DIVISION ONE
FILED: 3/21/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0254
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DESTINEY DAWN VAHLE,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-007449-001

The Honorable Cynthia J. Bailey, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Jeffrey L. Force, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Destiney Dawn Vahle (Defendant) appeals her convictions and sentences for two counts of hindering

prosecution in the first degree involving murder and one count of interfering with judicial proceedings. Defendant challenges the court's ruling denying her motion to suppress statements she made during an interview with a deputy sheriff. Because we conclude no *Miranda*[1] violation occurred and Defendant made her statements voluntarily, we affirm.

BACKGROUND[2]

¶2 On August 29, 2009, sheriff's deputies were surveilling Defendant's apartment as part of an investigation into a home invasion and homicide committed on or about August 24, 2009. After the suspects, Robert Pleickhardt and Kathleen Madden, exited the apartment the deputies arrested them. Pleickhardt is Defendant's stepfather and Madden's boyfriend. Pleickhardt's head appeared to have been recently shaved.

¶3 Detective Paul S. (Detective S.) interviewed Defendant soon after the suspects were detained, and she claimed not to know anything about the crimes. During the suspects' interviews later that day, deputies learned that "Corion" was also involved in the home invasion.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶4 Based on the interviews with Pleickhardt and Madden, Detective S. learned that Corion was Defendant's boyfriend and that Defendant had knowledge of the crimes. The next morning, on August 30, 2009, Detective S. and Sergeant Albert A. (Sergeant A.) returned to Defendant's apartment to re-interview her primarily for purposes of obtaining information regarding Corion. Detective S. requested that Defendant accompany him to the sheriff's office for further questioning, and she agreed to do so. Detective S. did not advise Defendant of her *Miranda* rights.

¶5 During the interview, Defendant conceded that she knew some details about the home invasion and that her boyfriend was involved, but she continued to lie "about who her boyfriend was."[3] She identified from a photo line-up someone named Corion Cooper as her boyfriend.

¶6 After concluding the interview, Detective S. and Sergeant A. returned Defendant to her home. At that time, Sergeant A. told Defendant's aunt (Tracie) that he believed Defendant was lying and asked Tracie to speak with Defendant and contact him if Defendant told her the truth. Tracie called Sergeant A. later that day. During the call Defendant admitted

[3] Defendant admitted that she had been protecting Pleickhardt and had cut his hair after she knew he was involved in the home invasion and after his picture was televised on the news.

to lying about Corion's identity. Based on information gathered during that call, Corion Babers was subsequently apprehended as the third suspect in the home invasion.

¶7 The State charged Defendant with two counts of hindering prosecution in the first degree involving murder, a class three felony: Count One relating to concealing the identity of Babers and Count Two relating to harboring or concealing Pleickhardt.[4] Before trial, Defendant moved to suppress the statements she made during the August 30 interview, arguing that those statements were made in violation of *Miranda* and were involuntary. The court held a hearing on the motion, and the only evidence presented was Detective S.'s testimony and the transcript of his August 30 interview with Defendant.[5] The court denied the suppression motion, finding *Miranda* warnings were not required because Defendant was not subjected to custodial interrogation. The court also found that the State proved by a preponderance of the evidence that Defendant's statements were voluntary.

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[4] The State also charged Defendant with one count of interfering with judicial proceedings, a class one misdemeanor, based on her failure to appear as the key witness in Babers' jury trial. The facts underlying this charge are not pertinent to our disposition of the issue Defendant raises on appeal.

[5] The State also attached a copy of the transcript of the August 29 interview to its opposition to Defendant's suppression motion.

¶8 A jury convicted Defendant of the charged offenses, and the court imposed concurrent presumptive terms of three and a half years' imprisonment for the felony convictions.[6] Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010) and -4033.A.1 (2010).

DISCUSSION

¶9 Defendant argues the court erred in denying her motion to suppress. She contends Detective S. failed to properly advise her of her *Miranda* rights before or during the August 30 interview and her statements were involuntary. We disagree.

¶10 We review the trial court's ruling admitting a defendant's statements over her objections for abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d 899, 909 (2006). We review only the evidence presented at the suppression hearing, and we do so in the light most favorable to upholding the trial court's ruling. *Id.*

¶11 "Voluntariness and *Miranda* are two separate inquiries." *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983). "Preclusion of evidence obtained in violation of *Miranda* is based on the Fifth Amendment privilege against self-

[6] For the misdemeanor conviction, the court sentenced Defendant to time served.

incrimination." *In re Jorge D.*, 202 Ariz. 277, 281, ¶ 19, 43 P.3d 605, 609 (App. 2002). "Preclusion of involuntary confessions is based on the Due Process Clause of the Fourteenth Amendment and applies to confessions that are the product of coercion or other methods offensive to due process." *Id.*

I. *Miranda*

¶12 The trial court found no *Miranda* violation occurred at the August 30 interview because Defendant was not subjected to a custodial interrogation; therefore, *Miranda* warnings were not required. We agree.

¶13 *Miranda*'s protections "apply only to custodial interrogation."[7] *State v. Smith*, 193 Ariz. 452, 457, ¶ 18, 974 P.2d 431, 436 (1999). In determining whether an interrogation

[7] For this reason, we reject Defendant's implication that Detective S. was required to advise her of her rights under *Miranda* merely because he was asking her incriminating questions. Further, because *Miranda* is implicated only in the context of custodial interrogation, Defendant's reliance on *State v. Pettit*, 194 Ariz. 192, 979 P.2d 5 (App. 1998), for the proposition that a *Miranda* violation also can be evidence of the voluntariness of statements is misplaced. In that case, the trial court found the defendant's statements were made in violation of *Miranda*. *Id.* at 194, ¶ 11, 979 P.2d at 7. On appeal, we noted that such a violation is also relevant to determining the voluntariness of those statements, and we affirmed the trial court's suppression of the defendant's statements from being used in any capacity at trial because they were involuntarily made. *Id.* at 196-97, ¶¶ 19, 24-25, 979 P.2d at 9-10. Here, there was no *Miranda* violation because Defendant was not in custody; accordingly, *Pettit* did not apply to require the court to consider Detective S.'s failure to give *Miranda* warnings as a factor in determining the voluntariness of Defendant's statements.

is custodial, we look to "the objective circumstances of the interrogation, not . . . the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994). We assess "whether under the totality of the circumstances a reasonable person would feel that he was in custody or otherwise deprived of his freedom of action in a significant way." *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985). In so doing, factors to consider include the method used to summon the defendant, whether objective indicia of arrest are present, the site of the questioning, and the length and form of the interrogation. *See State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983).

¶14 Detective S. testified that he did not read Defendant her *Miranda* rights at the August 30 interview because she was not in custody. Specifically, he testified that Defendant was never handcuffed or arrested, she willingly accompanied him in the front seat of his unmarked vehicle to the station, and he was unarmed during the interview. Detective S. further explained that he was dressed in civilian clothes, and he did not use threats, promises, or any force to get Defendant to talk to him. Defendant presented no evidence to the contrary, and, in any event, it was the trial court's role to assess Detective S.'s credibility. *See State v. Ossana*, 199 Ariz. 459, 461, ¶ 7,

18 P.3d 1258, 1260 (App. 2001) ("The trial court determines the credibility of the witnesses."). Finally, the interview lasted less than two hours, and it was punctuated by at least two breaks. Detective S. repeatedly stated during the interview that he was going to return Defendant home after the interview, and, in fact, he did so.

¶15 Under these circumstances, the trial court could properly conclude a reasonable person in Defendant's position would not have felt "he was in custody or otherwise deprived of his freedom of action in a significant way." *Carter*, 145 Ariz. at 105, 700 P.2d at 492. Simply stated, the "objective indicia of arrest" were not present during Defendant's August 30 interview. *See Cruz-Mata*, 138 Ariz. at 373, 674 P.2d at 1371 (holding a one and a half hour interview at a police station was not a custodial interrogation because the defendant was not physically restrained or arrested, no force or threats were used, and the defendant willingly accompanied the detective to the police station in the front seat of an unmarked police car). Accordingly, Defendant was not subjected to a custodial interrogation; therefore, Detective S. was not required to inform her of her rights under *Miranda*. The court did not abuse its discretion in denying Defendant's motion to suppress on this basis.

II. Voluntariness

¶16 Defendant also contends her "confession" was coerced because Detective S. promised "she would not be in trouble for talking to him and that they were only looking at her as a witness in the murder investigation," and he made threats related to separating her from her children. The record does not support this argument.

¶17 Because a defendant's statements are presumptively involuntary, the State has the burden of proving by a preponderance of the evidence that the statements were voluntarily made and not the product of coercion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). "In making this determination, the totality of the circumstances surrounding the confession must be considered." *Id.* "A voluntary confession cannot be induced by a direct or implied promise, however slight."[8] *Id.* at 165, 800 P.2d at 1273. "Before a court determines that a statement is involuntary as the result of a promise, there must be evidence that (1) a promise of a benefit or leniency was made, and (2) defendant relied on the promise in making the statement." *Pettit*, 194 Ariz. at 196, ¶ 20, 979 P.2d at 9. Mere advice from the police that it would be better for the accused to tell the truth when

[8] The State challenges the propriety of the "however slight" standard. Because we find Detective S. made no promises, we need not address this issue.

unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. *State v. Blakley*, 204 Ariz. 429, 436, ¶¶ 27, 29, 65 P.3d 77, 84 (2003).

