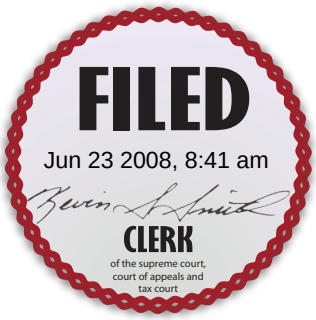

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IN THE COURT OF APPEALS OF INDIANA

JOHN HUDSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0712-CR-692
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0701-FB-11011

June 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

John Hudson appeals his convictions for criminal deviate conduct, criminal confinement, and sexual misconduct with a minor involving his fourteen-year-old stepdaughter. Specifically, he contends that the trial court erred by admitting the incriminating statements he made to a detective into evidence because the detective misled him about his right to counsel, making his waiver of rights unknowing and unintelligent. Finding that the detective clearly advised Hudson of his right to speak to an attorney before and during questioning and to stop questioning at any time, we conclude that Hudson validly waived his rights and therefore affirm the trial court.

Facts and Procedural History

Tiffany Underwood has four children, one of whom is S.U., and is married to Hudson. On the evening of December 24, 2006, Hudson woke up fourteen-year-old S.U. so that he could take her to the store to buy her mother a Christmas gift. While driving home from the store, Hudson pulled the hood from S.U.'s sweatshirt over her head, making it difficult for S.U. to breathe. After S.U. managed to take off her sweatshirt, Hudson stopped the car inside an apartment complex and tied S.U.'s hands behind her back with a necktie. Hudson then pulled down S.U.'s pants and underwear, bent her over the console, put his "penis" "inside" S.U.'s "butt," and began "moving." Tr. p. 35-36, 50. When S.U. threw up into the backseat of the car, Hudson stopped, untied S.U.'s hands, and cleaned up the mess. Hudson drove S.U. home, and she went to her room and cried. The following day, S.U. gave her mom the Christmas gift but did not mention what had happened the night before because she did not want to upset her.

On the evening of January 18-19, 2007, Hudson woke up S.U. to tell her that the trash cans had fallen over outside and that she needed to go outside and pick up the trash. When S.U. reentered the house, Hudson grabbed her and carried her outside to the backseat of the car. Hudson then handcuffed S.U. and drove off. At some point, Hudson stopped the car, got into the backseat, removed S.U.'s pants and underwear, put his "penis" "inside" S.U.'s "butt," and began "moving." *Id.* at 44, 50. When S.U. asked Hudson why he was doing this to her, Hudson replied that she "wasn't giving him enough attention." *Id.* at 44. Hudson then drove S.U. home.

The next day, Underwood noticed bruises around S.U.'s wrists from the handcuffs and asked S.U. what happened. S.U. told her that Hudson did it. Underwood then called the police. S.U. was taken to the Riley Center of Hope for a sexual assault examination.

A search warrant was executed on January 20, 2007, at Hudson and Underwood's house, and a black necktie was found in a bag in Hudson's closet. On the morning of January 21, 2007, Indianapolis Metropolitan Police Officer Richard Hemphill observed Hudson driving near his home. Officer Hemphill activated his lights and siren, but Hudson sped up. After a brief chase, Hudson's car rolled to a stop, and Hudson jumped out. Officer Hemphill yelled "stop, police" and then pursued him on foot. *Id.* at 161. Hudson was quickly apprehended. Handcuffs were located in Hudson's car.

Hudson was taken to the police department, where Detective Julie Dutrieux advised Hudson of his rights and asked him if he was interested in speaking to her. Hudson signed a Waiver of Rights form, which indicated that he understood his rights, did not want an attorney at that time, and was willing to make a statement and answer

questions. Ex. p. 30. Hudson then gave a statement in which he admitted pulling down S.U.'s pants and his pants, fondling S.U., and touching S.U.'s "privates." Ex. p. 65. Subsequent DNA testing revealed that Hudson was the source of sperm that was found from rectal swabs taken from S.U. Hudson's sperm was also found in S.U.'s underwear.

The State charged Hudson with Count I: Class B felony criminal deviate conduct (January 19, 2007, incident involving sex organ of Hudson and anus of S.U.); Count II: Class B felony criminal deviate conduct (January 19, 2007, incident involving sex organ of S.U. and finger of Hudson); Count III: Class C felony criminal confinement (January 19, 2007, incident involving handcuffing); Count IV: Class C felony sexual misconduct with a minor (December 24, 2006, incident); Count V: Class D felony criminal confinement (December 24, 2006, incident involving tying hands); Count VI: Class D felony resisting law enforcement (January 21, 2007, incident); and Count VII: Class A misdemeanor resisting law enforcement (January 21, 2007, incident). Before trial, Hudson filed a motion to suppress his statements to Detective Dutrieux. Although the CCS indicates that the trial court issued findings and an order denying Hudson's motion to suppress, *see* Appellant's App. p. 10, it is not contained in Hudson's Appendix. Following a jury trial, Hudson was convicted of Counts I, III, IV, VI, and VII and acquitted of Counts II and V. The trial court sentenced Hudson to an aggregate term of twenty-one years. Hudson now appeals his convictions for criminal deviate conduct, criminal confinement, and sexual misconduct with a minor.[1]

Discussion and Decision

[1] Hudson does not argue that his resisting law enforcement convictions should be reversed. *See* Appellant's Br. p. 13. ("His convictions, except perhaps those for resisting law enforcement, should therefore be reversed.").

Hudson raises one issue on appeal. Specifically, he contends that the trial court erred by admitting his statements to Detective Dutrieux into evidence because he "did not make a valid, knowing, and intelligent waiver of his *Miranda* rights prior to giving the statement[s] without counsel present." Appellant's Br. p. 10. The decision whether to admit a confession is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion. *Jones v. State*, 655 N.E.2d 49, 56 (Ind. 1995), *reh'g denied*. Admission of a confession into evidence is conditioned upon the State proving beyond a reasonable doubt that the defendant knowingly and intelligently waived his rights not to incriminate himself and to have the presence of counsel during questioning. *Id.* When reviewing a challenge to a trial court's decision to admit a confession, we examine the record for substantial, probative evidence of voluntariness; we do not reweigh the evidence. *Id.*

The record shows that before Hudson made any statements to Detective Dutrieux, she advised him as follows:

> You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer and you want one, one will be appointed for you by the court before any questioning. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time, you also have the right to stop answering at any time until you talk to a lawyer.

Ex. p. 52. Detective Dutrieux further advised Hudson that if he wanted to talk to her, he would have to sign a waiver of rights indicating that he did not want a lawyer and that no promises or threats had been made against him. After some discussion about when Hudson would appear in court, which Detective Dutrieux said would probably be that day

or the next, Hudson asked, "Okay so if I do want a lawyer, I mean I have to wait 'til I go to court to get a lawyer or?" *Id.* at 53. Detective Dutrieux said:

> Right and you'll be, I don't know if they have public defenders out here at the APC [processing center], I assume there's somebody out here to represent you guys. Sometimes there's not because it's just an initial hearing. Which just means you're just being notified what the charges are, after that everybody would have like, what they call pre-trials, the thing that's before the actual trial, a lot [of] times you have a mistrial but and at that point maybe they would appoint you a public defender. Um, so if you didn't have representation out here today when you go before the judge, when you go to um, downtown and meet before the next judge in the court that your case'll probably assigned there will be a public defender in there whether it's the person that would defend you or not, there'll be somebody there to represent you. But that won't be until at that time. So that's up to you, if you wanna wait, or you wanna have an attorney in here or something like that, um, that's not gonna happen today as far as me having somebody in here for you to sit while we talk. So if that's what you want then you need to just express that and then we'll just bypass this.

Id. at 53-54.

On appeal, Hudson claims that Detective Dutrieux's above remarks "misled" him. Appellant's Br. p. 11. Specifically, Hudson argues that the detective "confused the issue for him, suggesting that he had a right to counsel at a later time, but that this wouldn't happen for his talk with her at that time. That Mr. Hudson finally signed the waiver . . . is not conclusive evidence of a knowing, intelligent and voluntary waiver." *Id.* at 13. Contrary to Hudson's claim, Detective Dutrieux's statements were not misleading. As the United States Supreme Court said in *Duckworth v. Eagan*, "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." 492 U.S. 195, 204 (1989) (footnote omitted). The *Duckworth* Court explained, "*Miranda* emphasized that it was not

suggesting that 'each police station must have a 'station house lawyer' present at all times to advise prisoners'" and "[i]f the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel." *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)). Accordingly, the United States Supreme Court held in *Duckworth* that the advisement that a lawyer will be appointed for you "if and when you go to court" satisfied *Miranda*. *Id.*

The Indiana Supreme Court applied *Duckworth* in *Sauerheber v. State*, 698 N.E.2d 796 (Ind. 1998). In *Sauerheber*, the officer told the defendant that an attorney would be appointed "probably after you're arrested." *Id.* at 803. Our Supreme Court held that pursuant to *Duckworth*, the defendant did not present "a viable constitutional claim." *Id.* Likewise, in *Stroup v. State*, the defendant asked the detective, "How long would it be before I got a lawyer appointed," to which the detective responded, "It would be in court." 810 N.E.2d 355, 359 (Ind. Ct. App. 2004). Citing both *Duckworth* and *Sauerheber*, this Court held that what was crucial was that the defendant was advised of her right to speak to an attorney before and during questioning and to stop questioning at any time. *Id.* Because the defendant was advised of both, we held that the detective's response was permissible. *Id.*

Here, Detective Dutrieux advised Hudson of his right to speak to an attorney before and during questioning and to stop questioning at any time. Though the detective told Hudson that he would not have the opportunity to speak with an attorney right then and there, she told him that he would have the chance to speak with an attorney later that day or the next and that if he wanted to speak with an attorney right now, she would

cease the interview. Nevertheless, Hudson said that he did not want an attorney, signed the Waiver of Rights, and proceeded with the interview. Pursuant to *Duckworth*, *Sauerheber*, and *Stroup*, Hudson validly waived his rights, and the trial court properly admitted his statements into evidence. We therefore affirm the trial court.

Affirmed.

MAY, J., and MATHIAS, J., concur.