STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of NKF, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NKF,

Defendant-Appellee.

UNPUBLISHED
March 2, 2001

No. 229597
Kalamazoo Circuit Court
LC No. 00-000129-DL

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following an interview with Detective Jeffrey Johnson of the Kalamazoo Department of Public Safety, defendant minor was charged with three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), involving his five-year-old half-brother. Before trial, defendant moved to suppress his statements to Johnson on the ground that these statements were not voluntarily given. After a hearing on defendant's motion at which Johnson, defendant, and defendant's mother, Penny Start, offered testimony, the family court referee issued an order suppressing defendant's statements as involuntarily given. The circuit court later approved, signed, and entered that order. The prosecutor appeals by leave granted. We reverse and remand.

On appeal, the prosecutor argues that the referee erred as a matter of law and of fact in finding defendant's statements to have been involuntary. We agree. Whether a defendant's statement was voluntarily given is a question of law generally reserved for determination by the trial court. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). However, when reviewing a determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). Nonetheless, we will affirm the lower court's decision unless we are left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). In this case, after review of the record created at the suppression hearing, we are left with just such a conviction.

The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the challenged statement was the product of an essentially free and unconstrained choice by its maker, or whether the accused's will was overborne and his capacity for self-determination critically impaired. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997), quoting *People v Cipriano* 431 Mich 315, 333-334; 429 NW2d 781 (1988). The factors to be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include:

> (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997).]

No single factor is determinative; rather, the question remains whether the statement was voluntary under the totality of the circumstances. *Sexton (After Remand)*, *supra* at 753-754; see, also, *People v Good*, 186 Mich App 180, 187-188; 463 NW2d 213 (1990). Here, we do not believe that application of the foregoing factors supports the referee's finding that defendant's statements were involuntary.

In challenging the referee's decision on appeal, the prosecutor argues that because defendant's statements were not the product of a custodial interrogation, the referee erred as a matter of law in considering the absence of *Miranda* warnings as an aspect of the totality of the circumstances. We agree. The ultimate question whether a person is in custody, and thus entitled to *Miranda* warnings before being interrogated by law enforcement officers, is a mixed question of law and fact that must be answered independently by the reviewing court after de novo review. *People v Mendez,* 225 Mich App 381, 382; 571 NW2d 528 (1997). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Zahn,* 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances, with the key question being whether the accused could have reasonably believed that he was not free to leave. *People v Marsack,* 231 Mich App 364, 374; 586 NW2d 234 (1998).

Initially, we note that although it is not disputed that the subject statements were made during an after-hours interview conducted at police headquarters, the mere fact that an interview takes place in a police-dominated atmosphere is not sufficient to require that a defendant be informed of his rights under *Miranda*. As explained by the United States Supreme Court in *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977):

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. *Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect*. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited. [Emphasis added.]

See, also, *Mendez, supra* at 383-384.

In this case, with respect to any "restriction" on defendant's freedom during the questioning, each of the three witnesses who testified at the suppression hearing indicated that Johnson told defendant before the interview that he was neither "in custody" nor under arrest and that he was free to leave with his mother after the interview. Although defendant did not specifically acknowledge that he understood these statements and later testified to his belief that he would not be permitted to leave the station house unless he first spoke with the detective and acknowledged culpability, defendant's mother testified that she understood Johnson to mean that she and defendant could leave at any time. These facts, when considered in connection with the referee's finding that Johnson acted appropriately under the law during the interview and that defendant had "stretched" his testimony at the hearing to be somewhat "self-serving," weigh heavily against a finding that defendant reasonably believed that was he was not free to leave at any time during the interview. We therefore find that defendant was not "in custody" so that *Miranda* warnings were required and that the referee thus erred when he relied on the lack of *Miranda* warnings to support his conclusion that defendant did not voluntarily make a statement.

We also note that because defendant was not under arrest, the requirements of MCL 764.27; MSA 28.886 are not applicable, and thus the referee's ignoring this as a factor influencing the voluntariness of defendant's statement was appropriate. Defendant's mother accompanied him to the station house, but she was excluded from the actual interview. Consequently, we see no error in the referee's finding that defendant did not have the assistance of a friendly adult during the interview. Nonetheless, we find that in reaching his ultimate decision in this matter, the referee erred in primarily relying on defendant's mother's conduct.

Although it is undisputed that Start took defendant to the station house and advised him to tell the truth, defendant acknowledged during his testimony at the suppression hearing that although somewhat nervous (and uncertain as to what would ultimately result from anything he might say), he was "okay" with speaking to Johnson. Moreover, even assuming that, as found by the referee, Start's actions in this regard were ultimately not in defendant's best interest, we are not persuaded that her conduct constitutes "coercion" sufficient to support a finding that defendant's later statements were involuntary. Although a confession coerced by a private citizen can render the statement involuntary, see, e.g., *People v Switzer*, 135 Mich App 779, 784; 355 NW2d 670 (1984), whether a statement was voluntary is generally determined by examining

police conduct, *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). As noted by the United States Supreme Court in *Colorado v Connelly*, 479 US 157, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986), "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Thus, "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id*. at 164. Here, as noted above, the referee repeatedly indicated in his bench opinion that Johnson's conduct during the interview was "appropriate under the law."

Nonetheless, aside from her request that he was to tell the truth, defendant did not testify as to any coercive tactics by his mother that induced him to make the challenged statements. A family member's plea to tell the truth does not render any subsequent statement by the defendant involuntary. *People v Seymour*, 188 Mich App 480, 484; 470 NW2d 428 (1991). Moreover, because Start was not present in the interview room during the interview she could not have asserted coercive influence on defendant during the interview. Therefore, given the referee's finding that Johnson's conduct during the interview was appropriate, and considering defendant's own admission that despite his belief that he was entitled to the presence of an adult during the interview, he never informed Johnson that he did not wish to speak to him alone, we find the referee's ultimate determination that the statements were not voluntarily given to be clear error.

Our conclusion in this regard is further supported by applying the remaining *Givans*' factors. At the time of the interview, defendant was thirteen years old, in the ninth grade, and receiving above-average marks. By his own admission, defendant was "smart" and had a perceived knowledge of his rights during questioning by police. Moreover, the entire interview, even accepting defendant's testimony as true, took no more than one hour to complete. And, although defendant testified that Johnson extracted the statements through threats and coercion, the referee found that Johnson acted appropriately during the interview and that defendant's testimony was self-serving. These conclusions confirm that the referee found no outrageous or coercive conduct on the part of Johnson. On such matters of credibility and weight, this Court will generally defer to the findings of the lower court. *Sexton (After Remand)*, *supra* at 752. Finally, there is no evidence that defendant was tired, hungry, thirsty, or in poor mental or physical health during the course of the interview.

Accordingly, we find that the referee's decision to suppress defendant's statements as involuntary constitutes clear error because the totality of the circumstances do not demonstrate that these statements were the product of impermissible police coercion.

We reverse and remand. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey