my (unintelligible).” The detective responded to this statement saying, “Yeah well you'll be able to go to your research program at 3:30. Does that answer your question?” J.S. then asked the detective a series of questions about what might happen to her.

¶ 20 Not only does J.S.'s statement fail to express a desire to cease questioning, her subsequent questions to the detective suggest she had not intended to end the interview. Additionally, during the suppression hearing, the detective testified J.S. never made a request to stop the interview.

¶ 21 A statement indicating a desire to go to class is not the same as a request to cease questioning. J.S. did not invoke her privilege against self-incrimination; therefore, her statements to the detective were not involuntary on this ground.

#### B. Promised Leniency

¶ 22 J.S. also argues her confession was involuntary because the detective promised her leniency if she would tell him what had happened with C.S. A confession will be found involuntary if it is the product of threats or promises, no matter how slight. *Doody*, 187 Ariz. at 370, 930 P.2d at 447 (App.1996) (citing *State v. Williams*, 136 Ariz. 52, 56, 664 P.2d 202, 206 (1983)). “A confession is rendered involuntary as the result of a promise if two requirements are met: first, there must be an express or implied promise, and second, the defendant must rely on the promise in making the confession.” *State v. Amaya-Ruiz*, 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990).

¶ 23 According to J.S., the detective promised her, first, she and her family would receive resources, such as counseling, in exchange for her statements; second, she would go back to school and home after the interview; and third, she would be treated leniently by the court if she was honest. However, rather than promises, the detective's statements were responses to J.S.'s questions.

¶ 24 During the interview, J.S. asked the detective what was going to happen to her, if she could be taken from her family, and if she would be taken to court. The detective answered her questions, explaining there was, at the time, no reason for her to be taken from her family and that following the interview she would return to class and then go home. He also explained the purpose of the juvenile court and indicated the court would be informed that she had told him the truth, if she would do so.FN3 When the detective's statements are considered in context, the detective did not offer any benefit to J.S. in exchange for her confession. See, Doody, 187 Ariz. at 370, 930 P.2d at 447 (“[T]he detectives' statements did not constitute a ‘promise’ because they ‘did not offer any benefit to the defendant in exchange for information.’”). Additionally, the record does not reflect J.S. relied on what the detective had to say when she admitted what had happened with C.S. In sum, we see no evidence that the detective made promises to J.S. that induced her confession.

FN3. J.S.'s questions and the detective's answers were as follows:JS: What's going to happen to me?

NM [Detective]: Well if you mean right now after you and I talk today you're going to go back to your class and then after school today you're going to go home.

JS: Like can I be taken from my family or what?

NM: I, right now don't see a reason for you to be taken away from your family. But I do have some questions so that I can make sure that your family has some resources that if there's something that they feel that you will benefit from like talking to a counselor or something like that. That, that if that's something that you want to do then you can work with them to do that. But that would be your choice they're not going to make you do anything (unintelligible).

....

JS: Are they [C.S.'s family] going to take me to court?

NM: Well it's really not their job to take you to court. Like I said before if you, if you did something wrong you may be held accountable for it. But you know what? You're 12 years, or your [sic] 11 years old soon to be 12 and one thing the court understands is that kids make mistakes. What's important though is when we try to do our best to fix those mistakes are we honest about it do we accept responsibility for our actions or do we try to hide and tell lies to avoid responsibility. But the one thing Juvenile court understands is that you're only 11 and kids sometimes make mistakes. And the whole point of Juvenile court is to help kids fix mistakes its [sic] not to take them away from their families its [sic] not to put them into detention or anything like that. Those are only for the extreme, extreme cases where kids are lying and just won't accept responsibility things like that.

JS: Would that be like my case?

NM: I don't see how it's no, I don't see it like that. But again I'm, I'm going to be honest with you when I have to write up my report and I can say that you know what initially she lied to me, she was concerned afraid of what might happen to her but when I explained things to her and she asked me some questions she told me the truth. That's something that the judge will see that ....

C. J.S.'s Lack of Competency to Stand Trial

\*5 ¶ 25 J.S. finally argues her statements were involuntary because she was unable to understand her Miranda rights. She asserts, because the juvenile court found she was not legally competent to stand trial, she was not competent to understand the rights she agreed to waive at the inception of the school interview.FN4

FN4. In both the motion to suppress and at the evidentiary hearing on the motion, defense counsel relied on the reports of the mental competency examiners in arguing J.S. was “unable to understand or waive her constitutional rights.” The juvenile court held the mental competency examiners reports were not controlling: “The Court finds that mental competency proceedings and the mental health expert reports regarding J.S.’ s competency are not controlling on the issue of whether on November 2, 2005[,] J.S. was capable of waiving her Miranda rights and participating in a voluntary interview.”

¶ 26 Under the totality of the circumstances test, the court must inquire into all aspects of the interrogation. Jimenez, 165 Ariz. at 450, 799 P.2d at 791. “This includes evaluation of the juvenile’s ... capacity to understand the warnings given [her], the nature of [her] Fifth Amendment rights, and the consequences of waiving those rights.” Id. (quoting *Fare v. Michael C.*, 442 U.S., 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979)) (internal quotes omitted). However, “[u]nderstanding that one has the right ... to not talk is enough to show a knowing and intelligent waiver of Miranda rights.” *State v. Perkins*, 811 P.2d 1142, 1147 (Kan.1991).

¶ 27 Before questioning J.S. about the incident with C.S., the detective read J.S. the juvenile Miranda warnings. J.S. confirmed she understood her rights, signed the Miranda warnings form, and agreed to talk with the detective. Additionally, Dr. Hill, one of the competency examiners, reported that although J.S. did not understand how the “right to remain silent” could help her case, she did know it meant “[y]ou don’t have to talk if you don’t want to.” FN5 Thus, even though the court found J.S. was not initially legally competent, the record reflected J.S. had a basic understanding of her right to remain silent when it was explained to her and she waived it at the school interview. Therefore, we hold J.S.’s legal incompetence to stand trial did not affect the voluntariness of her statements to the detective.

FN5. Dr. Levitt, the other mental competency examiner, reported J.S. was “not competent to stand trial[,] ... [was] unable to make informed decisions about her case such as entering a plea or signing a plea bargain [,] ... [and] ha[d] some

comprehension of her Constitutional Rights.” Dr. Levitt later stated “[t]he defendant did not know or understand her Constitutional Rights.”

## II. Competency of C.S.

¶ 28 J.S. argues the juvenile court should not have found C.S. competent to testify at the adjudication because C.S. was not truthful. J.S. bases this argument on some mistakes and inconsistencies in C.S.'s testimony at the adjudication.

¶ 29 Before the adjudication, the court held a hearing and determined C.S. was competent to testify. During the adjudication, C.S. was asked to use two bears to demonstrate what occurred during the incident with J.S. On direct examination, C.S. stated she had seen the bears prior to the adjudication, however, on cross-examination, C.S. incorrectly stated she had never before seen the bears. C.S. also incorrectly stated she spoke with the prosecutor daily.<sup>FN6</sup> Based on this testimony, defense counsel asked the court to reconsider its ruling finding C.S. competent to testify. The court denied the motion to reconsider.

FN6. The prosecutor advised the court that C.S. had seen the bears prior to the adjudication but had not spoken with the prosecutor daily.

¶ 30 “The trial court has ‘practically unlimited’ discretion in determining competency.” Pinal County Juv. Action Nos. J-1123 and J-1124, 147 Ariz. 302, 305, 709 P.2d 1361, 1364 (App.1985) (quoting *State v. Jerousek*, 121 Ariz. 420, 425, 590 P.2d 1366, 1371 (1979)). Furthermore, the juvenile court's determination that a child is competent to testify will not be overturned absent an abuse of discretion. *Id.* at 305-06, 709 P.2d at 1364-65 (citing *State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977)).

\*6 ¶ 31 Although J.S. correctly notes there were some discrepancies in C.S.'s testimony, C.S. remained consistent in her testimony regarding the sexual contact with J.S. In denying J.S.'s motion to reconsider, the court correctly noted that inconsistencies in C.S.'s testimony were not an indication of C.S.'s lack of competency. Inconsistencies and contradictions in a witness's testimony go to the

reliability of the testimony, not the competency of the witness. *State v. Superior Court of Arizona in and for the County of Pima*, 149 Ariz. 397, 400, 719 P.2d 283, 286 (App.1986). Thus, we hold the juvenile court did not abuse its discretion by not reversing its earlier decision finding C.S. competent to testify.

### III. Limiting Defense's Cross-Examination

¶ 32 J.S. argues the juvenile court barred her counsel from vigorously cross-examining the detective at the adjudication hearing in violation of her constitutional right to confront and cross-examine the witness. However, a trial judge may place reasonable limits upon the scope of cross-examination, without infringing upon the defendant's right of confrontation. *State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977).

¶ 33 At the adjudication, defense counsel questioned the detective about the school interview, the questions he had asked J.S., and the answers J.S. gave. After thoroughly questioning the detective about his efforts to obtain J.S.'s admission, the State objected, asserting the questions were irrelevant and inappropriate because they addressed the issue of voluntariness, which had already been resolved. In response to the relevance objection, defense counsel stated, “[W]e’re trying to show that my client again and again and again denied and denied and denied, an 11-year-old that was adjudicated incompetent by this Court and this detective did not stop. He kept zeroing in on her and pressuring her.”

¶ 34 Based on this response, the court sustained the objection to the extent defense counsel was trying to show voluntariness. The court did not, however, preclude defense counsel from asking what took place during the school interview as it pertained to other matters.<sup>FN7</sup> Under the circumstances we see no abuse of discretion. Thus, we hold defense counsel's cross-examination was not unduly restricted.

FN7. The court stated, “[Y]ou can continue to ask this witness questions that are relevant to the actual questioning but to the extent that you're trying to show issues relating to voluntariness, I will sustain objections.”

## CONCLUSION

¶ 35 The juvenile court did not abuse its discretion in admitting J.S.'s statements to the detective, finding C.S. competent to testify, or limiting defense counsel's cross-examination of the detective. Therefore, we affirm the adjudication and disposition.

CONCURRING: PATRICK IRVINE, Presiding Judge, and SHELDON H. WEISBERG, Judge.

Ariz.App. Div. 1,2007.

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- 2007 WL 4310414 (Appellate Brief) Appellant's Reply Brief (Aug. 13, 2007)

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