IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| CARLOS ORTIZ, | § | No. 320, 2003 |
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| Defendant Below, | § | |
| Appellant, | § | Court Below: Superior Court of |
| | § | the State of Delaware in and for |
| v. | § | Sussex County |
| | § | |
| STATE OF DELAWARE, | § | Cr.ID No. 0208005710 |
| | § | |
| Plaintiff Below, | § | |
| Appellee. | § | |
| | § | |

Submitted: January 6, 2004
Decided: January 15, 2004

Before **VEASEY**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

**ORDER**

This 15th day of January 2004, upon consideration of the briefs of the parties it appears to the Court that:

(1) On August 8, 2002, the defendant, Carlos Ortiz, and his wife, Marisol Ortiz, were living separately. That evening, their three children, Carlos, Jr., Geovany, and Karla, stayed with Marisol in the mobile home where she was living.

(2) During the night, Marisol awoke to find Ortiz in the house, pointing a gun in her face. Ortiz threatened to kill Marisol if she did not come back to him. After a period of argument, Ortiz said he wanted Marisol to have sex with him and tried to convince her to perform oral sex on him. Marisol refused. Ortiz then raped Marisol.

(3) During the rape, the children were in the living room while Ortiz and Marisol were in the bedroom. The children were too frightened to go for help. Marisol eventually ran out of the trailer and went to her brother's house for help. At the hospital where Marisol was taken for examination by a SANE nurse, Detective Mitchell questioned the children about what had happened.

(4) Ortiz was indicted on eighteen criminal charges, including rape in the first degree,[1] attempted rape in the first degree,[2] possession of a deadly weapon during the commission of a felony,[3] kidnapping in the first degree,[4] burglary in the first degree,[5] possession of a weapon by a person prohibited,[6] aggravated menacing,[7] terroristic threatening,[8] endangering the welfare of a child,[9] and criminal contempt.[10] The three Ortiz children were among the witnesses at trial. Geovany testified that his father had

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[1] DEL. CODE ANN. tit. 11, § 773 (2001).

[2] *Id.*; *id.* § 531.

[3] *Id.* § 1447A.

[4] *Id.* § 783A.

[5] *Id.* § 826.

[6] *Id.* § 1448.

[7] *Id.* § 602(b).

[8] *Id.* § 621.

[9] *Id.* § 1102.

[10] *Id.* § 1271A.

a gun in the mobile home, that Ortiz had threatened to kill Marisol, and that Marisol eventually had escaped. Geovany also testified that he spoke with Detective Mitchell at the hospital. He stated that he lied to Detective Mitchell by describing Ortiz' gun as small because he did not want his father to go to jail.

(5) During Geovany's testimony, the prosecutor asked Geovany whether he spoke with Detective Mitchell "freely and voluntarily." Geovany responded, "No. He called us in a room and we talked separately." The prosecutor then asked, "Did it upset you to have to talk to him that night?" Geovany said, "No." On the basis of that exchange, defense counsel objected to admitting evidence of Geovany's out-of-court statement to Detective Mitchell on the ground that the statement was not voluntarily made as required by Title 11, Section 3507 of the Delaware Code[11]:

> Mr. Haller: I think there is a question about the coercion with the officer. He said he was coerced. I think the State has to be able to show there wasn't coercion. It is not like with the truth.
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> The Court: I think he was simply asked to come into the room and be interviewed.
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> Mrs. Withers: He said he felt okay about going in there. When you ask, "Did you speak freely and voluntarily?," they don't even know what that means. I think he explained the officer asked him in and he felt okay. He just didn't like having to tell on his dad.

[11]Section 3507 provides: "In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value." DEL. CODE ANN. tit. 11, § 3507(a).

The Court: I am satisfied he wasn't coerced.

The Superior Court permitted Detective Mitchell to testify regarding Geovany's statement to the detective.

(6) A jury found Ortiz guilty of all the charges against him. Ortiz appeals from his conviction and sentence. He contends that the trial court erred by admitting Geovany's out-of-court statement because it did not make a sufficient finding that the statement was voluntarily made. Whether an out-of-court statement of a witness was voluntarily made is a question of fact. This Court reviews the trial court's determination of that question to ensure that it was supported by competent evidence.[12]

(7) We conclude that the Court's determination that Geovany voluntarily made his statement to Detective Mitchell was supported by sufficient facts in the record. In *Hatcher v. State*, the defendant argued that an out-of-court statement of a witness should not have been admitted because the statement was not voluntarily made as required by Section 3507.[13] This Court remanded the case because it concluded that

[12]*Martin v. State*, 433 A.2d 1025, 1032 (Del. 1981); *see also Johnson v. State*, No. 578, 2000, 2002 WL 1343761, at *1 (Del. June 18, 2002) (affirming the trial court's admission of the out-of-court statement of a witness because the trial court's determination that the statement was voluntarily made was supported by sufficient facts in the record).

[13]337 A.2d 30 (Del. 1975).

Section 3507 required that the trial court make an explicit finding that the out-of-court statement was voluntarily made.[14] The Court stated:

> When a party in a criminal case offers a statement under §§ 3507, he must lay an appropriate foundation. . . . that the statement was voluntarily made. The voluntary nature of the statement may be elicited from the declarant during the direct examination . . . . However, if the declarant denies that the statement was voluntarily given or if an issue is raised in any other way as to its voluntary nature, the Court should hear the matter on voir dire.
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> Thus, a party who properly contests the voluntariness of a §§ 3507 statement is entitled to a "reliable and clear cut determination" that the statement was voluntarily rendered. A separate hearing (independent of the trial) is not required but, of course, the voir dire and determination by the Court should be conducted out of the jury's presence.
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> The Trial Court must be satisfied that the offering party has shown by a preponderance of the evidence that the statement was voluntarily made and must render an explicit determination on the issue before admitting it for the jury's consideration. After a statement is admitted into evidence any party may then present evidence on the voluntariness issue for consideration by the jury under appropriate instructions.[15]

(8) In the present case, the Superior Court made an explicit determination that Geovany's statement to Detective Mitchell was voluntarily made. The exchange between the prosecutor and Geovany did not seriously raise an issue that Geovany's statement was coerced. Geovany's negative response to the prosecutor's inquiry whether Geovany spoke "freely and voluntarily" must be considered in the context of

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[14] *Id.* at 32.

[15] *Id.* (citations omitted).

the remainder of Geovany's testimony.[16] Geovany continued his answer by saying, "[Detective Mitchell] called us in a room and we talked separately." Geovany also testified that he was afraid that his father would go to jail. Taken together, these statements could indicate that Geovany interpreted the prosecutor's question about the voluntariness of his statement to be inquiring whether he spontaneously reported or described the incident to the police. This interpretation of the testimony is buttressed by the fact that Geovany testified that it did not upset him to talk to the detective.

(9) Geovany's testimony, viewed in its totality, did not raise the issue whether his statement was voluntarily made, and thus the trial court was not required to conduct voir dire to inquire into that issue. In addition, the judge made an explicit finding, supported by sufficient evidence in the record, that Geovany voluntarily spoke to Detective Mitchell.

[16] *See Johnson v. State*, No. 578, 2000, 2002 WL 1343761, at *1 (Del. June 18, 2002) ("Moreover, the record reveals that the trial judge indeed reviewed the statement in the totality of the circumstances and found that [the witness] did speak voluntarily. Because there are sufficient facts in the record to support his conclusions, we will not disturb that ruling.").

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice