STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANDREA LYNN ARMSTRONG, Minor.

PEOPLE OF THE STATE OF MICHIGAN

Petitioner-Appellee,

v

ANDREA LYNN ARMSTRONG

Respondent-Appellant.

UNPUBLISHED
July 31, 2001

No. 222501
Oakland Circuit Court
Family Division
LC No. 98-615995-DL

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Following a jury trial, respondent, a juvenile, was found guilty of solicitation of murder, MCL 750.157b(2). She was sentenced to juvenile probation. She appeals as of right. We affirm.

Respondent argues that the trial court erred in admitting a private tape-recorded telephone conversation between herself and an acquaintance, which was recorded by her father. During the recorded conversation, respondent stated that she had arranged to have her parents killed by a classmate. Respondent argues that the recording should have been suppressed because it was obtained without her knowledge or permission, in violation of both the federal wiretapping act, 18 USC 2510 *et seq.*, and the Michigan eavesdropping statute, MCL 750.539c. We conclude that the recording was not obtained in violation of the federal statute. Although the recording does violate Michigan's statute, suppression of the evidence was not required.

The recording of another person's conversation is prohibited by the federal wiretapping act, 18 USC 2510 *et seq*. However, as noted by this Court in *Williams v Williams (On Remand)*, 237 Mich App 426; 603 NW2d 114 (1999), the Sixth Circuit Court of Appeals in *Pollock v Pollock*, 154 F3d 601 (CA 6, 1998), adopting the analysis in *Thompson v Dulaney*, 838 F Supp 1535, 1544 (D Utah, 1993), held that the act contains a "vicarious consent" provision to allow a parent to consent on behalf of their child to the recording of the child's conversations under certain circumstances:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. [*Pollock, supra* at 610.]

See also 18 USC 2511(2)(d). We are bound by the decision in *Pollock* with respect to this issue. *Williams, supra* at 430; see also *Young v Young*, 211 Mich App 446, 450; 536 NW2d 254 (1995).

Here, the evidence indicates that respondent's parents recorded respondent's telephone conversation because they were concerned for her well-being and alarmed by her recent behavior, and were afraid that she was pregnant or using drugs. The trial court found that the recording, although later used against respondent at trial, was initially made for the purpose of furthering respondent's best interests. We find no clear error with respect to this determination. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Therefore, we agree that the trial court did not err in holding that the recording did not violate the federal wiretapping act.

Unlike the federal act, Michigan's statute does not contain a consent exception. *Williams*, *supra* at 429. Although we are not convinced that the trial court properly distinguished this case from *Williams* with respect to this holding, we agree that, even if the Michigan statute was violated, the remedy that respondent seeks, suppression of the recording, is not appropriate. Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, and is excluded from being used against a criminal defendant. *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *People v Lyon (On Remand)*, 227 Mich App 599, 611; 577 NW2d 124 (1998). As a general rule, however, the exclusionary rule only applies to constitutional violations, not to violations of statutory protections; this is especially true where a statute provides its own remedies. *Lyon (On Remand)*, *supra*; *People v Moore (On Remand)*, 180 Mich App 301, 308; 446 NW2d 834 (1989); *People v Burdo*, 56 Mich App 48, 51-52; 223 NW2d 358 (1974).

Unlike the federal wiretapping act, which specifically provides for suppression,[1] the Michigan eavesdropping statute only provides for criminal penalties, MCL 750.539e; MCL 750.539f, as well as the following civil remedies:

> Any parties to any conversation upon which eavesdropping is practiced contrary to this act shall be entitled to the following civil remedies:
>
> (a) An injunction by a court of record prohibiting further eavesdropping.
>
> (b) All actual damages against the person who eavesdrops.
>
> (c) Punitive damages as determined by the court or by a jury. [MCL 750.539h.]

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[1] 18 USC 2515.

This Court has previously held that evidence initially gathered by a private party in violation of the Michigan eavesdropping statute need not be suppressed in a criminal proceeding because "[w]e will not judicially create a remedy that the Legislature chose not to create." *People v Livingston*, 64 Mich App 247, 255; 236 NW2d 63 (1975) (citation omitted). See also *People v Sacorafas*, 76 Mich App 370, 374; 256 NW2d 599 (1977). This holding is consistent with other cases by this Court interpreting the exclusion of evidence involving similar violations of other statutes. *Lyon (On Remand), supra*; *Moore supra*. Therefore, we conclude that the trial court was not required to suppress respondent's conversation, notwithstanding a possible violation of the Michigan eavesdropping statute.

Respondent next argues that the trial court erred in refusing to suppress her inculpatory statements made to the police following her arrival at the police station, and during subsequent police questioning, all of which occurred before she was advised of her constitutional rights. We agree in part, but find the error to be harmless.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived her Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 645. *Miranda* warnings are mandated before questioning but are not required unless the accused is subject to a custodial interrogation. *People v Daoud*, 462 Mich 621, 638; 614 NW2d 152 (2000); *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000).

A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of her freedom of action in any significant way. *Miranda, supra* at 444; *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. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). The key question in making this determination is whether the accused could have reasonably believed that she was not free to leave. *Id.*; *People v Roark*, 214 Mich App 421, 424; 543 NW2d 23 (1995). The determination of custody depends on the objective circumstances of the interrogation rather than simply the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994); *Zahn, supra* at 449. 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." *Stanbury, supra* at 325; see also *Roark, supra* at 424.

In the instant case, we conclude that respondent was in custody at the time of her initial interrogation. Although the fact that the questioning occurred at the police station does not, by itself, render the interrogation custodial, *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977); *Mendez, supra* at 383-384, this fact weighs heavily in our conclusion that respondent reasonably believed she was in custody and not free to leave at the time she was

questioned. Apart from the fact that the questioning occurred at the police station, respondent was never told that she was not under arrest or that she was not free to leave. See e.g., *Mathiason, supra* at 495; *Mendez*, *supra* at 383. Indeed, respondent was a 15-year old juvenile who was transported to the police station by the officer who later questioned her. The officer admitted that he would have formally arrested respondent if she had refused to accompany him voluntarily, because respondent's father, the complainant, had given his permission to question her. These facts bolster our conclusion that respondent was brought to the police station under circumstances that would have reasonably led her to believe that she was not free to leave. As such, the interrogating officer's questioning was improper and respondent's initial statement should have been suppressed. *Stanbury, supra* at 325; *Daoud*, *supra* at 638.

However, respondent's second statement was preceded by *Miranda* warnings. Furthermore, we are not persuaded that the trial court erred in finding respondent's statements to be voluntary. The trial court properly considered and applied the factors set forth in *People v Good*, 186 Mich App 180; 463 NW2d 213 (1990), and *People v Givens,* 227 Mich App 113; 575 NW2d 84 (1997). Furthermore, because respondent's initial statement is inadmissible because of a violation of *Miranda*, but was otherwise voluntary, a fruits of the poisonous tree analysis does not apply. See *Oregon v Elstad,* 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985); *People v Bieri,* 153 Mich App 696; 396 NW2d 506 (1986). Therefore, the second statement is admissible.

Concluding that the second statement is admissible, we must now ask whether the improper admission of the first statement was harmless. In light of the other evidence against respondent, and particularly in light of the second statement being admissible, we are satisfied that the jury would have reached the same result even if the first statement had not been admitted. *People v Whitehead,* 238 Mich App 1, 9-10; 604 NW2d 737 (1999). On the whole record, the error in admitting respondent's first statement was harmless beyond a reasonable doubt. *Neder v United States*, 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *People v Anderson (After Remand),* 446 Mich 392; 521 NW2d 538 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell