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IN THE
COURT OF APPEALS OF INDIANA

S.H.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A02-0602-JV-107

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Danielle Gregory, Magistrate
Cause No. 49D09-0503-JD-1498

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

At the age of nine, S.H. was adjudicated a delinquent child for committing an act that, if committed by an adult, would constitute class D felony criminal confinement. As a result, the juvenile court placed S.H. on probation with special conditions[1] and entered a parental participation order for his mother. S.H. presents the following restated issues for review:

1. Was an incriminating statement improperly obtained from S.H. during a custodial interrogation?

2. Did the State present sufficient evidence to support the adjudication?

We affirm.

On the evening of March 19, 2005, Deputy Jeff Badgley and Detective Michael Hanson of the Marion County Sheriff's Department were among several officers dispatched to an apartment complex to investigate the disappearance of N.C., a six-year-old boy. Aldwin Cromer, the child's father, had last seen N.C. around 3:00 p.m. playing with S.H.[2] Cromer had begun looking for N.C. around 3:30, but could not find him. Cromer, who is deaf, eventually had a neighbor call 911 to report the child missing. The search for N.C. lasted several hours.

After a door-to-door search of the apartment complex, Deputy Badgley and Deputy Rex Singletary searched behind a vacant apartment about one block from N.C.'s residence. They heard a noise coming from an outdoor storage closet and observed, with

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[1] The special conditions included that S.H. was to have no contact with the victim, participate in and successfully complete homebased counseling, and complete an assessment at Gallahue Mental Health Center and follow all recommendations.

[2] S.H. was eight years old at the time.

the use of flashlights, that a five-foot log had been propped in front of the closet door to keep the door closed. The deputies immediately removed the log and opened the door to find N.C. inside. The child was "very upset, crying, and shaking." *Transcript* at 122. When asked how he had gotten in the closet, N.C. responded that "[S.] put him in there." *THE EXHIBITS* at 13.[3] N.C. was returned to his parents and received medical attention.

Two children, who were present when N.C. was found, directed the deputies to S.H.'s nearby apartment. No one answered the door. Soon thereafter, however, S.H. and his mother, Melissa Black, pulled up in their van. Detective Hanson approached Black as she and S.H. were getting out of the van and advised that he needed to speak with her and her son "in reference to an incident that occurred". *Transcript* a 101. Black then "immediately asked [S.H.] what had happened." *Id*. S.H. responded that he had "put the little boy in the closet and he had put a stick against the door." *Id*. at 104. When his mother further questioned him, S.H. "changed his story to he didn't know…that [N.C.] was in the closet." *Id*. S.H. was arrested that evening for criminal confinement.

On April 1, 2005, the State filed a petition alleging that S.H. was a delinquent child for having confined and battered N.C. S.H. subsequently filed a motion to dismiss the delinquency petition based upon his young age and alleged lack of capacity to form the mens rea required to commit the charged offenses. The juvenile court denied the motion. Following the denial hearing, on September 29, 2005, the juvenile court entered a true finding as to the criminal confinement allegation, but found the battery allegation

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[3] Upon S.H.'s motion, Deputy Badgley's unredacted deposition was admitted into evidence at trial.

not true. The court adjudicated S.H. a delinquent child and subsequently ordered probation and services for S.H. as set forth above. S.H. now appeals.

1.

S.H. initially challenges the admission of his statement that he had put N.C. in the closet and then put a stick against the door. S.H. claims that the statement was illegally obtained during a custodial interrogation because he and his mother were never advised of his rights and, therefore, never waived his rights before making the statement.

The dispositive question here is whether S.H. was subjected to custodial interrogation. "As a general rule, when a juvenile who is not in custody gives a statement to police, neither the safeguards of *Miranda* warnings nor the juvenile waiver statute[4] is implicated." *Borton v. State*, 759 N.E.2d 641, 646 (Ind. Ct. App. 2001) (footnote supplied), *trans. denied*. "A custodial interrogation need not be preceded by an arrest, but must commence after the person's freedom of action has been deprived in a significant way." *Id.* In this regard, we apply an objective test asking whether "a reasonable person under the same circumstances would have believed that he was under

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[4] The juvenile waiver statute, Ind. Code Ann. § 31-32-5-1 (West 1998), provides:

> Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:
>
> (1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver;
>
> (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
>
> (A) that person knowingly and voluntarily waives the right;
> (B) that person has no interest adverse to the child;
> (C) meaningful consultation has occurred between that person and the child; and
> (D) the child knowingly and voluntarily joins with the waiver; or
>
> (3) by the child, without the presence of a custodial parent, guardian, or guardian ad litem, if:
>
> (A) the child knowingly and voluntarily consents to the waiver; and
> (B) the child has been emancipated…by virtue of having married, or in accordance with the laws of another state or jurisdiction.

arrest or not free to resist the entreaties of the police." *Clark v. State*, 808 N.E.2d 1183, 1193 (Ind. 2004).

In the instant case, S.H. had not been arrested or physically restrained by police in any way at the time he made his incriminating statement.[5] *See Wright v. State*, 766 N.E.2d 1223 (Ind. Ct. App. 2002) (noting that the inquiry into when an investigatory stop becomes a custodial interrogation ultimately involves whether there has been an arrest or restraint on freedom of movement of the degree associated with a formal arrest). On the contrary, the detective had simply approached S.H. and his mother upon their arrival on the scene and advised that he needed to speak with them. Under the circumstances, it is clear that S.H. was not in police custody until after he made his incriminating statement. *See Clark v. State*, 808 N.E.2d 1183 (defendant, a possible suspect in a shooting, was not in custody for purposes of *Miranda* when police officer stopped him in a parking lot, subjected him to a pat-down search for weapons, and briefly questioned him about his whereabouts at the time of the shooting).[6]

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[5] We note that S.H. misrepresents the record when he states: "Detective Hanson testified that *when he went to talk with [S.H.] and his mother*, [S.H.] was not free to go." *Appellant's Brief* at 5 (emphasis supplied). Rather, a fair reading of the detective's testimony is that S.H. was not free to leave after his arrest, which was made after the incriminating statement.

[6] S.H. incorrectly cites *Moore v. State*, 723 N.E.2d 442 (Ind. Ct. App. 2000) for the broad proposition that an interrogation is necessarily custodial once an officer knows or should know that he is investigating a potential crime and questioning a suspect. In *Moore*, police responded to the report of a pedestrian being struck by an automobile. Moore, the driver of the automobile, was subsequently placed in the back seat of a police cruiser, could not leave the scene, and had a statutory duty to stay and provide information for an accident report. This court acknowledged that under the circumstances Moore was in a custodial-type situation but held that Moore was not being subjected to a true custodial interrogation until the investigating officer knew he was dealing with a potential crime scene as opposed to an accident scene. *Moore* is inapposite to the instant case.

Moreover, aside from the issue of custody, we observe that S.H. was never subjected to police interrogation. *See A.A. v. State*, 706 N.E.2d 259, 261 (Ind. Ct. App. 1999) ("'interrogation' has been defined as a process of questioning by law enforcement officials which lends itself to obtaining incriminating statements"); *see also Jenkins v. State*, 627 N.E.2d 789, 796 (Ind. 1993) ("Miranda applies to cases of interrogation, not volunteered statements"), *cert. denied*. Detective Hanson clearly testified that he had not asked a single question of S.H. Rather, upon Detective Hanson's initial contact with them in the parking lot, S.H.'s mother immediately turned to her child and asked what had happened. S.H. proceeded to answer his mother's question. We cannot say that Detective Hanson, as opposed to S.H.'s mother, did anything that would tend to elicit an incriminating response from S.H. *See Wright v. State*, 766 N.E.2d at 1231 ("because police officers cannot be held accountable for the unforeseen results of their words and actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response"). S.H.'s claim that he was subjected to custodial interrogation is without merit.

2.

S.H. also argues the evidence was insufficient to sustain the true finding that he committed confinement. In particular, he claims the State failed to present any evidence that he acted with the requisite mens rea (that is, knowingly or intentionally) to constitute confinement.

> In reviewing the sufficiency of the evidence with respect to juvenile adjudications, our standard of review is well settled. We neither reweigh the evidence nor judge the credibility of witnesses. The State must prove beyond a reasonable doubt that the juvenile committed the charged offense. We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. We will affirm if there exists substantive evidence of probative value to establish every material element of the offense.

K.D. v. State, 754 N.E.2d 36, 38-39 (Ind. Ct. App. 2001) (citations omitted).

In the instant case, the State alleged that S.H. knowingly or intentionally confined N.C. without N.C.'s consent. Pursuant to Ind. Code Ann. § 35-41-2-2 (a) and (b) (West 2004), a person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so, and a person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

With respect to intent, S.H. claims that even assuming his statement is admissible, there is still no evidence that he engaged in that conduct with the conscious objective to confine N.C. or that he was aware of a high probability that he was confining N.C. without N.C.'s consent. In this regard, S.H. argues:

> [S.H.] and [N.C.], an eight year old and a six year old, were running around the apartment complex playing together. For all we know, [N.C.] went in the shed to see if he could open the door if [S.H.] put something against the door. The State presented no evidence that [N.C.] did not want to go in the shed. [S.H.] was eight years old. The only evidence in the record is that he did not even have the ability to understand that what he did was a crime.[7] And yet [S.H.] has now been adjudicated a delinquent for committing a criminal act. The petition alleging him a delinquent should never have been filed in the first place. When given another chance to rectify the situation, the juvenile court should have granted [S.H.]'s motion

[7] Here, S.H. directs us to page 155 of the transcript. That portion of the transcript, however, does not support his assertion that he did not have the ability to understand that what he did was a crime. Further, we remind S.H. that as a child his actions were delinquent, not criminal.

> to dismiss. The State's presentation of its case did nothing to suggest that the court was right to go forward with this case. Now this Court has the opportunity to do the right thing and conclude that the evidence does not support the delinquency adjudication.

Appellant's Brief at 7-8 (citation to transcript omitted and footnote supplied).

While we acknowledge that the State's decision to prosecute this case may seem harsh, we decline S.H.'s veiled invitation to declare as a matter of law that an eight-year-old child is unable to form the requisite intent to commit an act that would constitute criminal confinement if committed by an adult. We observe that S.H. has not presented us with any authority to support such a holding. The facts before us reveal that S.H. "put" a substantially younger boy into a storage closet and placed a large log against the door to keep it closed. *Transcript* at 104. S.H. then left N.C. confined in this abandoned area of the apartment complex and went to dinner with his mother. In light of this evidence, one could reasonably infer that S.H. knowingly or intentionally confined N.C. in the storage closet against N.C.'s will.

Judgment affirmed.

NAJAM, J., and DARDEN, J., concur.