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RENDERED: MAY 22, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000067-MR

ANGEL JUAREZ — APPELLANT

V.

ON APPEAL FROM BOONE CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
NO. 05-CR-00248

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury convicted Angel Juarez of five counts of first-degree sodomy, two counts of first-degree rape, and two counts of first-degree sexual abuse. Juarez contends that his convictions must be reversed because the trial court erroneously denied his motion to suppress incriminating statements he made to detectives and erroneously permitted the child victims to testify at trial via closed circuit television. We disagree with both contentions and, thus, affirm.

I. FACTUAL AND PROCEDURAL HISTORY.

After an investigation, Juarez, a native Honduran whose first language is Spanish and whose fluency in English is disputed in this case, was arrested for allegedly committing several sexual offenses against three young children, N.H., B.H., and H.S. After his arrest, he was interrogated by detectives at

headquarters where he made a number of highly incriminatory statements. This led to Juarez's indictment on seven counts of first-degree sodomy (N.H. the alleged victim), three counts of first-degree rape (N.H. the alleged victim), two counts of first-degree sexual abuse (N.H. the alleged victim), one count of first-degree sexual abuse (B.H. the alleged victim), one count of intimidating a witness in the legal process, and one count of first-degree rape (H.S. the alleged victim).

Juarez moved pretrial to suppress the statements he made to the detectives. After a hearing, the trial court denied the motion. Later, the Commonwealth moved pretrial for special testimonial conditions at trial to allow B.H. and N.H. to testify by closed circuit television.[1] Again, after conducting a hearing, the trial court granted the Commonwealth's motion.

A jury ultimately convicted Juarez of five counts of sodomy in the first degree, two counts of rape in the first degree, and two counts of sexual abuse in the first degree. N.H. was the victim for all of those offenses. The jury was unable to reach a verdict in the sentencing phase of the trial. So, ultimately, the trial court determined punishment and sentenced Juarez to thirty years' imprisonment on each rape and sodomy conviction and five years' imprisonment on each sexual abuse conviction, with all of those convictions being ordered to be served concurrently, for a total effective sentence of thirty years' imprisonment. This appeal followed.[2]

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1 H.S. had reached the age of majority.

2 *See* Ky. Const. § 110(2)(b).

II. ANALYSIS.

A. No Error in Denying Juarez's Motion to Suppress.

Juarez contends (1) that the trial court could not have accurately assessed the voluntariness of his waiver of his Miranda rights without reviewing the interrogation videotapes with the assistance of a certified translator or language expert; (2) that despite his limited understanding of the English language, he made several requests for counsel that the detectives ignored; and (3) that the trial court erred when it found that the resumption in questioning after Juarez had requested counsel was prompted by Juarez's voluntary desire to speak further to the detectives.

1. The Interrogation of Juarez at Headquarters.

After his arrest, Juarez was questioned at headquarters by Detective Bruce McVey. A videotape of that interrogation showed that Detective McVey first asked Juarez his name and then asked whether he understood English. Juarez responded that he understood English "so-so." No translator was present; and Detective McVey, who did not speak Spanish, did not request one. Instead, McVey then read Juarez his Miranda rights in English. While McVey was informing Juarez of his Miranda rights, Juarez mentioned that one of the alleged victims had raped him and words to the effect that he wanted to talk to a lawyer or judge.

McVey did not acknowledge Juarez's mention of an attorney. Rather, McVey finished informing Juarez of his rights and then read a waiver of rights form to Juarez. McVey then asked Juarez if he wanted to talk; and when Juarez

answered in the affirmative, McVey then told him that he needed to sign the waiver-of-rights form. Juarez appeared eager to relate his version of events to McVey.

Shortly thereafter, Juarez made the ambiguous statement that his lawyer "is no way coming." McVey did not verbally acknowledge Juarez's reference to an attorney and continued questioning Juarez about Juarez's contention that he had been raped. Juarez and McVey then had a lengthy dialogue about Juarez's version of events with McVey questioning Juarez only in English and Juarez answering in halting and broken English.

