

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002065-MR

ROBERT DUNSON

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 01-CR-00422

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant, Robert Dunson, challenges the trial court's denial of his motion to suppress his confession and a letter of apology that he wrote to the victim. Specifically, Appellant contends that the investigating police officer coerced his confession, rendering it involuntary.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In the instant case, Appellant was indicted for first-degree rape and first-degree sexual abuse. The victim was his girlfriend's daughter, a child under the age of twelve at the time of the offenses. Subsequent to the denial of the motion to suppress his confession, Appellant entered a conditional guilty plea in exchange for dismissal of the sexual abuse charge and amendment of the first-degree rape charge to second-degree rape. Pursuant to the plea agreement, Appellant was sentenced to ten years imprisonment.

Although Appellant expressly reserved the right to appeal from the suppression order, appointed counsel failed to follow through with an appeal. Ultimately, Appellant filed a *pro se* motion for a belated appeal which was rejected by this Court. However, the Supreme Court of Kentucky granted discretionary review and ordered that Appellant be granted a belated appeal. This appeal followed.

Upon a challenge to the voluntariness of a confession, the Commonwealth must prove by a preponderance of the evidence that the confession was made voluntarily. *Tabor v. Commonwealth*, 613 S.W.2d 133 (Ky. 1981). In reviewing a trial court's determination that a confession was voluntary, this Court must affirm the determination if it is supported by substantial evidence. *Bailey v. Commonwealth*, 194 S.W.3d 296 (Ky. 2006).

At the evidentiary hearing on Appellant's motion to suppress his confession, both Appellant and the investigating officer testified. It is undisputed

that Appellant signed a waiver of his Miranda rights prior to any questioning. Appellant testified that the officer used his son and step-son to manipulate him into confessing. While Appellant testified that the investigating officer told him that if he did not confess his children's lives would be miserable and he would not be able to see them again, the officer testified that he merely expressed to Appellant that a confession would minimize stress on the victim.

While the threshold determination is whether there was coercive police activity, the voluntariness of a confession depends on the totality of the circumstances. *Bailey*, 194 S.W.3d 296. The inquiry boils down to "(1) whether the police activity was 'objectively coercive'; (2) whether the coercion overbore the will of the defendant; and (3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession." *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999). The second and third prongs of the inquiry require an examination of the characteristics of the accused in addition to the circumstances surrounding the interrogation. *Bailey*, 194 S.W.3d 296. Said otherwise, particular police tactics must be evaluated in light of the suspect's age, education, linguistic ability, any mental impairment, and other relevant individual characteristics. *Id.*

Appellant does not claim any elevated vulnerability due to personal characteristics. The extent of his claim of coercive tactics arises from the officer's alleged references to Appellant's inability to see his son and the added stress the victim would suffer without a confession. Appellant makes no mention of other

factors relevant to the interrogation, such as prolonged detention, repeated questioning, lack of advice concerning his constitutional rights, humiliating or overtly coercive techniques such as deprivation of food or sleep. *Id.* The record reveals that none of these factors support Appellant's claim of coercion.

Consequently, the dispositive inquiry becomes whether the officer's brief references to Appellant's children and the victim constituted credible threats or psychological coercion sufficient to overcome Appellant's will. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Allee v. Commonwealth*, 454 S.W.2d 336, (Ky. 1970). It is true that coercion may be psychological as well as physical, particularly where it consists of credible threats of violence or of an offer of protection from physical harm in exchange for a confession. *See Fulminante*, 499 U.S. 279. However, where the officer does nothing more than to appeal to a suspect's sympathy or compassion for the victim and others who may be affected, such conduct cannot alone be deemed "coercive." We reiterate that in the instant case, Appellant put forth no additional claims of coercive tactics or evidence of any personal disabilities that would bear on the analysis. As such, the trial court's conclusion that Appellant's confession was voluntary was supported by substantial evidence.

Turning to suppression of the letter, Appellant testified that after his confession, the officer directed him to write a letter of apology to the victim. When Appellant started writing a letter merely questioning the victim's allegations, the officer tore it up and informed Appellant that it was not an apology. To the

contrary, the investigating officer testified that he simply gave Appellant the opportunity to write a letter to the victim but did not force him or direct him in any way. The officer testified that he left the room for about ten minutes to do some paperwork while Appellant wrote the letter. As the officer explicitly contradicted all of Appellant's allegations concerning the letter of apology, the decision turned on the credibility of the witnesses, a determination best left to the sound discretion of the trial judge. Accordingly, we discern no abuse of that discretion.

Acknowledging lack of preservation, Appellant seeks palpable error review of the trial court's alleged failure to comply with RCr² 9.78. This rule requires the trial court to make findings of facts resolving the essential issues raised in a motion to suppress evidence of a confession or other incriminating statements. In the case at bar, the trial court made oral findings which are a part of the record. Thus, even if RCr 9.78 were so strictly construed as to require written findings, failure to do so in this case did not result in palpable error. *See Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). The oral findings of record are sufficient for this Court's review.

Accordingly, the decision of the Fayette Circuit court is affirmed.

ALL CONCUR.

² Kentucky Rules of Criminal Procedure.

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