NO. COA14-179

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v.

JARMAL FLOOD

Hoke County
Nos. 12 CRS 00662;
12 CRS 50264-71

Appeal by the State from order filed 20 December 2013, *nunc pro tunc* 30 August 2013, by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Paul F. Herzog for Defendant.

McGEE, Chief Judge.

The State appeals the trial court's order allowing Defendant's motion to suppress incriminating statements made by Defendant during a non-custodial interview with law enforcement that implicated him in a child sex offense investigation. We reverse.

I. Background

Defendant previously served in the New Hanover County Sheriff's Office for four years as a deputy sheriff, courtroom bailiff, and custody deputy, and he also completed Basic Law Enforcement Training. Defendant was arrested in 2007 and subsequently was convicted for sex by a substitute parent, on a charge unrelated to the present case. Defendant went to prison for that conviction and was on probation and receiving treatment as a sex offender when the following events occurred.

Detective Donald Schwab ("Detective Schwab") of the Hoke County Sheriff's Office received a report in early December 2011 that Defendant had sexually abused some children ("the children"). Defendant voluntarily met with Detective Schwab on 12 December 2011 at the Pender County Sheriff's Office, and Defendant denied committing the offenses. Defendant subsequently agreed to undergo a polygraph examination.

Agent Kelly Oaks ("Agent Oaks"), a certified polygraph examiner with the North Carolina State Bureau of Investigation ("SBI"), met with Defendant on 20 December 2011 at the Pender County Sheriff's Office. Agent Oaks conducted a polygraph examination with Defendant ("the polygraph"). Throughout this process, Defendant was not in custody, was given multiple breaks, and was told he was free to leave at any time. Defendant

was even informed that he would not be arrested that day, no matter what he said to law enforcement.

Defendant failed the polygraph, and Agent Oaks interviewed Defendant about why he had not passed the polygraph ("the interview"). Defendant repeatedly denied that he had done anything wrong, but Agent Oaks pressed him on the issue for about fifty minutes. During the interview, Agent Oaks made numerous statements that she and Detective Schwab might help Defendant or make "recommendations" to the District Attorney's office, including recommending treatment rather than jail time, if Defendant confessed. At times, Agent Oaks indicated that the District Attorney's office would have discretion as to what it would do with their recommendations. Agent Oaks also stated that any offer to help Defendant would expire once their conversation ended.

Detective Schwab joined Agent Oaks and Defendant a little over forty minutes into the interview. Detective Schwab talked about Defendant's former role as a law enforcement officer. He also spoke to Defendant about sparing Defendant's mother from having to hear the details of the crime at trial, as well as sparing the children from having to testify. After almost five minutes of listening to Detective Schwab, Defendant asked to

speak to his mother on the phone. Agent Oaks again admonished that any offer to help Defendant would expire once their conversation ended. Nonetheless, Detective Schwab obliged Defendant's request and lent Defendant his cell phone. All three then took a brief break and left the interrogation room.

During the break, Defendant spoke to his mother on the phone and then to Detective Schwab outside the interrogation room; Defendant asked Detective Schwab what he should do, and Detective Schwab repeated the same sentiments he had previously conveyed to Defendant in the interrogation room. Agent Oaks, Detective Schwab, and Defendant then reentered the interrogation room, and Defendant began making incriminating statements regarding his having had sexual contact with a child.

Defendant was indicted on 30 July 2012 for rape of a child by an adult, first-degree rape, taking indecent liberties with a child (seven counts), attempted first-degree rape, sexual activity by a substitute parent (three counts), first-degree sexual offense (two counts), and first-degree sexual exploitation of a minor (two counts). Defendant filed a motion on 30 May 2013 to suppress the statements he had made to Agent Oaks and Detective Schwab during the interview on 20 December 2011. In his motion to suppress, Defendant asserted that,

during the interview, Agent Oaks made improper promises that she and Detective Schwab would help Defendant if he confessed, which deceived him and rendered Defendant's subsequent incriminating statements involuntary. Defendant argued, in part, that this violated his rights under the due process clause of the United States Constitution.

Defendant's motion to suppress was heard on 19 August 2013. The trial court orally allowed Defendant's motion to suppress and subsequently entered a written order ("the order"). The State appeals.

II. Standard of Review

> On appeal from a suppression hearing, this Court will review the trial court's factual findings to determine if they are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. The trial court's conclusions of law are fully reviewable on appeal.

State v. Bordeaux, 207 N.C. App. 645, 647, 701 S.E.2d 272, 274 (2010) (internal citations and quotation marks omitted).

III. Trial Court's Findings of Fact

The State first challenges the trial court's findings of fact 24–31 in the order:

> 24. That Agent Oaks, upon telling the Defendant that he had failed the

polygraph, told him on numerous occasions that he needed to tell the truth in order to unburden himself of guilt, to avoid a public trial for himself, his family and the victim, and to help himself in connection with the charges.

25. That Agent Oaks also told the Defendant that she and Detective Schwab would or could make "recommendations" to the District Attorney and that, if he cooperated and told the truth, they would advise the District Attorney accordingly.

26. That Agent Oaks used the terms "recommend" or "recommendation" on numerous occasions and indicated to the Defendant that she and Detective Schwab could make recommendations in the cases.

27. That Agent Oaks also asked the Defendant if he wanted her "help" and advised him that, if he did want her help, he needed to "tell the truth," because she knew from the polygraph results, the Defendant's body language and the look in his eyes, that he had committed the offenses.

28. That, early in the interview, after the Defendant had taken the polygraph and had again denied the allegations, Agent Oaks discussed the Defendant's future and sentencing possibilities and stated, essentially, "I would recommend treatment and extension of probation."

29. That numerous references to "recommend" and "help" were thereafter made by Agent Oaks.

30. That, as the interview progressed, Agent Oaks further explained that, while she and Detective Schwab could make recommendations to the District Attorney,

> she could only speculate about the results in the cases.
>
> 31. That, by the time Agent Oaks explained the limits of any "recommendation" to the District Attorney, the Defendant had been told numerous times about possible recommendations and help, including a recommendation for "further treatment and probation."

The State argues that findings of fact 24–31 "deprive the words Agent Oaks used [during the interview] of their context." In support of this assertion, but without providing further explanation, the State presents this Court with numerous statements made by Agent Oaks during the interview that supposedly provide this missing "context." Given its rather conclusory nature, we question whether the State's argument here is a genuine challenge to the competency of the trial court's findings of fact. *Cf. Bordeaux*, 207 N.C. App. at 648, 701 S.E.2d at 274 (holding that the State waived its challenge to the facts from a trial court's order granting a defendant's motion to dismiss because "the State never *directly* contend[ed] that the trial court's findings of fact [were] not supported by competent evidence[.]" (emphasis added)). Even assuming *arguendo* that the State has presented this Court with an actionable argument, upon reviewing the statements provided by

the State, we conclude that the trial court's findings of fact 24–31 are accurate and supported by competent evidence.

The State next challenges the trial court's finding of fact 32: "That Agent Oaks, an experienced agent and polygraph examiner, acknowledged in her testimony that her use of the word 'recommend' was a poor choice of words, implicitly acknowledging that it could have been misconstrued by the Defendant." Specifically, the State takes issue with the trial court's finding that Agent Oaks "implicitly acknowledge[d] that [her use of the word 'recommend'] could have been misconstrued by the Defendant." To support its challenge to this finding, the State points only to Agent Oaks' testimony during the suppression hearing. Agent Oaks testified that her use of the word "recommend" was merely meant to convey to Defendant that she was gathering information to share with the District Attorney's Office.

Even if that were what Agent Oaks meant to convey, Agent Oaks' intentions during the interview are irrelevant. *Cf. Moran v. Burbine*, 475 U.S. 412, 423, 1142, 89 L. Ed. 2d 410, 422 (1986) ("[T]he state of mind of the police is irrelevant to the question of the . . . voluntariness of respondent's election to abandon his rights.") (in the *Miranda* waiver context); *United*

States v. Cristobal, 293 F.3d 134, 140 (4th Cir. 2002) ("We engage in the same inquiry when analyzing the voluntariness of a *Miranda* waiver as when analyzing the voluntariness of statements under the Due Process Clause.") (citing *Colorado v. Connelly*, 479 U.S. 157, 169, 93 L. Ed. 2d 473 (1986)). Instead, the question of whether Defendant's incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him. *See State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) ("[If] the confession is 'the product of an essentially free and unconstrained choice by its maker,' then 'he has willed to confess [and] it may be used against him'; where, however, 'his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'" (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26, 36 L. Ed. 2d 854, 862 (1973))). During the suppression hearing, Agent Oaks testified that her use of "recommend" during the interview was "a poor choice of words." Thus, the trial court's finding that Agent Oaks "implicitly acknowledge[d] that [her use of the word 'recommend'] could have been misconstrued by the Defendant" is supported by competent evidence.

Finally, the State challenges finding of fact 34: "That, after Agent Oaks reiterated the possibility of [her making] recommendations to the District Attorney, although at this time she did use the phrase, 'but it is up to them,' and shortly after Detective Schwab joined the interview, the Defendant did make certain incriminating statements." The State contends that this finding "does not accurately portray the time sequence in which the events it recounts occurred." Specifically, the State argues that finding of fact 34 "makes it sound like [D]efendant made incriminating statements after Agent Oaks reiterated the possibility of recommendations to the District Attorney and shortly after Detective Schwab joined the interview, without making it sound like there was any break between those events." Notably, there was a break between those events; Defendant took a short break to call his mother after Detective Schwab joined the interview, but before making the incriminating statements at issue.

However, the State never directly contends that the trial court's findings of fact are not supported by competent evidence or that the order of events described are incorrect. *Cf. Bordeaux*, 207 N.C. App. at 648, 701 S.E.2d at 274–75 (holding that the State waived its challenge to the facts from a trial

court's order granting a defendant's motion to dismiss because "the State never directly contend[ed] that the trial court's findings of fact [were] not supported by competent evidence or that the officers conducting the interview were misquoted."). The State does argue that finding of fact 34 "does not accurately portray the time sequence in which the events it recounts occurred." However, findings of fact 8 and 9 in the trial court's order state that Defendant took brief breaks throughout his meeting with Agent Oaks and Detective Schwab on 20 December 2011. That the trial court did not mention this particular brief break in finding of fact 34 does not so misconstrue the timing of events as to render it unsupported by competent evidence. For these reasons, the trial court's findings are supported by competent evidence and are binding on appeal.

IV. Trial Court's Conclusions of Law

The State next argues that the trial court's conclusions of law are in error because Defendant's incriminating statements were voluntary. Under the Fifth Amendment of the Constitution of the United States, no one "shall be compelled in any criminal case to be a witness against himself". U.S. Const. Amend. V. "The self-incrimination clause of the Fifth Amendment has been

incorporated in the Fourteenth Amendment and applies to states." *State v. Linney*, 138 N.C. App. 169, 178, 531 S.E.2d 245, 253 (2000). It is well-established that "obtaining confessions involuntarily denies a defendant's fourteenth amendment due process rights." *State v. Jones*, 327 N.C. 439, 447, 396 S.E.2d 309, 313 (1990) (citing *Ashcraft v. Tennessee*, 64 S. Ct. 921, 88 L. Ed. 1192 (1944)). Generally, to be admissible, a defendant's "confession [must be] the product of an essentially free and unconstrained choice by its maker[.]" *Bustamonte*, 412 U.S. at 225, 36 L. Ed. 2d at 862. When reviewing a defendant's confession, this Court must determine whether the statement was made voluntarily and understandingly. *See State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982). The voluntariness of a defendant's confession is based upon the totality of the circumstances. *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992). Factors considered by courts making this determination include, but are not limited to:

> whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hyde, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000); *see also State v. Martin*, 315 N.C. 667, 680–81, 340 S.E.2d 326, 334 (1986) (cognitive capacity of the suspect); *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (age of the suspect). In making this determination, the court "may not rely upon any one circumstance standing alone and in isolation." *State v. Richardson*, 316 N.C. 594, 601, 342 S.E.2d 823, 829 (1986) (citation and quotation marks omitted).

The question before this Court is whether improper promises were made to obtain Defendant's incriminating statements and whether Defendant was deceived therefrom or had his will overborne so as to render his incriminating statements involuntary. In its order, the trial court concluded

> 1. That the repeated use of the terms "recommend" and "recommendation" and "help" by an experienced law enforcement officer, particularly in view of admonitions from our appellate courts that such terms should not be used during interrogations or interviews, induced a hope or promise of reward or benefits, specifically treatment and probation, by the Defendant.
>
> 2. That, under the totality of the circumstances, even though the agent at times sought to explain or limit her use of the term "recommend" or "recommendation," the aforesaid hope or promise of reward rendered the Defendant's incriminating statements

> involuntary, and that the overall import of the use of those terms was to induce a hope of benefit or reward for a lighter sentence.
>
> 3. That the agents statements to the Defendant exceeded a mere indication of willingness of the agent to discuss the Defendant's cooperation with the District Attorney.