¶18 Here, the purpose of the interview was to get information from Defendant regarding the third suspect, her boyfriend Babers, and to corroborate Pleickhardt's and Madden's statements. Detective S. had no information that Defendant actually participated in the home invasion, and nothing indicates that Detective S. expected Defendant to lie about Babers' identity. Thus, Detective S.'s statements that he considered Defendant to be merely a witness were not promises but statements of fact. Further, Detective S.'s statement to Defendant that nothing would happen to her was not a promise as Defendant asserts but similarly a statement of fact. *See State v. Miles*, 186 Ariz. 10, 14, 918 P.2d 1028, 1032 (1996) (detective telling the defendant that he was not guilty of murder if he was "just there" was not a promise but a statement of fact); *State v. Lopez*, 174 Ariz. 131, 138, 847 P.2d 1078, 1085 (1992) (detective's statement to the defendant that the tape recording of the interview would not be played for the victim's mother was not a promise but merely a factual statement). Finally, Detective S. did not mention a "deal" if Defendant provided information, and he expressly stated that he could not make her any promises if she told the truth. *See*

Blakley, 204 Ariz. at 436, ¶ 28, 65 P.3d at 84 (lack of specific "deal" accompanied by detectives' statement that no promises could be made precluded finding of involuntariness).

¶19 We further reject Defendant's contention that Detective S. made threats related to Defendant's children that coerced her statements. "To find a confession involuntary, we must find both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will." *State v. Boggs*, 218 Ariz. 325, 336, ¶ 44, 185 P.3d 111, 122 (2008). Defendant points to, among others, the following statements Detective S. made during the interview:

- He reminded Defendant how important her children were to her;
- When Defendant hesitated in answering a question or stated that she did not want to be a witness, Detective S. reminded her of her children and that she loved them and told her he knew she wanted to go home to them;
- After informing Defendant that she was "involved," Detective S. distinguished between being involved and being a witness and stated, "One is you're with your kids and you go home. The other is you don't . . . ."; and
- Detective S. asked Defendant whether she was afraid of losing her children, and Defendant answered, "Yes."

¶20 The court found these statements were made, not as threats, but as attempts to persuade Defendant to tell the

truth. In doing so, the court relied on *Boggs*. In *Boggs*, our supreme court held that one isolated question by the detective regarding the defendant's son's name did not constitute a threat to separate the defendant from his child if he failed to cooperate. *Id.* at ¶ 46. On the other hand, Defendant urges that *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981), is dispositive. In that case, an FBI agent expressly told the defendant either that she would not or might not see her two-year-old child "for a while" if she failed to cooperate. *Id.* at 1333-34. The Ninth Circuit held this statement was one of several factors that caused the defendant to confess during the interrogation after she cried for at least ten minutes and was visibly shaking. *Id.* at 1334, 1336.

¶21 Here, Detective S. did not directly threaten Defendant with separation from her children, as was done in *Tingle*; instead, Detective S. made considerably more than one non-threatening statement similar to what the *Boggs* court found did not constitute a threat. However, assuming, without deciding, that Detective S.'s statements did amount to threats, they did not rise to the coercive effect of the threatening statement in *Tingle*. There was no evidence that Defendant was upset in response to Detective S.'s comments, and we note that Defendant herself introduced the topic of her children as a mechanism to explain her innocence. When confronted with information that

Pleickhardt told law enforcement "everything," Defendant stated that she would not knowingly allow Pleickhardt and Madden to stay in the house after committing the crimes because doing so would jeopardize her children's safety. She also swore "on [her] kids" in an attempt to persuade Detective S. that she was telling the truth about not knowing her boyfriend's given name.[9]

¶22 Moreover, Defendant did not rely on Detective S.'s comments regarding her children to the extent her will was overborne in compelling her to make inculpatory statements. During the interview, although Defendant gradually provided information that law enforcement already had, she continued to lie about her boyfriend's identity. Defendant did not divulge Babers' identity until after the interview ended when she was at home and had discussed the matter with Tracie. Whatever impropriety may be attributed to Detective S.'s questioning, it did not overcome Defendant's will because she continued to lie about Babers; therefore, Detective S.'s questioning was not coercive.[10] *See State v. Walton*, 159 Ariz. 571, 579–80, 769 P.2d 1017, 1025–26 (1989) (finding no reliance when forty-five

[9] Defendant stated she knew her boyfriend only as "Phat."

[10] While threatening statements made by a police officer may result in a coerced or involuntary confession as in *Tingle*, we note that a defendant may not use those statements as a defense to his or her decision to lie during an interrogation.

minutes elapsed between alleged promise and confession during interrogation).

¶23 On this record, we cannot conclude the trial court abused its discretion in finding Defendant's statements were voluntary.

CONCLUSION

¶24 The court did not err in denying Defendant's motion to suppress; accordingly, her convictions and sentences are affirmed.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PETER B. SWANN, Judge

/S/
_____
DANIEL A. BARKER, Judge Pro Tempore*

*The Honorable Daniel A. Barker (Retired), Judge Pro Tempore of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147 (2003).