IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000097-MR

CHARLES FRANKLIN MICHAEL — APPELLANT

V.

ON APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, JUDGE
NO. 10-CR-00359

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles Franklin Michael, appeals as a matter of right, Ky. Const. § 110(2)(b), from a Judgment of the Nelson Circuit Court convicting him of one count each of first-degree sodomy and first-degree sexual abuse, and sentencing him to a total of twenty years' imprisonment. Thereafter, Appellant pleaded guilty, but his plea was conditioned upon his right to appeal the trial court's denial of his motion to suppress incriminating statements he made to law enforcement officers. Appellant argued to the trial court, and argues to this Court that the state actors coerced him into making the incriminating statements by representing that he would be prevented from seeing his children unless and until he confessed to sexual abuse. The trial court,

however, concluded from the totality of the circumstances that Appellant's confession was voluntary. We agree and now affirm.

In April 2009, the Buncombe County (North Carolina) Department of Social Services (BCDSS) received a report that Appellant had inappropriate sexual contact with his four-year-old step-daughter, "Dorothy."[1] As a result of the ensuing investigation, Appellant agreed to have no contact with Dorothy or his two biological daughters, "Francis" and "Brittany,"[2] until further notice from BCDSS. In August 2009, BCDSS closed its case against Appellant after his wife, Joy, moved the three girls to Appellant's parents' home in Alabama. BCDSS recommended that Appellant "continue to have no contact with the minor children until completing a Sexual Offender Specific Evaluation and addressing any recommendations that may result of evaluation." In September 2009, Appellant moved Joy and the three girls to Bardstown, Kentucky.

In October 2010, Detective Barbara Roby received a report from the Cabinet for Health and Family Services that Appellant was possibly sexually abusing Dorothy and Francis. Shortly thereafter, all three girls—who were living with Joy, but not Appellant—were placed into foster care.[3] On November 1, 2010, Detective Roby and Social Worker Casey Newton interviewed Appellant at the Bardstown Police Department. Detective Roby began the interview by

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[1] "Dorothy" is a pseudonym employed in this opinion to protect the child's true identity.

[2] "Francis" and "Brittany" are also pseudonyms employed in this opinion to protect the children's true identities.

[3] Although Appellant was not living with Joy and the girls permanently, he visited regularly, despite the recommendation from BCDSS that he not do so.

advising Appellant that he was not under arrest and reviewed his *Miranda* rights with him. Appellant waived those rights orally and in writing, and voluntarily agreed to speak with Roby and Newton.

During the first part of the interrogation, Appellant admitted to touching Dorothy's "vagina area" with his hand on three occasions—once in Asheville, North Carolina, and twice in Bardstown, Kentucky. Appellant stated that there was never any direct contact between his penis and Dorothy's vaginal area, nor was there ever any penetration of any kind. Appellant denied ever touching either of his biological daughters in a sexual manner, although Roby and Newton repeatedly told Appellant that they believed he had had inappropriate contact with Francis. Roby and Newton told Appellant several times that they wanted to offer him help but that they could not do so until he admitted to everything he had done. Appellant maintained that he had told them everything that happened.

About an hour and a half into the interrogation, Detective Roby made the first of four statements that form the basis for this appeal: "As of right now, you are not allowed to be around any of the children." Less than two minutes later she made the second of the four complained-of statements: "You are not to have any contact with your children. Until you admit to everything, you are not having contact with your children." Appellant remained silent.

A few minutes later, Appellant again told his interrogators that he had told them everything that happened. Newton responded to this comment with the third complained-of statement: "You know, before you can see any of your

kids you will have to complete a sexual abuse assessment treatment program, and if you're not honest with me you'll never get to see them and I'll make sure of that. So until you can sit here and tell us what really happened, nobody here is going to get help—nobody—and especially those little girls and you won't get to see them."

Unsatisfied with Appellant's answers, Detective Roby uttered the fourth statement at issue in this appeal: "You're going to continue the rest of your life without seeing your children, because you want to bottle this up and you're too embarrassed and you just want to throw your time away with your children for the rest of your life because you don't want to talk about it." The interview ended a few minutes later.

Appellant was permitted to leave the police station but he was arrested shortly thereafter and interrogated a second time that afternoon by Roby and Detective Lynn Davis. Appellant was re-Mirandized and made seriously incriminating statements, including that: (1) he pressed his pinky finger against Dorothy's rectum, perhaps to the point of penetration; (2) he rubbed his penis against her buttocks; (3) he touched her vagina with his penis; (4) he ejaculated on her twice; and (5) his penis was briefly in her mouth on one occasion. Additionally, Appellant admitted that his penis *could have* "slipped into" Dorothy's rectum on two occasions. After the interrogation, Appellant provided a written confession.

A Nelson County Grand Jury then returned a multiple-count indictment against Appellant. Thereafter, Appellant moved to suppress his statement to

police, arguing that his statement was procured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).[4] In a Supplemental Motion to Suppress, Appellant claimed that his confession was coerced by Roby and Newton's statements concerning his children. The Nelson Circuit Court, however, denied the Motion to Suppress. In doing so it acknowledged that the statements made by Roby and Newton concerning Appellant's children were "inappropriate," but that under the totality of the circumstances, Appellant's statements were voluntary. This appeal followed.

It has long been recognized that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the admission of involuntary confessions. *See, e.g., Wilson v. United States*, 162 U.S. 613 (1896). The United States Supreme Court has framed the issue as follows:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Culombe v. Connecticut, 367 U.S. 568, 602 (1961). "The voluntariness of a confession is assessed based on the totality of circumstances surrounding the making of the confession." *Mills v. Commonwealth*, 996 S.W.2d 473, 481 (Ky. 1999) (*overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010)). "However, the threshold question to a voluntariness analysis is the presence or absence of coercive police activity . . . ." *Bailey v.*

[4] Appellant has abandoned this argument.

Commonwealth, 194 S.W.3d 296, 300 (Ky. 2006). In this regard, the Commonwealth bears the burden of establishing that a confession was voluntary by a preponderance of the evidence. *Tabor v. Commonwealth*, 613 S.W.2d 133, 134 (Ky. 1981). "On appeal, we defer, absent clear error, to the trial court's findings of fact with respect to the surrounding circumstances, but we review its ultimate voluntariness determination—a question of law—*de novo*." *Stanton v. Commonwealth*, 349 S.W.3d 914, 917 (Ky. 2011).

In *Lynumn v. Illinois*, 372 U.S. 528 (1963), the U.S. Supreme Court recognized the coercive nature of preying upon a suspect's parental instincts in order to induce a confession. In that case, law enforcement set up a controlled purchase of marijuana between the petitioner and an informant. *Id.* at 529. The petitioner initially denied involvement, but later confessed to selling the informant marijuana. *Id.* at 530. The police officers told the petitioner, *inter alia*, that if she was charged with the offense state financial assistance "would probably be cut off and also that she would probably lose custody of her children." *Id.* at 533.[5] The Supreme Court summarized the totality of the circumstances leading to the petitioner's confession:

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[5] At trial, the petitioner testified about the circumstances surrounding her confession, and the statements the officers made to her:

> [H]e started telling me I could get 10 years and the children could be taken away, and after I got out they would be taken away and strangers would have them, and if I could cooperate he would see they weren't; and he would recommend leniency and I had better do what they told me if I wanted to see my kids again. The two children are three and four years old. Their father is dead; they live with me. I love my children very much. I have never been arrested for anything in my whole life before. I did not know how much power a policeman had in a recommendation to the State's Attorney or to the Court. I did not know that a Court and a

> It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.' These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up.' There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.

Id. at 534. The Court then held: "We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced." *Id.*

This Court has also acknowledged the coercive nature of threatening to remove children from a suspect's custody unless a confession is given. In *Stanton*, the appellant was accused of sexually assaulting his stepson. 349 S.W.3d at 915. At some point, a social worker told the appellant that if he did

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> State's Attorney are not bound by a police officer's recommendations. I did not know anything about it. All the officers talked to me about my children and the time I could get for not cooperating. All three officers did. After that conversation I believed that if I cooperated with them and answered the questions the way they wanted me to answer, I believed that I would not be prosecuted. They had said I had better say what they wanted me to, or I would lose the kids. I said I would say anything they wanted me to say. I asked what I was to say. I was told to say 'You must admit you gave [the informant] the package' so I said, 'Yes, I gave it to him.'
>
> 'The only reason I had for admitting it to the police was the hope of saving myself from going to jail and being taken away from my children. The statement I made to the police after they promised that they would intercede for me, the statements admitting the crime, were false.
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> 'My statement to the police officers that I sold the marijuana to [the informant] was false. I lied to the police at that time. I lied because the police told me they were going to send me to jail for 10 years and take my children, and I would never see them again; so I agreed to say whatever they wanted me to say.'

