DIVISION ONE
FILED: 09/04/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0634
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
ENRIQUE AMADOR SOTO, Appellant.	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR200901169

The Honorable Tina R. Ainley, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Fort Collins, CO
Attorney for Appellant

S W A N N, Judge

¶1 Enrique Amador Soto ("Defendant") appeals from his convictions for child abuse and failure to appear. He argues that statements he made at a hospital and a police station were

improperly admitted as evidence. He also argues that the trial court erred in denying one of his motions to continue. We conclude that his statements were properly admitted and that the continuance was properly denied. We affirm his convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant and his wife B. are the parents of two children. On October 7, 2009, Defendant, B., and the two children were at the Prescott house they shared with Defendant's parents, eating dinner and playing cards. While the adults played cards in the kitchen, the almost-ten-month-old child, A., was in the living room walking on the couch. He fell off and landed on the carpet. He cried a little, but soon stopped. B. checked on him -- she testified that "he was fine" -- and then walked into the bathroom.

¶3 On her way back from the bathroom, B. noticed A. lying on his back next to the couch. His stomach was "go[ing] up and down really slowly." His eyes had "started to roll to the back of his head," he was "turning purple," and he had lost consciousness. Defendant's mother performed CPR and B. called 911.

¶4 Paramedics drove A. to the emergency room of the hospital in Prescott. Emergency-room doctors performed a CAT scan and, after viewing it, told Defendant and B. that A. had

"bleeding in his brain." The doctors ordered that A. be flown to the hospital in Flagstaff.

¶5 Dr. Nathan Avery, a neurosurgeon at the Flagstaff hospital, was called in by the trauma surgeon to examine A. Dr. Avery reviewed the CAT scan; he found that A. had a subdural hematoma, which he described as "a bleeding into the space between the brain and skull," and that the bleeding was compressing A.'s brain. A. was in critical condition and needed immediate surgery to remove the pressure on his brain. With B.'s consent, Dr. Avery performed the surgery.

¶6 During the surgery, Dr. Avery found an additional injury: a "chronic" subdural hematoma. The chronic subdural hematoma troubled Dr. Avery because it was inconsistent with the story that A.'s condition had been caused by his fall off of the couch -- A.'s chronic subdural hematoma would have been caused approximately two weeks earlier. Further, the lack of any expected evidence (e.g., a skull fracture) that A.'s fall off the couch had caused severe head injury, plus the fact that such falls generally do not cause subdural hematoma, led Dr. Avery to conclude that A. had suffered "nonaccidental trauma." In other words, Dr. Avery believed that A. had shaken-baby syndrome, in which the shaking "displaces the brain enough to cause subdural bleeding," and that his condition after the fall was a "posttraumatic seizure." After the surgery was completed

successfully, A. was placed in the pediatric ICU to recover. Child Protective Services notified the Prescott police department that A.'s injury appeared to have been nonaccidental.

¶7 The investigating detective, Ryan Hobbs, travelled to the Flagstaff hospital on October 9, 2009. When he arrived at the hospital, Detective Hobbs asked Defendant and B. if they were willing to speak with him; both said that they were. Without reading *Miranda* warnings to either of them, Hobbs interviewed Defendant and B. in a vacant hospital room next door to A.'s room. Hobbs sometimes spoke with both together, sometimes with each separately. And without informing either Defendant or B. that he was doing so, he recorded all of the interviews.

¶8 After collecting background information from Defendant and B., Hobbs explained that the doctors had told him that A. had been shaken, and that he needed to interview them to find out what had happened to A. When Hobbs and Defendant spoke alone, Defendant denied harming A. When B. rejoined them, Hobbs, using a telephone handset, demonstrated the kind of shaking he had in mind: shaking that could range from "subtle" jerks to "very violent" jerks. After the demonstration, B. asked Defendant, "Have you done that?" and Defendant responded, "Well, not that hard. I've done that, but not that hard." Hobbs asked B. to leave and then again used the phone to

demonstrate the kind of shaking that he was talking about. Defendant admitted that he had shaken A. five times for "a couple of seconds."