After having questioned Juarez for over an hour, McVey was replaced as interrogator by Detective Tracy Watson. Not long into Watson's questioning of Juarez, Juarez asked for an attorney. Watson ignored Juarez's request and finished making a statement of her own, but Juarez repeated his request for an attorney. At that point, Watson stopped the interrogation; and Juarez was taken to a holding cell at headquarters.

Before escorting Juarez to the holding cell, McVey reappeared in the interrogation room and asked Juarez if he wanted to say anything else. Juarez responded negatively. Since Juarez had already clearly invoked his right to counsel, McVey was not entitled to ask Juarez if he wanted to make any further statements. But Juarez did not actually make any further statement in response to McVey's improper question, and Juarez does not raise this as an issue on appeal.

According to McVey, once Juarez reached the holding cell he made unsolicited statements about being sick. McVey apparently thought Juarez meant that he was physically ill and asked Juarez if he could assist him. Juarez told McVey how this was not fair because he was sick and that is why this was happening. Shortly thereafter, McVey escorted Juarez back to the interview room and asked Juarez if he wanted to talk further, to which Juarez responded affirmatively.[3] Questioning then resumed, and Juarez made several incriminating statements.

2. The Trial Court Did Not Need Translator to Review Videotape.

We reject Juarez's contention that the trial court was required to review the videotaped interrogations with the aid of an interpreter. Juarez contends that the trial court "was unable to assess the demeanor of a native Spanish speaker with limited knowledge of the English language" because of the trial court's "lack of understanding of the Spanish culture and language . . . ." First, as noted by the Commonwealth, there is no indication that Juarez made this argument to the trial court, meaning that the argument is not properly before us.[4] Second, the colloquy between Juarez and the authorities is readily capable of being understood without the aid of a translator, which means that the trial court was able fully and completely to fulfill its role to scrutinize the record to determine if Juarez's wavier of his Miranda rights was knowing, voluntary, and intelligent.

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[3] The proceedings in the interrogation room were videotaped; the questioning at or near the holding cell was not.

[4] Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976).

From our review of the videotape, it is clear that Juarez's command and usage of the English language was far from perfect. But linguistic perfection is not a legal requirement. Rather, the proper question is whether Juarez's waiver of his right to counsel was "knowing, voluntary[,] and intelligent."[5] The Commonwealth is required to show by a preponderance of the evidence that the confession was voluntary.[6] A voluntariness determination should be made considering the totality of the circumstances, including factors such as the accused's age, education, intelligence, and linguistic ability.[7] In order to make that ultimate determination, we review the trial court's factual findings under the clearly erroneous standard, yet review the trial court's application of the law to those facts de novo.[8] And although better practice likely would have been for the authorities to have used the services of an interpreter, the question before us is only whether Juarez's actual wavier of his Miranda rights was knowing, voluntary, and intelligent.

3. Juarez Did Not Unequivocally Invoke His Right to Counsel.

A more difficult question involves whether Juarez invoked his right to counsel early on during his interrogation by McVey. But, as with Juarez's previous argument, he has not cited to where he made this argument before the trial court.

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5 Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky. 2007), *citing* Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

6 Bailey v. Commonwealth, 194 S.W.3d 296, 300 (Ky. 2006).

7 *Id.*

8 Cummings, 226 S.W.3d at 65.

It is unquestioned that Juarez stated early on that he wanted to speak to an attorney or a judge and shortly thereafter made the cryptic statement that his lawyer was "in no way coming." Our precedent holds that "[o]nce an accused has expressed a desire to deal with the police only through counsel, he is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . with the police."[9] The invocation of the right to counsel must be unequivocal.[10] In other words, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning."[11] This inquiry is done using an objective, not a subjective, standard.[12] So we must determine if Juarez's passing references to an attorney objectively constitute a sufficiently clear invocation of his right to counsel, bearing in mind that our review on that point is de novo.[13] We find that they do not.

