DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 08-0083
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
SAMEH BASTA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2003-020557-001 DT

The Honorable Thomas W. O'Toole, Retired Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Katia Mehu, Assistant Attorney General
And Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

Theresa M. Armendarez PLC — Phoenix
By Theresa M. Armendarez
Attorney for Appellant

S W A N N, Judge

¶1 Sameh Basta ("Defendant") appeals from his convictions and sentences for kidnapping and first degree murder. He contends that the trial court committed reversible error by denying his motion to suppress his confession to police. Because sufficient evidence supports the court's determination that the confession was voluntary, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On August 11, 2003, police found a deceased woman in the trunk of a car parked at a Scottsdale office complex. She had been killed by blunt force trauma to the head.

¶3 In the course of investigating the homicide, police discovered August 8, 2003 surveillance video of the victim leaving a casino with an unidentified man. Images from the surveillance video were disseminated by the news media, and the police received several tips identifying the man in the video as Defendant. In addition, Defendant (who was in Yonkers, New York) called and spoke three times to Detective John Kirkham of the City of Scottsdale Police Department.

¶4 Detective Kirkham and Detective Daniel Rincon traveled to Yonkers in September 2003. On the morning of September 2, the detectives made contact with Defendant at a Yonkers apartment, where he was staying with a friend, and asked him to accompany them voluntarily to the Yonkers police station. At approximately 9:55 a.m., the two detectives began to interview

Defendant in a room at the police station. A camera recorded audio and video of the interview.

¶5 The detectives began by asking Defendant about his background. Defendant stated that he is Egyptian and entered the United States on a visa in 1999. He also told the detectives that he cannot write English, and it is clear from the videotape and transcript of the interrogation that Defendant's command and comprehension of spoken English is imperfect. The detectives, however, determined that an interpreter was not necessary[1] and the interview was conducted entirely in English.

¶6 Early in the interview, Detective Kirkham read *Miranda* warnings to Defendant from a standard police card. The detective asked Defendant whether he understood and Defendant replied that he did not. The following exchange ensued:

> [Detective Kirkham]: You don't understand? Well, let me explain. Okay? We want to talk to you a little bit about – about yourself. We want to talk to you about what happened at the casino with this woman like what we talked about on the phone.

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[1] In his testimony at the voluntariness hearing, Detective Rincon explained that Detective Kirkham, who had previously communicated with Defendant by telephone, did not express concern about Defendant's ability to communicate in English. Detective Rincon further testified: "[T]here was never a point in time where there was an extreme difficulty of understanding him. In the few times he didn't understand a word, he was very vocal and let us know and we were able to communicate with him in using maybe more elementary words to have him understand. But that was infrequent."

[Defendant]: Yes.

[Detective Kirkham]: And you came in here voluntarily with us, okay?

[Defendant]: What does that mean?

[Detective Kirkham]: Well, we asked you will you come with us and talk with us.

[Defendant]: Right.

[Detective Kirkham]: And we want to make sure that you understand that that's – you're here to talk with us. You don't have to talk with us if you don't want to. And if you want to have an attorney here, you can have an attorney here if you want.

[Defendant]: What's [inaudible]?

[Detective Kirkham]: A lawyer. Okay?

[Defendant]: What? I [inaudible].[2]

[Detective Kirkham]: Well, that's something that you need to decide. But you don't have a problem sitting here talking with us?

[Defendant]: No, no.

[Detective Kirkham]: Okay.

¶7 The interview continued and the detectives began to ask Defendant about his contact with the victim. Defendant told the detectives that on the night in question, he met the victim at the casino, left with her, and had sex with her in her car. He stated that after they had sex, the victim dropped him off

[2] At the voluntariness hearing, Detective Rincon testified that there is an error in the transcript and the word "Why" should replace the word "What." The detective testified that at this point, Defendant was asking why he would need a lawyer.

and drove away. He denied any involvement in the victim's death.

¶8 As the interview progressed, the detectives repeatedly proposed a scenario in which Defendant accidentally killed the victim, and told Defendant that the alternative scenario was an intentional slaying. The detectives suggested that things would go better for Defendant, and they would help him, if he confessed. The detectives also told Defendant that they, like him, are Christians, and stated that Christians believe in forgiving.

¶9 Defendant asked if he could smoke a cigarette, and was allowed to do so. As he smoked, the conversation continued:

> [Detective Kirkham]: What happened?
>
> [Detective Rincon]: We'll understand, okay? But you've gotta help us. If you're not gonna help us, we can't help you. No one can help you. How did it start? Come on.
>
> [Defendant]: How long is jail for that?
>
> [Detective Kirkham]: How what?
>
> [Defendant]: How many years is jail for that?
>
> [Detective Rincon]: What?
>
> [Defendant]: How many years is jail for this, jail?
>
> [Detective Rincon]: We don't know. We're not –
>
> [Detective Kirkham]: We're not gonna worry about that. That's not what we do. Okay? We just, we're here to find out what happened.