¶9 Hobbs asked Defendant if he would demonstrate the shaking on videotape. Defendant said that he would. Hobbs asked hospital staff if the hospital had videotaping facilities that could be used for the demonstration. When he was told that the hospital had nothing that would be appropriate, Hobbs asked Defendant if he would go to the Flagstaff police station to videotape the shaking there; Defendant said that he was willing to do so. At the station, without reading *Miranda* warnings to Defendant, Hobbs handed Defendant a doll and asked him to demonstrate; Defendant did so, but his shaking was "substantially less violent" than the shaking he had demonstrated at the hospital. After Hobbs and Defendant discussed the shaking, Hobbs eventually asked him if he felt that what he had done to A. constituted "abuse of a child." Defendant said, "Yes." The interview concluded and Defendant left the police station with his parents.

¶10 On November 18, 2009, a grand jury indicted Defendant for one count of child abuse under A.R.S. § 13-3623 and one count of aggravated assault under § 13-1204. On June 8, 2010, Defendant filed a motion to suppress all of the statements obtained by Hobbs during the hospital and police-station

interviews. Defendant argued that Hobbs had not read him his *Miranda* rights either at the hospital or at the police station. The court held an evidentiary hearing on June 28; it found that during the hospital and police-station interviews Defendant had not been in custody and that his statements were made voluntarily. The court denied Defendant's motion to suppress.

¶11 On August 30, 2010, the court reset the trial (originally set for September 8, 2010) for March 2, 2011. On September 22, 2010, probation services notified the court that Defendant had violated his release order and that his whereabouts were unknown. The court issued an arrest warrant. On January 24, 2011, the court vacated the March 2 trial and reset it for June 22, 2011. On January 31, defense counsel requested, without objection from the state, to continue the case to June 29 so that counsel could attend the Arizona Public Defender's Conference on June 22. The court granted that motion, and the trial was set for June 29, 2011.

¶12 On June 27, 2011, defense counsel filed another motion to continue the trial. Defense counsel identified as the "[m]ost crucial" reason for continuing the trial the fact that "at the Arizona Public Defender Association Conference last week, it was discovered that new medical evidence is available now, to disprove the state's contention of AHT [abusive head trauma]." Appended to the motion were two documents: (1) an

article, “Imaging of Nonaccidental Injury and the Mimics,” from a medical journal published in January 2011; and (2) a *New York Times* article, “Shaken-Baby Syndrome Faces New Questions in Court,” published in February 2011.

¶13 At the evidentiary hearing, defense counsel said that she had attempted to contact two expert witnesses but neither was then available; one would be available in the future but she did not know when. Counsel did not offer any evidence or argument describing the experts’ anticipated testimony. The state argued that the information contained in the articles had been available well before June, and stated that B., “[a]s a victim,” asked that the trial not be continued. The court denied the motion to continue.

¶14 Defendant did not appear for trial and was tried in absentia. The jury convicted him on the child abuse charge; it also found, pursuant to A.R.S. § 13-3601, that the crime was a domestic-violence offense and that A. was under 15 years old at the time of the offense. The jury was unable to reach a verdict on the aggravated assault charge.

¶15 After his conviction, Defendant was apprehended. On August 30, 2011, Defendant pled guilty to failure to appear, a class 5 felony, with the stipulation that whatever sentence was imposed for that offense would run consecutively with his sentence for child abuse. On the same day, the trial court

sentenced Defendant to 3.5 years' imprisonment on the child abuse conviction; it imposed a consecutive sentence of 1.5 years' imprisonment for failure to appear.

¶16 Defendant filed a timely notice of appeal. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12–120.21(A)(1), 13–4031, and 13–4033(A).

DISCUSSION

¶17 Defendant argues that his Fifth Amendment and Fourteenth Amendment rights were violated when his statements to Hobbs were admitted against him at trial without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). He also argues that he was unable to obtain a necessary expert witness because the trial court abused its discretion by denying his June 27, 2011 motion for a continuance.

I. THE MIRANDA ISSUE

¶18 When reviewing a trial court's ruling on a motion to suppress a criminal defendant's statements, we will not reverse that ruling absent an abuse of discretion. *State v. Jones*, 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002); *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009). We defer to the trial court's factual findings, but to the extent that its ruling involves a conclusion of law, our review is de novo. *Zamora*, 220 Ariz. at 67, ¶ 7, 202 P.3d at 532.