The State claims that Agent Oaks' statements to Defendant during the interview on 20 December 2011 were permissible. In support of this contention, the State argues that this case is much like *State v. Bailey*, 145 N.C. App. 13, 548 S.E.2d. 814 (2001). In *Bailey*, a suspect, who was later prosecuted, voluntarily participated in a polygraph examination as part of a child sex offense investigation. *Id.* at 16–17, 548 S.E.2d at 816–17. The suspect failed the polygraph, and the SBI agent administering it made statements to the suspect that "everything would probably have a little less consequence to it" and "[t]hings would probably go easier" if he confessed, which he then did. *Id.* at 17, 548 S.E.2d at 817. In spite of these statements by law enforcement, this Court held that the confession was voluntary because "there were no promises made to [the suspect], and it was made clear to [the suspect] that the district attorney, rather than [law enforcement], would

ultimately determine how to handle the case." *Id.* at 18, 548 S.E.2d at 817.

The State also cites *State v. Williams*, 67 N.C. App. 144, 312 S.E.2d 501 (1984), for the contention that Agent Oaks' use of the words "recommend" and "recommendation" did not render her statements to Defendant improper. In *Williams*, officers used the words "recommend" and "recommendation" when speaking to a suspect but they clearly and consistently indicated to the suspect that they could only tell the District Attorney's office that the suspect cooperated; the officers also never suggested that the suspect might gain anything in exchange for his confession. *See id.* at 147, 312 S.E.2d at 503. In total, the officers in *Williams* did nothing improper except use the words "recommend" and "recommendation" during their interrogation of the suspect. However, even then, this Court admonished "law enforcement officers to avoid entirely use of words such as 'recommend' and 'recommendation,' which in some circumstances . . . could render a confession involuntary." *Id.*

Agent Oaks' actions in the case before this Court are distinguishable from *Bailey* and *Williams*, as they delve deeper into the realm of impermissible conduct by law enforcement. During the interview, Agent Oaks suggested she would work with

and help Defendant if he confessed and that she "would recommend . . . that [defendant] get treatment" instead of jail time. She also asserted that Detective Schwab "can ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them [what] they do with that but they're going to look for recommendations[.]" Agent Oaks further suggested to Defendant that

> if you admit to what happened here . . . [Detective Schwab is] going to probably talk to the District Attorney and say, "hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?" and talk about it.

At one point, Agent Oaks asked Defendant directly: "Do you want my help?" Agent Oaks also threatened that any possibility of help from her or Detective Schwab would cease after their conversation with Defendant ended, once even after Defendant asked to speak to his mother on the phone.

Although Agent Oaks' statements to Defendant are peppered with occasional references to the District Attorney's Office having discretion as to what it might do with her and Detective Schwab's potential "recommendations," it is clear that the purpose of Agent Oaks' statements to Defendant was to improperly

induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed. *See State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975) ("[An] improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.") (citations omitted). Indeed, Agent Oaks' statements appear to promise that she and Detective Schwab would work with the District Attorney's Office on Defendant's behalf -- if he confessed -- in order to lessen the consequences of the charges that would likely be filed against him. Such promises are improper. *Cf. State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967) (confession rendered involuntary where law enforcement officer told the suspect that the officer would testify on the suspect's behalf if he cooperated). At the very least, Agent Oaks' actions fall outside the best practices that law enforcement officers should follow when interviewing suspects. *See State v. Branch*, 306 N.C. 101, 110, 291 S.E.2d 653, 659–60 (1982) ("[L]aw enforcement officers . . . should always be circumspect in any comment they make to a [suspect], particularly in connection with any confession the [suspect] is to give or has given. The better practice would be for law enforcement officers not to engage in

speculation of any form with regard to what will happen if the [suspect] confesses.").

Given that Agent Oaks made improper promises to Defendant, which appear to have encouraged Defendant to make incriminating statements, we now continue the totality of the circumstances analysis to determine whether Defendant was deceived thereby or had his will overborne and, therefore, was induced to make the incriminating statements involuntarily. Generally, a suspect's confession can be rendered involuntary when induced by an officer's statements that it would be harder for the suspect if he did not cooperate or that the suspect might obtain some material advantage by confessing. *See e.g.*, *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102 (statements inadmissible where "officers repeatedly told [the suspect] that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around'"); *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72 (statements inadmissible where an officer offered to testify on the suspect's behalf if he cooperated). However, such statements by law enforcement generally tend to render a suspect's confession involuntary only when they are preceded by other circumstances which might provoke fright in the suspect or otherwise overbear

his will. *See e.g.*, *Pruitt*, 286 N.C. at 449, 458, 212 S.E.2d at 97, 102 (suspect in custody and interrogation was conducted in a "police-dominated atmosphere"); *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72 (suspect in custody); *but see Richardson*, 316 N.C. at 604, 342 S.E.2d at 831 ("Promises or other statements indicating to [a suspect who is not in custody and has 'considerable experience' in the criminal justice system] that he will receive some benefit if he confesses do not render his confession involuntary *when made in response to a solicitation by the* [*suspect*]." (emphasis added)).

Such additional circumstances are largely absent in the present case. It appears uncontroverted that, at the time of the interview, Defendant was a competent adult; he was not in custody, and there were no *Miranda* issues; Defendant was not held incommunicado; the length of the interview was reasonable; there were no physical threats or shows of violence against Defendant; Defendant was told repeatedly that he could leave at any time and was given multiple breaks; Defendant was even told that he was not going to be arrested that day, no matter what he said to law enforcement; and Defendant had extensive experience with the criminal justice system -- both through four years of

serving as a trained sheriff's deputy and for a prior conviction of an unrelated sex offense against a child.

The Supreme Court of North Carolina was presented with a similar defendant in *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823 (1986). In *Richardson*, the defendant was a competent adult with an extensive history with the criminal justice system. *Id.* at 604, 342 S.E.2d at 831. He voluntarily met with North Carolina law enforcement and subsequently confessed to committing crimes within the state, although at the time he was out on bond for a pending attempted burglary charge in Tennessee, was a suspect in several states for a string of related criminal activity, and was concerned that he might be convicted of being an habitual felon in Tennessee, which carried with it a life sentence. *Id.* at 596–97, 342 S.E.2d at 826. Much like in *Fuqua* where a suspect's confession was rendered involuntary, an officer agreed to testify on the *Richardson* defendant's behalf if he cooperated with the other investigations. *Id.* at 604, 342 S.E.2d 831. However, in distinguishing *Fuqua*, the *Richardson* Court held that the defendant's confession was not involuntary because he initiated and "engaged in hard-headed bargaining" with the authorities in

exchange for the officer's testimony. *Id.* at 604, 342 S.E.2d at 831.

The present case largely falls between *Fuqua* and *Richardson*. As in both cases, law enforcement made promises to work on Defendant's behalf if he confessed. However, *Fuqua* is distinguishable because Defendant was not in custody at the time those promises were made, nor is there any indication that the *Fuqua* defendant had extensive experience with the criminal justice system. *Richardson* is distinguishable because Defendant did not initiate and engage in active negotiations with law enforcement before making his incriminating statements, although this is slightly balanced out by the unique pressures that the *Richardson* defendant was under to cooperate with law enforcement to mitigate his circumstances. *See id.* at 596–97, 342 S.E.2d at 826.

Thus, the present case is more like *Richardson* than it is like *Fuqua*. Defendant was not in custody when he made his incriminating statements and had extensive experience in the criminal justice system. Defendant arguably had even more experience in the criminal justice system than the *Richardson* defendant whose only previous experience involved being investigated and prosecuted for crimes he had committed;

Defendant not only had previous experience as a defendant in another child sex offense case, he also had four years of experience as a trained law enforcement officer. This, combined with the non-custodial nature of the interview, strongly pushes this Court towards finding Defendant's incriminating statements voluntary. Indeed, although Agent Oaks' statements were improper, taking all of these factors into account, we cannot say that the circumstances leading up to and surrounding Defendant's confession were such as to overbear Defendant's will or deceive him.

This Court is mindful of the need to "apply well-recognized rules of law impartially to easy and hard cases alike[,] lest we make bad law which will erode constitutional safeguards [that have been] jealously guarded" by North Carolina courts. *See Pruitt*, 286 N.C. at 458-59, 212 S.E.2d at 103. We arrive at our conclusion attentive to the fact that any totality of the circumstances analysis is more difficult when both sides of the scale of voluntariness are weighted heavily. Under the totality of the circumstances, Defendant's incriminating statements during the interview were not rendered involuntary by law enforcement as a matter of law.

Reversed and remanded.

Judges BRYANT and STROUD concur.