[Detective Rincon]: That depends on how you explain it to us. No one's in jail right now, so you're okay.

[Defendant]: But see, [Inaudible] I take care of my family.

[Detective Rincon]: Can take care, we can –

[Detective Kirkham]: We know. We know that you care about your family, okay? But right now we gotta take care of you. Okay?

[Detective Rincon]: Help us. Help us.

[Defendant]: [Inaudible], there's nobody helping me. [Inaudible].

[Detective Rincon]: We'll help you, your church will help you.

[Defendant]: [Inaudible], I don't want to go to jail, I can't go to jail.

[Detective Rincon]: No one's going to jail.

[Defendant]: I can't go jail.

[Detective Rincon]: Talk to us.

[Detective Kirkham]: Sameh, talk to us about what happened. Let us at least know what happened, okay? We have to know what happened. We don't think that you're a bad guy. We think that something happened and it was an accident. And that's really all we want to know. But you have to tell us what happened. Okay? So what happened that day? After you guys left the casino, what happened?

¶10 At that point, Defendant began to confess to killing the victim. The detectives continued to question Defendant about the details surrounding the victim's death until approximately 12:47 p.m., at which point they concluded the interview and placed Defendant under arrest. Defendant was

later indicted for kidnapping and first degree murder, and the State gave notice of its intent to seek the death penalty on the murder charge.

¶11 Before trial, Defendant filed a motion to suppress his confession and all evidence therefrom. The matter proceeded to a voluntariness hearing at which Defendant presented only the testimony of Dr. Richard Ofshe, a social psychologist. Relying only on the transcript of the interview, Dr. Ofshe opined that Defendant's confession was the product of psychological coercion. He explained that the detectives engaged in a pattern of questioning that culminated in a promise that Defendant would not go to jail if he told the appropriate story.

¶12 The State presented the testimony of Detective Rincon, who testified that the detectives did not make any promises to Defendant. He further testified that his statements to Defendant that "No one's in jail right now" and "No one's going to jail" were statements of fact and were not intended to be promises. The prosecutor played the videotape of the statements in open court and Detective Rincon observed that Defendant had started to speak before the detective completed the statement "No one's going to jail."

¶13 After considering the evidence presented at the voluntariness hearing, the court issued a minute entry denying Defendant's motion to suppress. The court found that Dr. Ofshe

was not credible because, *inter alia*, he had not reviewed the videotape of the interview. The court identified the issue as whether Defendant had relied on a promise that he would not go to jail, and found that "the Defense can provide the Court with no evidence that the defendant relied upon the statement."[3]

¶14 Defendant moved for reconsideration, the court denied his motion without comment, and the case proceeded to trial. The jury found Defendant guilty of kidnapping and first degree premeditated murder and found that Defendant had committed the murder in an especially cruel manner. In the penalty phase, the jury rejected imposition of the death penalty and recommended life in prison.

¶15 The court entered judgment on the jury's verdicts and sentenced him to concurrent prison terms of life[4] for the murder and five years for the kidnapping. Defendant timely appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

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[3] We note that the court made no additional findings. Though the court was not required to state its findings and reasoning on the record, the absence of specific findings makes effective appellate review considerably more difficult. *See State v. Fisher*, 141 Ariz. 227, 236 n.1, 686 P.2d 750, 759 n.1 (1984).

[4] The court later clarified that the term was not for natural life.

DISCUSSION

I. STANDARD OF REVIEW

¶16 Defendant contends that the trial court committed reversible error by finding that his confession was voluntary and denying his motion to suppress. In Arizona, confessions are presumed involuntary and it is the State's burden to show by a preponderance of the evidence that the confession was voluntary. *State v. Knapp*, 114 Ariz. 531, 538, 562 P.2d 704, 711 (1977). We will not disturb the trial court's determination of voluntariness absent clear and manifest error. *State v. Arnett*, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978). We will not find clear and manifest error unless the record contains insufficient evidence from which we can find that the State carried its burden of proof. *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986).

II. VOLUNTARINESS

¶17 The crucial question in the voluntariness inquiry is whether the defendant confessed because his will was overborne by coercion, or police overreaching. *State v. Scott*, 177 Ariz. 131, 136, 865 P.2d 792, 797 (1993); *State v. Lopez*, 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992). To answer this question, we must consider the totality of the circumstances. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). Relevant factors may include the environment and duration of the

interrogation, whether *Miranda* warnings were given, and whether there was impermissible police conduct. *State v. Blakely*, 204 Ariz. 429, 436, ¶ 27, 65 P.3d 77, 84 (2003). The defendant's age, intelligence, and level of education may also be considered. *State v. Hatfield*, 173 Ariz. 124, 126, 840 P.2d 300, 302 (App. 1992).