Id. at 531-32.

not cooperate with their investigation, "she was prepared to 'pick up the phone and call [District Court] Judge Browning for an order to remove the children.'" *Id.* at 917. The appellant thereafter confessed to having sexual contact with his stepson. *Id.* at 915. He conceded that he had been advised of his *Miranda* rights and understood them, "but claimed, in effect, that he feared, at least during the first interview, that if he exercised his rights he would subject his children to removal." *Id.* at 918.

After summarizing *Lynumn*, we looked to *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981), for guidance. *Id.* at 919. In *Tingle*, the Ninth Circuit reversed a theft conviction, in part because "the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time." *Id.* at 1336. The court noted that

> [w]hen law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit "cooperation," they exert the "improper influence" proscribed by *Malloy* [*v. Hogan*, 378 U.S. 1 (1964)]. The warnings that a lengthy prison term could be imposed, that Tingle had a lot at stake, that her cooperation would be communicated to the prosecutor, that her failure to cooperate would be similarly communicated, and that she might not see her two-year-old child for a while must be read together, as they were intended to be, and as they would reasonably be understood. Viewed in that light, [the officer's] statements were patently coercive.

Id. (footnotes omitted). The Ninth Circuit concluded that under the totality of the circumstances, the appellant's confession was involuntary. *Id.* at 1337.

Next, in *Stanton*, we turned to *Colorado v. Medina*, where the Supreme Court of Colorado upheld the suppression of a defendant's confession to abusing his infant child. 25 P.3d 1216, 1226 (Colo. 2001). In that case, the defendant's confession was found to have been induced by multiple threats that unless he confessed to child abuse, "the detective would cause the child to lose his mother and the mother, her child; and . . . if he did confess, mother and child would be together, and the detective would help [the defendant] to be reunited with them." *Id.* Under the totality of the circumstances—including "the existence of the threat, its duration, and effect on [the defendant], in light of his emotional and psychological condition"—the court held suppression was justified. *Id.*

Under the guidance of *Lynumn*, *Tingle*, and *Medina*, this Court noted in *Stanton* that

> when law enforcement personnel deliberately prey upon parental instincts by conjuring up dire scenarios in which a suspect's children are lost and by insinuating that the suspect's "cooperation" is the only way to prevent such consequences, the officers run a grave risk of overreaching. So powerful can parental emotions be that the deliberate manipulation of them clearly has the potential to "overbear" the suspect's will and to "critically impair" his or her capacity for "self-determination."

349 S.W.3d at 920 (*quoting Schneckloth*, 412 U.S. at 225). However, in *Stanton* we upheld the trial court's finding that the confession was not coerced. We gave weight to the trial court's finding that "this information was not delivered in a threatening manner but was simply an accurate statement as to the usual next step when a suspect in a child sexual abuse case declined to cooperate

and children were deemed to be at risk."[6] *Id.* Rather than inducing an involuntary confession, the social worker merely "informed [the appellant and his wife] that in the circumstances it would . . . be her duty, she believed, to request an order removing the two children from the home." *Id.* Accordingly, we affirmed the trial court's order denying the appellant's motion to suppress. *Id.* at 921.

Turning to the case before us, we agree with the trial court that Roby and Newton's statements were inappropriate. In contrast to the statements made in *Stanton*, the statements made by Roby and Newton were delivered in a threatening manner. Additionally, this case is distinguishable from *Stanton* where the social worker provided an "accurate statement as to the usual next step when a suspect in a child sexual abuse case declined to cooperate and children were deemed to be at risk." *Id.* Here, Francis and Brittany did not live with Appellant, had been removed from Joy's custody, and had been placed into foster care. Thus, it is clear to this Court that stating Appellant was "going

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[6] We continued:

> It may well be, as [the appellant] testified, that [the social worker] spoke forcibly and that she did not explain to the [appellant and his wife] what their rights would be in the event of a temporary removal. Supposing so in no way undermines the trial court's finding that [the social worker's] apprising [the appellant] truthfully and accurately that the next step in the process could be a removal order did not "threaten" him with the loss of his children or with other consequences so dire as to overbear his capacity to choose whether to submit to questioning and whether to confess. This is so notwithstanding [the appellant's] bipolar disorder and his low intelligence, for, as the trial court noted, there was no evidence that the investigators sought to exploit [the appellant's] limitations or that those limitations prevented [the appellant] from understanding the situation.

Id. at 920-21.

to continue the rest of [his] life without seeing [his] children"—whom he had consistently denied sexually abusing—was made for the sole purpose of coercing a confession. The comments therefore satisfy the threshold requirement that *coercive* state action be present. *See Bailey*, 194 S.W.3d at 300.