As McVey was reading Juarez his rights, Juarez stated that he could "answer anytime." McVey then asked Juarez to sign the form stating that he had been advised of, and understood, his rights. As he was signing the form, Juarez

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9 Cummings, 226 S.W.3d at 65, *citing* Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981).

10 *See, e.g.,* Dean v. Commonwealth, 844 S.W.2d 417, 420 (Ky. 1992).

11 Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994).

12 *Id.*

13 Jackson v. Commonwealth, 187 S.W.3d 300, 306 (Ky. 2006).

suddenly uttered that the victim had raped him, after which he immediately stated that he was "gonna to talk to a lawyer [unintelligible] or judge, I don't care." McVey then immediately summarized the waiver of rights form for Juarez and asked Juarez if he understood the form and wanted to talk, to which Juarez replied, "yeah," and then signed the form. McVey then received a phone call, during which Juarez stated, "my lawyer in no way coming." McVey immediately finished his phone call and began questioning Juarez about his contention that he had been raped, without acknowledging or inquiring about Juarez's mention of an attorney.[14]

Juarez's ambiguous statement that his lawyer is "in no way coming" is not an express invocation of the right to counsel because the statement is capable of multiple interpretations. Indeed, that statement could lend itself to an interpretation that Juarez was declaring that he was going to speak to McVey without his attorney or it could be construed as a question to McVey as to when Juarez's attorney would arrive. So, at most, the statement might be an invocation of the right to counsel; but an ambiguous, invocation of the right to counsel is of no constitutional significance, which means that McVey was not required immediately to cease questioning Juarez.

Similarly, Juarez's earlier statement that he was "gonna to talk to a lawyer [unintelligible] or judge, I don't care[,]" is not an express invocation of the right to counsel. Rather, the statement could reasonably be construed as Juarez's

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[14] Juarez also contends that he invoked his right to counsel at a point approximately forty-seven minutes into tape one of his interrogation. However, our review of the tape did not locate any intelligible request for counsel by Juarez at that point.

contention that, at some undetermined point in the future, he was going to relate his version of events to an attorney or to a court.[15] This conclusion is reinforced by the fact that very shortly after that Juarez clearly stated his willingness to speak to McVey. Therefore, again, the statement that Juarez was going to speak to a lawyer or judge is, at most, an ambiguous invocation of the right to counsel, insufficient to mandate cessation of questioning.[16]

Juarez's contentions to the contrary, the fact that his mastery of the English language is less than that of someone whose native tongue is English does not alter our conclusion. The United States Supreme Court has recognized that a suspect's lack of language skills may cause some suspects to fail explicitly to invoke their right to counsel, yet the Court, nevertheless, remained committed to the rule that a suspect must unambiguously invoke his right to counsel.[17] Furthermore, Juarez clearly had a sufficient grasp of English unambiguously to invoke his right to counsel, as evidenced by his unambiguous requests for counsel during his questioning by Watson. Additionally, at the suppression

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[15] *Cf.* Jackson, 187 S.W.3d at 307 (holding that a suspect's statements and questions that he was eventually going to have a lawyer were not unequivocal invocations of the right to counsel).

[16] We agree with the United States Supreme Court's advice to the law enforcement community that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." Davis, 512 U.S. at 461. This advice is even more appropriate in cases where the suspect's command of the English language is less than proficient.

[17] *Id.* at 460 ("We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who–because of fear, intimidation, *lack of linguistic skills*, or a variety of other reasons–will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves.") (emphasis added).

hearing, a Honduran associate of Juarez testified that he had observed Juarez speaking to his girlfriend in a mixture of English and Spanish. Finally, McVey testified that Juarez never told him that he did not understand the questions being asked him by McVey. So we conclude that Juarez was able sufficiently to comprehend his constitutional rights and validly to waive those rights,[18] especially since there was not a lengthy interrogation or any other overly coercive technique (such as deprivation of food or usage of humiliating tactics).[19]

Likewise, reversal is not required because of Detective Watson's failure immediately to cease questioning once Juarez did later unequivocally invoke his right to counsel. Only a few seconds passed between Juarez's initial unequivocal invocation of his right to counsel and his second unequivocal invocation of that right. At that point, questioning ceased; and Juarez made no statements during those few seconds, nor was Juarez threatened or otherwise cajoled into a confession during that brief period. Juarez suffered no prejudice

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[18] The cases cited by Juarez do not alter this conclusion. Although we will not burden this opinion with a discussion of each case cited in Juarez's brief, one case relied upon by Juarez involves whether authorities' failure to inform a suspect of her Miranda rights at a previous interrogation renders invalid a subsequent interrogation. United States v. Short, 790 F.2d 464 (6th Cir. 1986). Another involves whether authorities' failure to inform foreign nationals of their right to inform their consulate of their arrest mandates suppression of incriminating statements. Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006). Yet another involves a defendant who spoke very limited English and had an apparently diminished mental capacity. United States v. Garibay, 143 F.3d 534 (9th Cir. 1998).

We agree that a suspect's unfamiliarity with English is a factor that may have a bearing on whether the suspect has understood his rights sufficiently to knowingly and voluntarily waive them. But, in the case at hand, we find no error in the trial court's determination that Juarez's waiver was knowing, voluntary, and intelligent.

[19] Bailey, 194 S.W.3d at 300-01 (listing factors to be taken into account in determining voluntariness of confession, including length of interrogation and usage of overly coercive tactics, such as humiliation).

because of Watson's failure immediately to cease questioning once Juarez unequivocally invoked his right to counsel.

4. Juarez Voluntarily Submitted to Second Interrogation Session.

We also reject Juarez's contention that the trial court erred in denying his motion to suppress statements he made when questioning resumed after his brief detention in a holding cell. Once an accused has invoked his right to counsel, he may be interrogated only if "the accused himself initiates further communication, exchanges, or conversations with the police."[20] In order to determine if an accused has waived his right to counsel after initiating conversation with the authorities, courts "must determine whether (1) the inquiries or statements were intended to initiate a conversation with authorities and (2) there was a waiver of the right to counsel which was voluntary, knowing, and intelligent given the totality of the circumstances."[21]

In the case at hand, Juarez contended that he sought to speak to the police only because McVey had threatened him. However, McVey denied making any threats and testified that Juarez had begun speaking to him unbidden and of his own accord. Indeed, the videotape of the re-interrogation contains no evidence of coercion or duress. The trial court found that Juarez voluntarily initiated a conversation with McVey; and that finding is supported by substantial evidence and is, therefore, conclusive.[22] Likewise, we find that

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[20] Cummings, 226 S.W.3d at 65.

[21] *Id.* at 66, *citing* Oregon v. Bradshaw, 462 U.S. 1039, 1045-46, 103 S.Ct. 2830, 2835, 77 L.Ed.2d 405 (1983).

[22] Kentucky Rules of Criminal Procedure (RCr) 9.78.

Juarez voluntarily, knowingly, and intelligently waived his previous invocation of his right to counsel, as evidenced by the fact that Juarez quickly responded affirmatively when McVey asked him if he wanted to talk, despite the fact that little time had elapsed between Juarez's invocation of his right to counsel and his subsequent agreement to speak to McVey without the presence of counsel. Thus, we affirm the trial court's denial of Juarez's motion to suppress.

B. No Error in Permitting Child-Victims to Testify Via Closed Circuit.

Several weeks before trial, the Commonwealth filed a motion for special testimonial conditions. That motion requested that the then-eleven year old (N.H.) and nine-year old (B.H.) victims should be permitted to testify by closed circuit television because they would be unable to articulate the alleged sexual offenses in Juarez's presence in open court. The trial court conducted a hearing on the Commonwealth's motion, after which it granted the motion, finding that "there is a substantial probability that both victims would be unable to reasonably communicate because of serious emotional distress produced by the Defendant's [Juarez's] presence." On appeal, Juarez contends the trial court abused its discretion when it permitted N.H. and B.H. to testify via closed circuit television outside his presence. We disagree.

Kentucky Revised Statutes (KRS) 421.350(2) provides in relevant part that:

> The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. . . . The court shall permit the defendant to observe and hear the testimony of the child in

person, but shall ensure that the child cannot hear or see the defendant.

Compelling need is defined in KRS 421.350(5) as "the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." Because it creates an exception to a defendant's right to confront his accusers face-to-face,[23] KRS 421.350's "provisions should be scrupulously followed."[24] We may disturb a trial court's decision to utilize KRS 421.350 to permit child victims to testify via closed circuit television only if that decision is an abuse of discretion.[25]

We have instructed trial courts faced with a motion for special testimonial conditions under KRS 421.350 to consider factors such as "the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in court or facing the defendant."[26]

At the hearing in the case at hand, a victim's advocate testified that when he met with the minor victims and advised them that their testimony would be required, B.H. became withdrawn and N.H. indicated she would not testify in Juarez's presence. Furthermore, the victims' mother testified that N.H. had experienced sleep disorders and night terrors, for which she participated in

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[23] *See, e.g.,* Temple v. Commonwealth, 77 Ky. (14 Bush) 769, 771, 1879 WL 6665 (1879) ("It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor.").

[24] Price v. Commonwealth, 31 S.W.3d 885, 894 (Ky. 2000).

[25] Danner v. Commonwealth, 963 S.W.2d 632, 634 (Ky. 1998).

[26] Commonwealth v. Willis, 716 S.W.2d 224, 230 (Ky. 1986).

counseling and received medications for about a year following the disclosure of Juarez's alleged sexual acts. Likewise, the mother testified that B.H. participated in counseling and received medications. The mother also testified that N.H. had told her that she would not speak about the incidents in Juarez's presence, and, furthermore, that N.H. had expressed fear when she learned that an individual had escaped from the jail because she thought Juarez might be the escapee.

We conclude that the trial court considered the appropriate factors. The order granting the Commonwealth's motion for N.H. and B.H. to testify via closed circuit notes the victims' ages, the serious sexual nature of the charges, and the probability that the "serious emotional distress produced by the Defendant's presence" would cause N.H. and B.H. to be "unable to reasonably communicate . . . ." It appears that the trial court gave appropriately thoughtful consideration to this matter and, after analyzing the evidence, exercised its discretion to reach a reasonable conclusion that was supported by the evidence. Given the relatively young ages of the victims, the serious and potentially embarrassing nature of the charges about which they would have to testify, the apparent emotional trauma suffered by the victims, and at least one victim's stated refusal to testify in Juarez's presence, we hold that the trial court did not abuse its discretion when it granted the Commonwealth's KRS 421.350-related motion.

III. CONCLUSION.

For the foregoing reasons, Angel Juarez's convictions and sentences are affirmed.

All sitting. Abramson, Cunningham, Minton, and Scott, JJ., concur. Noble, J., dissents by separate opinion in which Lambert, C.J., and Schroder, J., join.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE NOBLE

Respectfully, I dissent.

The Appellant spoke, at best, broken English. However, more than once, he clearly indicated he wanted to speak with an attorney when the officers were interrogating him. Regardless of the basis for it, he showed by his request for an attorney or "judge" that he wanted legal assistance. The officers ignored his clear request, continued with the Miranda warnings, and began to question him. The Appellant was confronted with linguistic and cultural barriers that prevented him from making an informed and voluntary statement. He could not be expected to understand the legal consequences without an interpreter. This allowed the officers to run roughshod over the Appellant to the extent that his interrogation ceased to be fair long before the officers stopped questioning him. Every advantage goes to the officers here, and language barriers and cultural responses must be given a reasonable weight. His statement should have been suppressed under these circumstances. Consequently, I would reverse.

Lambert, C.J. and Schroder, J., join.