A. Environment and Duration of the Interview

¶18 Defendant voluntarily submitted to the interview, it commenced at a reasonable hour, and it lasted approximately three hours. Defendant was allowed to smoke a cigarette during the interrogation and there is no evidence that he was denied access to any amenities. Though it is undisputed that Defendant is not a native English speaker, the transcript and videotape reflect that, for the most part, the parties were able to communicate effectively without the assistance of an interpreter.

¶19 We have no difficulty concluding that the record contains sufficient evidence to support a finding that the atmosphere of the interview was not inherently coercive.[5]

[5] We note that the Arizona Supreme Court has consistently refused to find a coercive atmosphere in numerous cases involving interrogations under far more onerous conditions. *See, e.g., State v. Newell*, 212 Ariz. 389, 399, ¶ 42, 132 P.3d 833, 843 (2006) (fourteen-hour interrogation not coercive where defendant was given breaks to smoke, use the restroom, write letters, and sleep); *Scott*, 177 Ariz. at 136-37, 865 P.2d at 797-98 (interrogation not coercive where defendant had not

B. *Miranda* Warnings

¶20 *Miranda* and voluntariness are separate inquiries, *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983), but the question whether there has been a *Miranda* violation may be relevant to the voluntariness determination.

¶21 *Miranda* warnings are required only where the defendant is in custody. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). When the warnings are required but are not given, that factor weighs against a finding of voluntariness. *State v. Pettit*, 194 Ariz. 192, 196, ¶¶ 17, 19, 979 P.2d 5, 9 (App. 1998). And when the warnings are required and are properly given and waived, that factor weighs in favor of a finding of voluntariness. *See State v. Patterson*, 105 Ariz. 16, 17-18, 458 P.2d 950, 951-52 (1969). Further, when the warnings are *not* required but are nonetheless properly given and waived, that factor weighs in favor of a finding of voluntariness. *See Blakley*, 204 Ariz. at 435-36, ¶¶ 23, 28, 65 P.3d at 83-84. The State contends that this is the situation here.

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slept, eaten, or taken his medication during his fourteen hours at the police station, but had been given drinks and cigarettes upon request and had not requested other amenities); *Amaya-Ruiz*, 166 Ariz. at 164-65, 800 P.2d at 1272-73 (interrogation not coercive where defendant, clad only in blanket and jockey shorts, had been placed alone in a room for approximately nine hours but during that time had been given a drink, cigarettes, and possibly food).

¶22 We agree that Defendant was not in custody,[6] and that *Miranda* warnings were not required. On this record, however, we cannot conclude that the warnings were nonetheless properly given and waived. *Miranda* requires that the defendant be apprised that he has a right to remain silent, that his statements may be used against him, and that he has a right to retained or appointed legal counsel. 384 U.S. at 444. Here, the standard recitation read to Defendant was comprehensive. Defendant, however, unequivocally indicated that he did not understand. The detectives knew that Defendant is not a native English speaker and knew that he required extra explanation of some English words. Detective Kirkham therefore attempted to explain the warnings using different words. His explanation, however, was incomplete. He did not explain that Defendant's

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[6] A defendant is in custody where he is formally arrested or where his freedom of movement is restrained to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322 (1994). The custody inquiry is based on objective criteria only. *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983). "Factors indicative of custody include: (1) whether the objective indicia of arrest are present; (2) the site of the interrogation; (3) the length and form of the investigation; and (4) whether the investigation had focused on the accused." *State v. Stanley*, 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991).

In *State v. Carrillo*, the court found that the defendant was not in custody where he was interviewed at a police station but was not subjected to any booking processes and was expressly told that he was not under arrest. 156 Ariz. 125, 133-34, 750 P.2d 883, 891-92 (1988). Like the defendant in *Carrillo*, Defendant was not booked and was told several times that his presence was voluntary.

statements could be used against him, and he did not explain Defendant's right to an appointed attorney. It also appears that Defendant's confusion about the meaning of the terms "voluntarily" and "attorney" -- central concepts in the warnings -- was not adequately resolved. Because the record is insufficient to establish whether Defendant was adequately apprised of his rights, we cannot conclude that he validly waived them. *See Miranda*, 384 U.S. at 444 (valid waiver must be voluntary, knowing, and intelligent).

¶23 We therefore conclude that the *Miranda* factor weighs against a finding of voluntariness here. But this factor does not compel a finding that the confession was not voluntary. *Miranda* is a prophylactic measure that is required only in custodial situations. Were we to find that police failure to administer *Miranda* warnings (either in whole or in part) in non-custodial situations renders a defendant's statements per se inadmissible, we would effectively expand *Miranda* beyond its terms. We note also that here, the flaw in the warnings was apparently unintentional and the warnings, though incomplete, did not misstate the law.