However, the coercive statements did not induce Appellant's confession. He did not make any incriminating statements in response to Roby and Newton's comments; indeed, he did not make *any* statements in response to the complained-of comments, despite their confession-inducing design, and remained silent following each one. Although Appellant admitted to touching Dorothy's "vagina area" (on three occasions) during the first interrogation, he did so before any of the coercive statements were uttered.[7] The first interview ended shortly after Roby uttered the fourth and final at-issue comment; Appellant did not make his other confessions (including those leading to the sodomy charge) until after he was released from the first interview, arrested at Joy's house, brought back to the police station, re-*Mirandized*, and questioned by Roby and Davis.

With respect to the remaining circumstances bearing on the confession's voluntariness, we note initially that although subsequent to his arrest

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[7] Accordingly, before *any* of the coercive statements were uttered, Appellant had admitted to three acts of first-degree sexual abuse—one in North Carolina and two in Kentucky. "A person is guilty of sexual abuse in the first degree when . . . [h]e or she subjects another person to sexual contact who is incapable of consent because he or she . . . [i]s less than twelve (12) years old . . . ." KRS 510.110(1)(b)2. As previously noted, Appellant ultimately pled guilty to one count of first-degree sexual abuse and one count of first-degree sodomy.

Appellant was diagnosed with major depressive disorder with psychotic features and alcohol abuse in remission, he exhibited calm and rational behavior throughout both interrogations. Accordingly, the trial court's finding that "no reasonable person would have concluded that [Appellant] was suffering from any serious psychotic problem or that he was contemplating suicide," despite Appellant's protestations to the contrary, is conclusive. As such, there is no reason to believe that the investigators were aware of any psychological or emotional limitations, much less that they sought to exploit them. *See Stanton*, 349 S.W.3d at 921 (taking into consideration that the investigators did not try to exploit the appellant's bipolar disorder or low intelligence).

Next, although Appellant alleges to have consumed wine and to have gone without sleep the night before his interrogation, there is no evidence from the recording to corroborate these claims. Although this Court has only been provided with an audiotaped recording of Appellant's interrogations, Appellant never slurs his words or otherwise exhibits any signs of intoxication or fatigue. Furthermore, the trial court—which was provided with and thoroughly reviewed a videotaped recording of the interrogations—noted that Appellant had no problems with balance. Additionally, the trial court noted that Appellant admitted to being in the United States Marine Corps where he underwent sleep deprivation training. Finally, Appellant told Detective Roby that he had not consumed any alcohol or drugs in the twenty-four hour period prior to his interrogation.

We also note that Appellant has a full scale IQ of 132, which places him in the "very superior range." Moreover, he scored in the 97th percentile in arithmetic (well-above average range) and in the 82nd percentile in reading (above average range) on the Kaufman Functional Academic Skills Test. The Bender Visual Motor Gestalt Test indicated that there was no evidence of organic brain impairment. In *Stanton*, we concluded that the appellant's bipolar disorder and low intelligence did not prevent him from understanding the situation he was in. *Id.* Clearly then, someone of "very superior" intelligence would understand the situation he was in.

Finally, although not dispositive of voluntariness, Appellant was advised of his *Miranda* rights both orally and in writing before both interrogations. Each time, he indicated that he understood those rights and voluntarily waived them in a document with the following language:

> I Charles F. Michael have had the above statements of my rights read and explained to me and fully understand them. I hereby waive these rights and wish to answer any questions or make any statements to officer Det. Barbara Roby of the Bardstown Police Department. I do this freely and voluntarily, without threat or any promises of any kind.

Indeed, Appellant exercised his right to "not answer any questions or make any statements" at least four times—after each of the four complained-of statements.

In sum, we hold that although Roby and Newton's statements satisfy the threshold requirement of *coercive* state action, under the totality of the circumstances, Appellant's incriminating statements were voluntary. There is absolutely no evidence in the record that his "will ha[d] been overborne and his

capacity for self-determination critically impaired." *Culombe,* 367 U.S. at 602. Accordingly, the trial court properly denied his motion to suppress, and we therefore affirm his convictions for first-degree sodomy and first-degree sexual abuse.

Minton, C.J., Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

COUNSEL FOR APPELLANT:

Jason P. Floyd
Larry D. Raikes
Fulton, Hubbard & Hubbard
117 East Stephen Foster Avenue
P.O. Box 88
Bardstown, KY 40004

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David Wayne Barr
Assistant Attorney General
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601-8204