¶19 The police are permitted to question suspects without *Miranda* warnings if the person being questioned is not in custody. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) ("*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'"); *State v. Carter*, 145 Ariz. 101, 105-06, 700 P.2d 488, 492-93 (1985); *Zamora*, 220 Ariz. at 67, ¶ 9, 202 P.3d at 532. Whether the interrogated person is "in custody" must be determined "in light of 'the objective circumstances of the interrogation.'" *Howes v. Fields*, 132 S.Ct. 1181, 1189 (2012) (citation omitted). The critical question is whether, in those objective circumstances, a reasonable person would have felt "at liberty to terminate the interrogation and leave." *Id.* (citation omitted).

¶20 Courts have identified several factors to consider in the custody determination. In *State v. Cruz-Mata*, our supreme court specified three: the site of the questioning; whether "objective indicia of arrest" were present (e.g., whether suspect was subjected to the booking process, whether officer's weapon was drawn); and the length and form of the interrogation. 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983). The U.S. Supreme Court has also listed: statements made during the interview; the presence or absence of physical restraints during

the interview; and whether the person questioned was released when the questioning concluded. *Howes*, 132 S.Ct. at 1189.

¶21 With those factors in mind, we analyze Defendant's two interviews to determine whether a reasonable person would have felt free to stop answering Hobbs's questions and to leave.

A. The Hospital Interview

¶22 The site of the hospital interview and the manner in which it was conducted show that it was not an "incommunicado interrogation . . . in a police-dominated atmosphere." *State v. Morse*, 127 Ariz. 25, 28, 617 P.2d 1141, 1144 (1980) (citation omitted). The hospital interview took place in an empty room next to the room that held A., and it had a glass door that was shut but not locked. Even if he was uncomfortable talking to Hobbs in a strange environment, Defendant was not entirely "cut off from his normal life and companions," nor was he "thrust into" a "police-dominated atmosphere." *Maryland v. Shatzer*, 130 S.Ct. 1213, 1220 (2010) (citation omitted). At different times during the interview, Defendant's wife, B., was present, participated in the discussion, and even asked Defendant questions on her own. And although during the interview Hobbs's gun and badge were visible, Defendant was never handcuffed nor was he told that he was under arrest.

¶23 Further, Hobbs told Defendant more than once that he could leave whenever he wanted. Hobbs told Defendant such

things as: “[Y]ou are free to leave, and, you know, I’m not placing you under arrest.” The hospital interview concluded with Defendant agreeing to go to the police station to be videotaped.

¶24 We conclude that the trial court properly found that Defendant was not in custody during the hospital interview. A reasonable person would have realized that he or she was free to stop talking to Hobbs and to leave the room.

B. The Police-Station Interview

¶25 On appeal, Defendant emphasizes two facts about the trip to the police station and his interview there. First, he points out that when he sat in the back of the squad car that drove him from the hospital to the police station, the back doors of the car were “locked.” Second, he claims that the interview room, which was in a “secured” section of the station, was “also locked.”

¶26 Factually, the first assertion is true, but misleading without context. As Hobbs testified at the evidentiary hearing, Defendant agreed to enter the police car and could have exited if he had asked to do so. The second assertion was not established as a fact; Hobbs testified that he didn’t know whether the door to the police-station interview room was locked or not. He testified that “[i]f the door was locked,

[Defendant] wouldn't have been able to get out, but he was informed he was free to leave at any time."

¶27 A suspect does not enter police custody just because an officer drives that suspect in the officer's vehicle to the station for questioning. *See State v. Navarro*, 201 Ariz. 292, 294, 297, ¶¶ 5, 21, 34 P.3d 971, 973, 976 (App. 2001) (holding that suspect was not in custody when he voluntarily accompanied officer to the station in front seat of unmarked police car). The critical question is still "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Here, Defendant entered the police car because he had agreed to travel to the station to videotape the kind of shaking that he and Hobbs had discussed. He was not forced to go, nor was he handcuffed for the trip. He accepted a ride from Hobbs, and a reasonable person accepting a ride in the back seat of a police squad car (a vehicle often used to transport unwilling passengers) would realize that the back doors would not open easily (or at all) from the inside. The doors' being locked would not have meant that Defendant was in no way free to leave; it would only have meant that (as Hobbs testified) Defendant would first have needed to ask for the doors to be opened if he changed his mind about the trip and decided to exit the squad car.

¶28 Further, *Miranda* warnings are not automatically required simply because a suspect is questioned in a police station. *Carter*, 145 Ariz. at 106, 700 P.2d at 493. Here, the fact that Defendant agreed to leave the hospital and go to the station for a reason that Hobbs explained to him -- the hospital had no facilities to videotape the shaking -- weighs against a finding that the police-station interview was "custodial." Defendant went to the station voluntarily and with a purpose, not because he was under arrest. Also, the police-station interview was relatively short, lasting less than 30 minutes, and Defendant was allowed to leave the station without hindrance at the interview's conclusion. *See id.* (non-custodial interrogation lasted for approximately an hour). And at the beginning of the interview, Defendant had been told that he was free to go. A consideration of these factors leads us to conclude that a reasonable person would have felt free to terminate the interview and to leave.

¶29 Defendant argues that *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011), requires us to consider an additional factor: Defendant's immaturity. In *J.D.B.*, the Court held that when applying the *Miranda* custody analysis to the police's questioning of a 13-year-old child, it was appropriate for the trial court to factor in the child's age. 131 S.Ct. at 2398-99. In reaching that conclusion, the Court's discussion expressly

focused only on "cases involving juvenile suspects." *Id.* at 2405. The word "juvenile" functions in *J.D.B.* as a term of art: "[a] person who has not reached the age of (usu. 18) at which one should be treated as an adult by the criminal-justice system." *Black's Law Dictionary* 884 (8th ed. 2004). The Court was not discussing cases involving adults who happen to be immature. The Court specifically articulated its holding with the phrase "the *child's* age." *J.D.B.*, 131 S.Ct. at 2406 (emphasis added).

¶30 In this case, Defendant was a nineteen-year-old man, a husband, and the father of two children. He himself was not a child, and *J.D.B.* did not require the court to consider in its custody analysis the fact that he was (as he puts it on appeal) an "immature 19 year old defendant." The statements he made to Hobbs at the hospital and police station were properly admitted against him.

II. THE CONTINUANCE ISSUE

¶31 Defendant argues that the trial court erred in denying his June 27, 2011 motion to continue. Under Ariz. R. Crim. P. 8.5(b), a continuance "shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." The granting of a continuance under Rule 8.5 is "not a matter of right." *State v. Sullivan*, 130 Ariz. 213, 215, 635 P.2d 501, 503 (1981). Whether

to grant or deny a continuance is a decision "left to the sound discretion of the trial judge," *id.*, because the trial judge is "the only party in a position to determine whether there are 'extraordinary circumstances' warranting a continuance and whether 'delay is indispensible to the interests of justice.'" *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983) (quoting Ariz. R. Crim. P. 8.5(b)). Therefore, the trial court's decision will not be disturbed absent a clear abuse of discretion and a resulting prejudice. *Sullivan*, 130 Ariz. at 215, 635 P.2d at 503.

¶32 Here, the trial court was not convinced that the circumstances were extraordinary: it noted that the articles Defendant attached to his motion (and the theory contained in those articles) had "been out for some time." *See State v. Jackson*, 157 Ariz. 589, 593-94, 760 P.2d 589, 593-94 (1988) (denial of continuance proper when defendant had "ample opportunity" to obtain a witness several months before trial). It also concluded that it was impractical to allow Defendant to have additional time to develop an undisclosed expert who was not available with any certainty (and the substance of whose testimony, we note, was unknown). Instead, the court permitted Defendant to use the articles to conduct a "liberal cross examination" of the state's experts.

¶33 Further, the court considered the express "wishes of the victim" -- i.e., B., who was acting on A.'s behalf pursuant to A.R.S. § 13-4433(C) -- that the trial be concluded as quickly as possible. In doing so, the court followed Ariz. R. Crim. P. 8.5(b), which states that "[i]n ruling on a motion for continuance, the court shall consider the rights of the defendant and any victim to a speedy disposition of the case." *See also State v. Dixon*, 226 Ariz. 545, 555, ¶ 56, 250 P.3d 1174, 1184 (2011) ("Rule 8.5(b) expressly directs the trial judge to consider the rights of victims, who, like the defendant, are entitled under our Constitution to a speedy disposition of criminal charges.").

¶34 Nothing in the record indicates that the court's decision to deny the motion to continue was a clear abuse of discretion.

CONCLUSION

¶35 We affirm Defendant's convictions and sentences.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
ANDREW W. GOULD, Judge