C. Impermissible Police Conduct

¶24 A confession is involuntary if it is the product of impermissible police conduct. *Amaya-Ruiz*, 166 Ariz. at 164, 800 P.2d at 1272. Pursuant to the Fifth Amendment to the United

States Constitution, it is impermissible for the police to obtain a confession by "any direct or implied promises, however slight," *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)); this standard applies to the states through the Fourteenth Amendment. *Thomas*, 148 Ariz. at 227, 714 P.2d at 397. A confession is involuntary, therefore, if (1) the police made an express or implied promise, and (2) the defendant relied on the promise in confessing. *State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994). Though the burden of proof in a voluntariness determination generally rests on the State, it is the defendant's burden to show reliance. *See, e.g., State v. Tapia*, 159 Ariz. 284, 290, 767 P.2d 5, 11 (1988).

¶25 As an initial matter, we defer to the trial court's determination that Dr. Ofshe's testimony was not credible. Though Dr. Ofshe opined that the detectives' interview of Defendant was coercive, he admitted that he did not recall whether he reviewed the videotape of the interview. Where a videotape of an interview is available, a witness whose function is to offer an opinion of whether the interview was coercive should review the tape. A videotape, unlike a transcript, preserves useful evidence such as tone, conversation pacing, and body language.

¶26 Even without Dr. Ofshe's testimony, however, on this record we conclude that a promise was made. We will find a promise where a police statement implies that the defendant will receive a benefit in return for providing information. *State v. Burr*, 126 Ariz. 338, 340, 615 P.2d 635, 637 (1980) (finding promise not to arrest defendant in detective's statement that "I would just like to know what you have to say about it. First of all, before we go any further, I've got to tell you, I'm not trying, I'm not going to arrest you or put you in jail or anything."). *See also Pettit*, 194 Ariz. at 196, ¶ 21, 979 P.2d at 9 (finding promise not to use defendant's statements against him where defendant was told that questioning would not concern his specific case but instead would relate only to furthering an investigation against a different defendant); *Thomas*, 148 Ariz. at 226-27, 714 P.2d at 396-97 (finding promise where deputy told defendant that he would probably qualify for non-prison punishment if he confessed).

¶27 An objective review[7] of the interview transcript and videotape[8] show that Detective Rincon's statement "No one is

[7] Contrary to the State's argument on appeal, the promisor's subjective intent is immaterial to our inquiry.

[8] The copy of the videotape that was admitted into evidence at the voluntariness hearing is defective because it cuts off before the relevant portion of the recording. But because the relevant portion was played in open court at the hearing and we

going to jail" was a promise. Detective Rincon made the statement during a stage of the interview in which Defendant was emphatically and emotionally communicating that he did not want to go to jail. Further, the statement was preceded (and also immediately followed) by the detectives' statements that they could help Defendant if he confessed, that forgiveness was possible, and that they believed the victim's death was an accident. In this context, Detective Rincon's assertions about jail clearly implied that if Defendant confessed, he would not go to jail.

¶28 To render the confession involuntary, however, the defendant must have relied on the promise. We do not agree with the trial court that there is "no evidence" of reliance here. Though Defendant did not urge that there was reliance except through the testimony of Dr. Ofshe, reliance may be established by circumstantial evidence alone. *Pettit*, 194 Ariz. at 197, ¶ 23, 979 P.2d at 10. The interview videotape does not reveal words, body language, changes in tone or other indicia that Defendant processed and considered the promise before confessing. But the videotape and transcript show that Defendant confessed almost immediately after the promise was made. From that, reliance could have been inferred. *See*

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are able to review a complete copy of the tape that was admitted into evidence at the trial, the defect in the tape is harmless.

Pettit, 194 Ariz. at 197, ¶ 23, 979 P.2d at 10 (finding ample evidence of reliance where defendant agreed to talk to police immediately after he was promised that his statements would not be used against him).

¶29 The court was not, however, compelled to find from the timing of Defendant's confession alone that reliance was shown by a preponderance of the evidence. The judge had the opportunity to view the video recording and evaluate all aspects of Defendant's reaction to the promise. Because Defendant's behavior cannot be said to unambiguously demonstrate reliance as a matter of law, the record is sufficient to support a finding that reliance was not shown by a preponderance of the evidence, and we cannot conclude that the trial court committed clear and manifest error in finding an absence of reliance.

CONCLUSION

¶30 There is sufficient evidence to support findings that the atmosphere of Defendant's interview was not inherently coercive and that his confession was not the product of impermissible police conduct. We cannot say, therefore, that the trial court committed clear and manifest error by finding that the confession was voluntary. Accordingly, we affirm.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge