DIVISION ONE
FILED: 09/13/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0240
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ANGEL JOHN OSIF,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-136239-001 SE

The Honorable Steven P. Lynch, Judge *Pro Tempore*

AFFIRMED AS MODIFIED

Terry Goddard, 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 Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Judge

¶1 A jury convicted Angel John Osif of armed robbery, a class 2 felony and dangerous offense, and misconduct involving weapons (prohibited possessor), a class 4 felony. The convictions stemmed from a robbery in which Osif's co-defendant punched the victim in the face to obtain the victim's property, and Osif threatened the victim with a handgun when the victim chased after them as they fled the scene. The State alleged and proved that Osif had two historical felony convictions, and the trial court sentenced him as a repetitive offender to concurrent, aggravated terms of imprisonment, the longest being sixteen years on the armed robbery conviction, with credit for 284 days of presentence incarceration.

¶2 Osif argues the trial court erred in denying his motion to suppress statements and by failing to give him full credit for presentence incarceration. For reasons that follow, we affirm Osif's convictions but modify his sentences by increasing the credit for presentence incarceration.

DISCUSSION

A. Motion to suppress

¶3 Prior to trial, Osif moved to suppress statements made to the police during a post-arrest interview on the grounds they were involuntary. The statements included admissions to possessing a handgun and pointing it at the victim. The parties

waived an evidentiary hearing and agreed to have the motion decided on arguments of counsel and the trial court's review of a videotape of the interview. Following oral argument, the trial court found Osif's statements to be voluntary and denied the motion to suppress. Osif's admissions were subsequently introduced by the State at trial.

¶4 Osif argues the trial court erred in denying his motion to suppress, asserting his admissions were the result of a "mixture of promises and threats" by the police. We will not disturb the trial court's determination that a confession was voluntary "absent clear and manifest error." *State v. Poyson*, 198 Ariz. 70, 75, ¶ 10, 7 P.3d 79, 84 (2000). We review the trial court's factual findings for an abuse of discretion, but we consider de novo whether a constitutional violation occurred. *State v. Davolt*, 207 Ariz. 191, 202, ¶ 21, 84 P.3d 456, 467 (2004).

¶5 Confessions made to law enforcement officials are admissible at trial only if made voluntarily. *State v. Ellison*, 213 Ariz. 116, 127, ¶ 30, 140 P.3d 899, 910 (2006). Confessions are presumed to be involuntary, and the State has the burden of establishing by a preponderance of the evidence "that the confession was freely and voluntarily given." *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986) (citation omitted). In determining whether a confession is voluntary, we consider

whether the defendant's will was overborne under the totality of the circumstances surrounding the confession. *State v. Newell*, 212 Ariz. 389, 399, ¶ 39, 132 P.3d 833, 843 (2006). "Although 'personal circumstances, such as intelligence and mental or emotional status, may be considered in a voluntariness inquiry, the critical element . . . is whether police conduct constituted overreaching.'" *Poyson*, 198 Ariz. at 75, ¶ 10, 7 P.3d at 84 (alteration in original) (quoting *State v. Stanley*, 167 Ariz. 519, 524, 809 P.2d 944, 949 (1991)).

¶6 Officers questioned Osif at the police station following his arrest. The interview lasted approximately forty-seven minutes and was recorded in its entirety. After being advised of the *Miranda* warnings, Osif initially denied any involvement in criminal activity but offered no explanation for the victim's debit card in his possession when arrested. The officer in charge decided to terminate the interview, but as Osif was about to be taken to booking, another officer who apparently knew Osif asked about his son's age. Osif answered his son was ten months old. This officer made repeated references to Osif's son while attempting to convince him to tell the truth about the robbery. Thereafter, upon further questioning, Osif admitted to possessing the handgun and pointing it at the victim.

¶7 Osif cites *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981) to argue that the officer coerced his admissions by using threats and promises to play on an emotional attachment to his son. In *Tingle*, the police essentially told the defendant that if she did not make a statement she would not see her child for a long time and her failure to cooperate would be communicated to the prosecutor. 658 F.2d at 1336. The court held that the officers' statements were patently coercive, observing that "Tingle had every reason to believe, from what she was told, that her confession would have a significant impact on her ability to see her child." *Id.* at 1336-37.

¶8 Here, the trial court found the officer's statements to Osif concerning his son to be distinguishable from those in *Tingle* and more akin to the circumstances in *State v. Boggs*, 218 Ariz. 325, 185 P.3d 111 (2008). In *Boggs*, our supreme court rejected a similar argument based on *Tingle*, holding that the officer's statements regarding Boggs' son were an "attempt[] to solicit a sense of responsibility for his son to encourage Boggs to 'tell the truth,' not to intimate that Boggs would never see his son if he did not cooperate." *Id.* at 336, ¶ 46, 185 P.3d at 122.

¶9 The officer made statements concerning Osif's son that, if viewed in isolation, might be considered similar to those in *Tingle*. These include: "The difference is if you see

your kid sooner or not see your kid soon," and "I don't think that your ten-month-old son needs to grow up without a dad." When viewed in context and considered under the totality of the circumstances, however, the evidence supports a finding that the thrust of the officer's statements, like in *Boggs*, was to communicate it would be better for Osif to take responsibility and to do the right thing for himself and his son. "Mere advice that it would be better to be truthful is a permissible interrogation tactic." *State v. Blakley*, 204 Ariz. 429, 436, ¶ 29, 65 P.3d 77, 84 (2003) (citation omitted).

¶10 Our review of the recording supports a finding that no promises of any kind were made to Osif and, in contrast with *Tingle*, at no time did the officer suggest that Osif would be subject to harsher treatment if he did not cooperate. *See United States v. Harrison*, 34 F.3d 886, 891 (9th Cir. 1994) (recognizing distinction between propriety of suggesting cooperation may increase likelihood of more lenient sentence and impropriety of threatening to inform prosecutor of failure to cooperate); *State v. Strayhand*, 184 Ariz. 571, 579-80, 911 P.2d 577, 585-86 (App. 1995) (same). On this record, the trial court could reasonably conclude that the officer's remarks concerning Osif's son were not the sort that would have overborne Osif's will and render his admissions involuntary. Accordingly, there

was no clear and manifest error by the trial court in denying the motion to suppress.

B. Credit for presentence incarceration

¶11 Osif also contends the trial court erred in granting too little credit for presentence incarceration. He argues he is entitled to credit for 286 days of presentence incarceration rather than the 284 days granted by the trial court. The State concedes error, and we agree.

¶12 A defendant is entitled to credit for "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense." Ariz. Rev. Stat. ("A.R.S.") § 13-712(B) (2010).[1] Osif was taken into custody on May 30, 2009, and was sentenced on March 12, 2010. This period between arrest and sentencing totals 286 days. Thus, we modify Osif's sentences to increase the total credit for presentence incarceration to 286 days. We further correct the sentencing minute entry and the order of confinement to reflect this change. *See* A.R.S. §§ 13-712(E), -4037(A) (2010); *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992).

[1] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

CONCLUSION

¶13 For the foregoing reasons, we affirm Osif's convictions, but we modify his sentences by increasing the credit for presentence incarceration to 286 days.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Jon W. Thompson, Presiding Judge

/s/
Daniel A. Barker, Judge