[Cite as *In re T.F.*, 2009-Ohio-3141.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

IN RE: T.F.	C.A. No. 08CA009449
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07JD19588

DECISION AND JOURNAL ENTRY

Dated: June 29, 2009

BELFANCE, Judge

{¶1} On July 19, 2007, twelve-year old, juvenile Appellant T.F. was questioned at the Elyria police station regarding alleged sexual assaults involving two minors. Before the interview, T.F. was *Mirandized* and then confessed to conduct forming the basis of the sexual assault charges. T.F. filed a Motion to Suppress the confession which the trial court denied following a hearing. The State dismissed one count of the Complaint and T.F. pled "No Contest" to the remaining count. The trial court placed T.F. on community control.

{¶2} In the instant appeal, T.F. has timely challenged the trial court's denial of his Motion to Suppress arguing the denial has violated his Fifth Amendment right against self incrimination and his Sixth Amendment right to legal counsel. This Court reverses.

FACTS

{¶3} On July 18, 2007, pursuant to the investigation of the alleged sexual assaults of two minors, Detective Eric Van Kerkhove of the Elyria Police Department visited the home of

T.F. in order to speak with T.F. and his mother. T.F.'s mother was not at home and the Detective left a card with T.F. and asked that T.F. have his mother call him. T.F.'s mother spoke with the Detective that evening, and the Detective asked that she bring T.F. to the station for an interview. In light of her conversation with the Detective, T.F.'s mother felt she was required to bring T.F. to the police station, and she informed T.F. that he had to go with her. The Detective did not inform T.F.'s mother that she had the option of not bringing T.F. to the station. Neither T.F. nor his mother had any previous experience with the criminal or juvenile justice systems.

{¶4} On July 19, 2007, T.F. and his mother came to the Elyria police station for the requested interview. The interview was conducted in an unlocked room, in the presence of T.F.'s mother and Debra Riley, an employee of Lorain County Children's Services. Neither the Detective nor T.F.'s mother remembers for certain if the door was open or closed. According to the Detective, T.F. was the only suspect in his investigation. The Detective confirmed that the purpose of the interview with T.F. was to elicit incriminating statements from T.F.

{¶5} The Detective quickly read T.F. the *Miranda* warnings and informed T.F. that he was not under arrest and that T.F. would go home with his mother following the interview. The Detective read the rights consecutively without pausing in between rights and without providing further explanation. The Detective directed T.F. where to place his initials after each *Miranda* warning and T.F.'s mother assisted, also directing him where to place his initials. Throughout the questioning process, T.F.'s mother was prompting T.F. to answer questions verbally. The Detective did not inform T.F. that even if his mother chose to make a statement, T.F. was not required to do so. According to both the Detective and T.F.'s mother, T.F. appeared confused during the reading of the *Miranda* warnings. At one point during the reading of the *Miranda* warnings, T.F. said that he did not understand. The Detective did not attempt to alleviate the

confusion, instead he continued to ask T.F. if he was going to answer his questions. Notwithstanding T.F.'s apparent confusion, both T.F. and his mother signed the *Miranda* waiver and T.F. confessed to conduct giving rise to the sexual assault charges.[1]

{¶6} T.F. has raised one assignment of error, arguing that the trial court erred in denying his Motion to Suppress in violation of the Fifth and Sixth Amendments to the United States Constitution.

STANDARD OF REVIEW

{¶7} An appeal from a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. This Court must defer to the trial court's findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the witnesses. *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶10, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, and quoting *Akron v. Bowen*, 9th Dist. No. 21242, 2003-Ohio-830, at ¶5. A reviewing court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6, citing *State v. Searls* (1997), 118 Ohio App.3d 739, 741. However, this Court will review the trial court's application of the law to the facts *de novo*. *Metcalf* at ¶6.

CUSTODIAL INTERROGATION AND *MIRANDA*

{¶8} We first note that the facts of this case are not in dispute. This is not a case of "he said, she said"; and as such, we see no need to go into a detailed recitation of the trial court's

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[1] In the interview, T.F. stated that while he was at the alleged victims' house playing in the tree-house, one of the children tried to kiss him and T.F. tried to push the child off. T.F. also admitted that he sucked both children's "pee-pees."

factual findings when the facts themselves are not disputed. Given the undisputed facts, the question is one of law. It is our duty to examine the facts, and independently, and without deference to the trial court's legal conclusions, determine if those facts support the legal determinations made by the trial court. See *Metcalf* at ¶6. If we determine the facts do not support the trial court's legal conclusions we are bound to reverse its decision. Thus, the focus of our entire analysis is to apply the law to the facts and determine whether it was error for the trial court to deny T.F.'s motion to suppress.

{¶9} In analyzing whether T.F.'s constitutional rights were violated, the Court must first address the threshold issue of whether T.F. was in custody while undergoing questioning. The Fifth Amendment to the United States Constitution provides an individual protection against self incrimination. The Fifth Amendment privilege against self incrimination applies to individual states through the Fourteenth Amendment. *Malloy v. Hogan* (1964), 378 U.S. 1, 6. "[T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." *In re Gault* (1967), 387 U.S. 1, 55.

{¶10} The U.S. Supreme Court held in *Miranda v. Arizona* (1966), 384 U.S. 436, 444, that "the prosecution may not use statements * * * stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda* warnings are not required any time an individual is in custody, only when he or she is subject to "custodial interrogation." *State v. Mason* (1998), 82 Ohio St.3d 144, 153, citing *Berkemer v. McCarthy* (1984), 468 U.S. 420, 435.

{¶11} The *Miranda* court defined custodial interrogation as a situation in which the defendant is "questioned while in custody or is otherwise deprived of his freedom of action in any significant way." *Miranda*, 384, U.S. at 444. See, also, *State v. Prunchak*, 9th Dist. No.

04CA0070-M, 2005-Ohio-869, at ¶26, quoting *California v. Beheler* (1983), 463 U.S. 1121, 1125 (Custody for *Miranda* purposes occurs when restraint on freedom of movement rises to a level associated with a formal arrest.). In determining whether T.F. experienced a restraint on his freedom of action, and hence was in custody, the relevant inquiry is whether under the totality of the circumstances, a reasonable person in the defendant's position would have believed he was not free to leave. *Berkemer v. McCarty* (1984), 468 U.S. 420, 442; see *State v. Gray* (March 14, 2001), 9th Dist. No. 00CA007695, at *2; see also *In re R.H.*, 2nd Dist. No. 22352, 2008-Ohio-773, at ¶15 ("[T]he only relevant inquiry is how a reasonable person in R.H.'s position would have understood his situation."). Thus, we "must examine 'all of the circumstances surrounding the interrogation' and determine 'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.'" *Yarborough v. Alvarado* (2004), 541 U.S. 652, 663, quoting *Stansbury v. California* (1994), 511 U.S. 318, 322, 325.

{¶12} Upon thorough review of the totality of the circumstances in this case, we conclude that a reasonable person in T.F.'s position would not have felt free to leave the police station. Thus, we conclude that the trial court erred in determining that T.F. was not in custody while undergoing questioning by the Detective at the police station.

{¶13} Initially we note that T.F. did not voluntarily go to the police station. He was taken by his mother who believed that she was compelled to abide by the Detective's request to bring T.F. to the police station for questioning. The Detective did not inform T.F. or his mother that they were free to decline the Detective's request. Thus, T.F. had no choice or control over his appearance at the police station. See *In re R.H.* at ¶20 (determining R.H. to be in custody

where R.H. was brought to the police station by a police officer and the mother felt she had to let the detective take the boy for questioning).

{¶14} T.F. was not interviewed at home, or even at school, but at the police station, which is not a familiar or comfortable setting, but rather a more intimidating and authoritarian atmosphere with visible police presence. Compare *Gray*, at *2 (determining juvenile was not in custody where juvenile was interviewed at home) and *In re R.H.* at ¶20 (determining juvenile was in custody where juvenile taken to the police station and mother felt she had to let the officer take her son to the station); *In re Harris* (June 7, 2000), 5th Dist. No. 1999AP030013, at *8 (juvenile found to be in custody where interview was conducted at police station).

{¶15} As noted above, T.F. was the only suspect and the Detective wanted to question T.F. so as to elicit incriminating statements from him. At the onset of the questioning, the Detective's demeanor, tone and pace of the questioning created an atmosphere in which a reasonable person in T.F.'s position would not have felt free to terminate the questioning and leave. The questioning was initially conducted at a fast pace, leaving T.F. little time to reflect and thoughtfully consider the implications of waiving his rights. In fact, the portion of the interview involving the *Miranda* warnings lasted only a little over three minutes out of an almost thirty minute session. In comparison, preliminary matters to establish T.F.'s identity and those present for the interview lasted almost a minute and a half. The Detective quickly read through the *Miranda* warnings with T.F., directing T.F. where to place his initials. At the hearing, the Detective stated that T.F. appeared confused during the reading of his *Miranda* rights. T.F.'s mother also confirmed that T.F. was confused. However, when T.F. expressed confusion as to the meaning of the *Miranda* warnings, the Detective did not alleviate the confusion. Instead, the Detective continued to ask T.F. if he was going to answer his questions: "Are you going to

answer any questions I ask you? Is that a yes or a no?" In addition, T.F.'s mother was visibly upset at the interview and at times seemed to demand that T.F. respond to questions. The Detective did not inform T.F. that even if his mother wanted T.F. to answer the questions, T.F. could nonetheless refuse to answer the questions. Given the Detective's demeanor and conduct during the questioning, and his disregard of T.F.'s attempts to clarify the meaning of the *Miranda* rights, a reasonable person in T.F.'s position would not have felt free to simply decline to answer the questions and terminate the questioning.

{¶16} Significantly, the Detective testified that if T.F. would have tried to terminate the interview and leave the station, T.F. would have been stopped and prevented from leaving until security cleared him. Thus, T.F. was not free to leave the police station. Further, because T.F. was only twelve years old at the time of the interrogation, he could not have left the station without his mother as he was not yet old enough to drive. See *In re R.H.* at ¶20 ("R.H.'s control over his presence was clearly limited; at the age of 11, R.H. could not simply leave of his own accord.").

{¶17} Finally, T.F. and his mother had no prior experience with either the juvenile justice system or the criminal justice system prior to this interrogation. Given the totality of the circumstances, it is hard for this Court to imagine that a reasonable person in T.F.'s situation would have felt free to terminate the interview and leave, thus, we conclude that T.F. was in custody within the meaning of *Miranda*.

{¶18} Because T.F. was in custody for purposes of *Miranda* this Court must decide if T.F.'s waiver of his rights was made "voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. The U.S. Supreme Court recognized that problems may accompany the waiver of *Miranda* rights by children:

> "We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique-but not in principle-depending upon the age of the child and the presence and competence of parents. * * * If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. at 55.

In Ohio, courts apply the standard set forth in *State v. Edwards* (1976), 49 Ohio St.2d 31, 40-41 (overruled on other grounds) to determine if a juvenile voluntarily waived his or her rights. *In re Watson* (1989), 47 Ohio St.3d 86, 90.

{¶19} In *Edwards*, the Supreme Court of Ohio explained:

> "[i]n deciding whether the defendant's confession in this case was involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." Id. at 40-41.

{¶20} As our determination here is focused on whether T.F. voluntarily, knowingly, and intelligently waived his *Miranda* rights, the heart of our analysis is directed at the portion of the interrogation during which T.F. is presented with the *Miranda* warnings. In reviewing the totality of the circumstances, we note that T.F. was only twelve years old at the time of the interrogation and did not have any previous experience with the criminal justice system. Even though T.F. was in an age-appropriate grade level and could read and speak English, it is clear that his mentality was that of a young child who lacked more advanced understanding and reasoning ability. During the interrogation, T.F. had difficulty understanding some of the questions and required help from his mother. T.F. expressed himself with simple child-like language in describing what took place between himself and the other two children.

{¶21} It is apparent that T.F.'s waiver was not knowingly or intelligently made as he was confused and indicated that he did not understand the meaning of the waiver. The Detective read the *Miranda* warnings without a break between each individual right. He then asked T.F. at the end if he understood them. T.F. initially answered in the affirmative but then indicated he was confused. Following the Detective's explanation, T.F. asked "So during this whole talk, I can't say anything?" to which the Detective replied, "If you don't want to talk to me, you can do that. That's why I have your mom here. * * *" This was the only reply the Detective gave to T.F.'s question.

{¶22} Then the following exchange took place between the Detective, T.F. and T.F.'s mother. The sound recording indicates that T.F., in a plaintive tone of voice, indicated that he did not understand:

> "Detective: * * * Where it says, having these rights in mind, do you wish to talk to me? You say, yes or no. Do you still want to talk to me? Yes or no?
>
> "[T.F.]: Right now?
>
> "Detective: Yea. Do you want to talk to me?
>
> "[T.F.] Right now?
>
> "Detective: Is that a yes or no? [T.F.], yes or no?
>
> "[T.F.'s mother]: Yes. Answer yes.
>
> "[T.F.]: *Well, I don't understand.*
>
> "[T.F.'s mother]: Are you going to talk to him about this?
>
> "Detective: Are you going to answer any questions I ask you? Is that a yes or no?
>
> "[T.F.'s mother]: Say yes, because he's got a tape recorder on.
>
> "Detective: Okay. Put your initials again.
>
> "[T.F.]: Yes." (Emphasis added.)

{¶23} After this exchange, the Detective did not make any effort to explain T.F.'s rights to him or to clarify precisely what T.F. did not understand notwithstanding the fact that it was apparent to both the Detective and T.F.'s mother that T.F. was confused during the reading of his *Miranda* rights. Thus, the Detective did not adequately explain T.F.'s rights and "did little more than convey the basic *Miranda* warnings to appellant." *In re Harris*, at *11.

{¶24} There is no evidence from the record that the Detective caused T.F. to suffer any physical deprivation or mistreatment. The interview was not unreasonably long as it lasted only approximately thirty minutes. However, in examining the totality of the circumstances, we cannot determine that T.F. voluntarily, knowingly, and intelligently waived his rights. The pace of the initial interrogation was quick and left T.F. with little time to process the Detective's questions; as soon as the Detective asked T.F. a question, either the Detective, T.F.'s mother, or both began pressuring T.F. to quickly respond. Ultimately, this led to T.F. making the statement, "Well, I don't understand." The exchange concerning T.F.'s waiver of his *Miranda* rights outlined above during which the Detective stated "[i]s that a yes or no? [T.F.], yes or no?" followed by the Detective and T.F.'s mother directing T.F. where to place his initials not only evidences T.F.'s lack of understanding of the waiver of his rights, but also the totality of the circumstances contributing to T.F.'s acquiescence to the waiver of his rights, notwithstanding his obvious lack of understanding. See *In re Harris*, at *10-*11 (The court held that twelve year-old Harris' waiver was not voluntary, knowing and intelligent where the officer did little more than recite the *Miranda* warnings, despite the fact that the interview was not long, Harris did not suffer from physical deprivation, he was not mistreated, the officer did not yell at Harris, the officer used a regular tone of voice, and the officer informed Harris that he could stop the questioning at any point and Harris could step outside the room and talk to his mother.)

{¶25} At this point in the interrogation, when it was clear to the Detective that T.F. did not understand some part of the *Miranda* warning, it was the duty of the Detective to ascertain what precisely T.F. did not understand and ensure that T.F. truly understood the rights he was waiving. We cannot imagine a clearer way for a defendant to notify an officer that he or she does not understand the warnings than to say "I don't understand." The failure of the Detective to even attempt to alleviate that confusion is unacceptable and makes it difficult, if not impossible, for this Court to conclude that T.F.'s waiver was voluntary, knowing, and intelligent.

{¶26} Given the totality of the circumstances, including T.F.'s age, lack of experience in the criminal justice system, and T.F.'s apparent confusion during the cursory reading of his *Miranda* rights which was not alleviated by the Detective, despite the Detective's awareness of T.F.'s confusion, we conclude that T.F.'s waiver was not made voluntarily, knowingly, and intelligently. We therefore sustain T.F.'s assignment of error.

VIOLATION OF SIXTH AMENDMENT RIGHT TO COUNSEL

{¶27} T.F. also argues that his Sixth Amendment right to counsel was violated. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." The right to counsel comes into play "at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams* (1977), 430 U.S. 387, 398, quoting *Kirby v. Illinois* (1972), 406 U.S. 682, 689. As there were no formal charges against T.F. at the time of the interrogation, the Sixth Amendment right to counsel was inapplicable to T.F.'s situation.

CONCLUSION

{¶28} In light of the foregoing, this Court sustains T.F.'s assignment of error concerning the violation of his Fifth Amendment Rights. The judgment of the trial court is reversed, and this matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

WHITMORE, J.
DISSENTS, SAYING:

{¶29} I respectfully dissent as I would affirm the trial court's denial of T.F.'s motion to suppress the statements that he made to Detective Van Kerkhove.

{¶30} The Ohio Supreme Court has held that:

> "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, at ¶6, citing *Burnside* at ¶8.

{¶31} To review a trial court's factual findings for competent, credible evidence, one must first note what factual findings the trial court made. Here, the trial court determined that T.F. and his mother ("Mother") came to the Elyria Police Station at Detective Van Kerkhove's request. The trial court further determined that Detective Van Kerkhove advised T.F. of his *Miranda* rights prior to any questioning and that T.F. understood those rights. According to the trial court:

> "*** [N]either Mother's [n]or the Detective's statements on the recorded interview, in light of the testimony of Mother and the Detective rise to coercion, threat, or force to warrant suppression of [T.F.'s] statement and that Mother at all

> times was appropriate and merely assisting in having [T.F.] answer in verbal as opposed to nonverbal language."

Based on the foregoing facts, the trial court determined that T.F. knowingly and voluntarily waived his *Miranda* rights before speaking with Detective Van Kerkhove.

{¶32} Detective Van Kerkhove testified that he initially attempted to contact Mother in person by driving to T.F.'s house. When he discovered that Mother was not at home, however, he left his business card with T.F. and asked T.F. to have Mother contact him. Mother contacted Detective Van Kerkhove shortly thereafter, and the two arranged a time for Mother to bring T.F. to the police station for an interview. Detective Van Kerkhove testified that T.F.'s interview took place in an unlocked room with Mother and a social worker present. Detective Van Kerkhove explained to T.F. that no charges were pending against him, that he was not under arrest, and that the interview results would not impact his ability to go home with Mother. He then asked T.F. to stand beside him and read along as he read T.F. his *Miranda* rights from a typewritten sheet. Detective Van Kerkhove testified that he asked T.F. several times if he understood his rights and that T.F. responded affirmatively. According to Detective Van Kerkhove, T.F. repeatedly gave nonverbal responses to questions. Consequently, both Detective Van Kerkhove and Mother had to tell T.F. to answer yes or no at points throughout the interview.

{¶33} Mother testified that she thought she was obligated to call Detective Van Kerkhove and to bring T.F. to the police station for an interview because Detective Van Kerkhove was a police officer and she had to "obey the law." Mother noted that she did not have any experience with the criminal justice or juvenile justice systems and that "[she] didn't know [she] couldn't not go" to the police station. Mother agreed, however, that Detective Van Kerkhove never ordered or commanded her to bring T.F. to the police station. She further agreed that she took T.F. to the police station of her own volition.

{¶34} Mother confirmed Detective Van Kerkhove's testimony that T.F. repeatedly gave nonverbal responses to questions and that both she and Detective Van Kerkhove instructed T.F. that he had to orally respond with his yes or no. Mother testified that she even helped T.F. to answer Detective Van Kerkhove's questions at several points during the interview, often by rephrasing them slightly when it seemed that T.F. was having difficulty answering. Although Mother testified that T.F. appeared to be confused at several points, she admitted that T.F. verbally indicated more than once that he understood his rights. She also agreed that Detective Van Kerkhove informed her and T.F. that T.F. did not have any charges pending against him and that he was not under arrest.

{¶35} The sound recording of T.F.'s interview with Detective Van Kerkhove also confirms Detective Van Kerkhove's testimony. At the beginning of the interview, Detective Van Kerkhove repeatedly told T.F. that he was only present for an interview, no charges were pending against him, he was not under arrest, and he could go home after the interview. Detective Van Kerkhove read T.F. his *Miranda* rights and T.F. indicated that he understood them. Detective Van Kerkhove then clarified: "Okay. You understand you have a right not to talk to me. You have a right to have an attorney present before any questioning, okay?" T.F. once again indicated that he understood Detective Van Kerkhove's explanation. Detective Van Kerkhove then had T.F. initial and sign a typewritten *Miranda* waiver. The second question on the waiver form read: "Having these rights in mind, do you wish to talk to us now?" T.F. indicated that he did not understand whether that question meant that he would be talking to Detective Van Kerkhove "[r]ight now." Detective Van Kerkhove responded affirmatively, but T.F. once again indicated that he did not understand. Detective Van Kerkhove then asked, "[a]re you going to answer any questions I ask you?" T.F. apparently responded nonverbally at this

point, which caused Detective Van Kerkhove to ask "[i]s that a yes or no?" and Mother to direct T.F. to "[s]ay yes, because he's got a tape recorder on." Mother confirmed on redirect examination that she was instructing T.F. to respond verbally rather than nonverbally.

{¶36} Throughout the interview, Detective Van Kerkhove's voice remained calm and took on a concerned tone at several points. His questions were even-paced, he explained his questions for T.F.'s benefit on multiple occasions, and he allowed T.F. time to respond if T.F. did not do so right away. Mother, on the other hand, sounded upset and shaken at multiple points throughout T.F.'s interview. She pushed for T.F. to answer questions that Detective Van Kerkhove asked, sometimes rephrasing the question and asking T.F. the question herself. It would appear from the sound recording of T.F.'s interview that Detective Van Kerkhove was not the source of any pressure exerted on T.F. during his interview.

{¶37} The majority opinion fails to review the trial court's factual findings. Instead of setting forth the trial court's factual findings and reviewing them for competent, credible evidence, the majority opinion essentially conducts a de novo review of the record and makes its own factual findings without regard for the trial court's findings. The majority reasons that its approach is warranted because "the facts themselves are not disputed." There are, however, at least two flaws in the majority's reasoning. First, the majority's opinion contains many findings, which were not made by the trial court, and which can only be construed as factual findings made for the first time on appeal. For instance, the majority finds that Detective Van Kerkhove's answers "did not alleviate the confusion" of T.F., that Mother "seemed to demand that T.F. respond to questions," and that "it is clear that [T.F.'s] mentality was that of a young child who lacked more advanced understanding and reasoning ability." These statements are not pure recitations of fact. Rather, they are factual findings suited to the trier of fact. Yet, the trial court

did not make any of these factual findings in its decision. The majority made these and other findings for the first time on appeal. Second, a review such as this one contravenes the Ohio Supreme Court's mandate that appellate courts must afford a trial court's factual findings on a motion to suppress due deference because of the trial court's being in the "best position to resolve factual questions and evaluate the credibility of witnesses." *Burnside* at ¶8. The majority's review lends itself more to a criminal manifest weight of the evidence review in which this Court weighs all of the evidence and occupies the position of the "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. This Court does not review an appeal from a motion to suppress under a criminal manifest weight of the evidence standard. As the Supreme Court specified in *Burnside*, a civil manifest weight standard applies in an appeal from a motion to suppress. *Burnside* at ¶8. In a competent, credible review of any findings, the starting point to any analysis should be the findings of the trial court.

{¶38} Based on all of the foregoing evidence, I would conclude that the record contains competent, credible evidence in support of the trial court's factual findings. The trial court found that Mother brought T.F. to the police station, that T.F. understood his rights based on Detective Van Kerkhove's explanation, and that T.F. was not subjected to any coercion, threats, or force. Neither the testimony elicited at the suppression hearing, nor the sound recording of T.F.'s interview, detract from the trial court's factual findings. Accordingly, the remaining issue is whether the trial court reached the correct legal conclusions based on those factual findings. See *Burnside* at ¶8.

{¶39} "[I]n order to protect a [juvenile's] Fifth Amendment right against self-incrimination, statements resulting from custodial interrogations are admissible only after a showing that law enforcement officers have followed certain procedural safeguards." *In re M.B.*,

9th Dist. No. 22537, 2005-Ohio-5946, at ¶10, citing *Miranda v. Arizona* (1966), 384 U.S. 436, 444. That is, before any custodial interrogation, a juvenile must be informed of his *Miranda* rights. *In re M.B.* at ¶10. "Determining whether a suspect is in custody for purposes of *Miranda* depends on the circumstances of each case." *State v. Gray* (Mar. 14, 2001), 9th Dist. No. 00CA007695, at *1. "[T]he ultimate inquiry is whether there was a formal arrest or restraint on movement to the degree associated with a formal arrest." (Internal quotations omitted.) Id., quoting *State v. Warrell* (1987), 41 Ohio App.3d 286, 287. Once it is determined that a juvenile was in custody, a court then must look to whether the juvenile knowingly, voluntarily, and intelligently waived his rights prior to any interrogation. *In re M.B.* at ¶11.

{¶40} In reviewing the propriety of a juvenile's *Miranda* waiver and the voluntariness of his confession, courts must employ a totality of the circumstances approach. *In re Watson* (1989), 47 Ohio St.3d 86, 88-89. "This includes 'the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment[;] and the existence of threat or inducement.'" *State v. White* (Feb. 21, 2001), 9th Dist. No. 19930, at *2. The Ohio Supreme Court has held that:

> "The inquiry whether a waiver is coerced has two distinct dimensions. 'First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Dailey* (1990), 53 Ohio St.3d 88, 91, quoting *Moran v. Burbine* (1986), 475 U.S. 412, 421.

"A suspect's decision to waive his Fifth Amendment privilege is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *Dailey*, 53 Ohio St.3d at 91. Neither a suspect's

age, nor his I.Q., negates the voluntariness of his confession. *White* at *2, citing *Dailey*, 53 Ohio St.3d at 92.

{¶41} Initially, I question the majority's conclusion that T.F. was in custody at the time of his interview with Detective Van Kerkhove. Detective Van Kerkhove initially went to T.F.'s home, but left his card with T.F. after discovering that Mother was not there. Mother initiated further contact with Detective Van Kerkhove by calling him. Mother testified that Detective Van Kerkhove never ordered her to bring T.F. to the police station for an interview. She testified that she brought T.F. to the police station of her own volition. The majority seems to imply that a juvenile's appearance at a police interview is only voluntary if a police officer informs a juvenile and/or his mother that "they were free to decline" an interview. This Court, however, has never imposed such an affirmative duty upon police officers. The fact that Detective Van Kerkhove did not inform T.F. or Mother that their cooperation was optional does not equate to a finding that T.F. "had no choice or control over his appearance" at the interview.

{¶42} Furthermore, T.F.'s interview took place in an unlocked room with Mother and a social worker present for the entire interview. Detective Van Kerkhove repeatedly informed T.F. that he was not under arrest, there were no charges pending against him, and that he could go home with Mother regardless of the results of the interview. See, e.g., *In re Bucy* (Nov. 6, 1996), 9th Dist. No. 96CA0019, at *1-2 (concluding that juvenile was not in custody when officer interviewed him in a conference room at his school, told him he was not under arrest and free to leave at anytime, and told him that he could call his mother); *In re White* (July 10, 1996), 9th Dist. No. 96CA0004, at *1-3 (remanding the matter for the trial court to determine whether juvenile was even in custody when officer interviewed him in the principal's office at school with the door closed, told him that his parents had given their permission for the interview to

occur, and told him that he was free to go at anytime). In total, the interview lasted for less than thirty minutes. Although Mother testified that she did not think she had the option to refuse to contact Detective Van Kerkhove or to bring T.F. to the police station for an interview, this Court has recognized that subjective belief is irrelevant to a determination of whether a juvenile is in custody. *Gray*, at *2. This Court applies a reasonable person standard to determine whether or not a suspect was in custody for purposes of the Fifth Amendment. Id.

{¶43} The majority's opinion concludes that T.F. was in custody based on several facts that have no legal bearing on the issue of whether a reasonable person in T.F.'s situation would have believed that he was unable to leave. References to T.F. being the only suspect in Detective Van Kerkhove's investigation, to the pace of Detective Van Kerkhove's questioning, to the number of minutes it took to complete T.F.'s *Miranda* warning, and to Detective Van Kerkhove's thoughts about whether T.F. could have left the police station are irrelevant to a determination of custody. See *Gray*, at *2 (noting that a custody determination focuses on the restraint of a suspect's movement and that an officer's subjective intent has no bearing on the issue of custody). Furthermore, the majority relies upon *In re R.H.*, 2d Dist. No. 22352, 2008-Ohio-773, for the proposition that T.F. was not capable of leaving the police station because "he was not yet old enough to drive." In that case, however, an officer took the juvenile from his mother's home, drove him to the police station, and later drove him back home. *In re R.H.* at ¶5. Here, Mother drove T.F. to the police station herself and remained with him. The fact that T.F. was not old enough to drive is inapposite because, unlike R.H., T.F. could have had his Mother drive him home at anytime.

{¶44} Moreover, the majority opinion comes dangerously close to holding that a juvenile who is interviewed at a police station is always in custody for purposes of *Miranda*.

The majority writes that "T.F. was not interviewed at home, or even at school, but at the police station, which is not a familiar or comfortable setting, but rather a more intimidating and authoritarian atmosphere with visible police presence." Unless an officer interviewed an individual over the phone, it would be impossible for a police officer to ever conduct an interview without there being a "visible police presence." Although the location of an interview may be one of many factors contributing to a custody determination, the majority seems to imply that because Detective Van Kerkhove interviewed T.F. at the police station, he automatically subjected T.F. to an "intimidating and authoritarian atmosphere." I disagree with such an overreaching conclusion. I also disagree with the majority's reasoning that T.F. was in custody because "T.F. was the only suspect and [Detective Van Kerkhove] wanted to question T.F. so as to elicit incriminating statements from him." The fact that an interview occurs at a police station, and the fact that an investigation has narrowed to a particular suspect are "not sufficient [facts] to create a custodial interrogation atmosphere." *State v. Hutlzer*, 9th Dist. No. 21343, 2003-Ohio-7193, at ¶18. The majority's reasoning strays from this Court's precedent regarding these issues.

{¶45} Even if T.F. was in custody, I disagree with the majority's conclusion that he did not validly waive his *Miranda* rights. Detective Van Kerkhove explained T.F.'s *Miranda* rights to him more than once and specified that T.F. had the right not to talk. T.F. confirmed more than once that he understood his rights. While T.F. indicated that he was confused about whether he and Detective Van Kerkhove were going to talk "[r]ight now," his confusion did not relate to the *Miranda* rights themselves and came after he had indicated twice that he understood those rights. Moreover, the record supports the conclusion that Detective Van Kerkhove's prompting T.F., "[i]s that a yes or no?" was not attempt to force a response, but a request that T.F. verbalize his nonverbal response. The record does not contain any evidence that T.F.'s waiver was the result

of intimidation, coercion, or deception on the part of any person. See *Dailey*, 53 Ohio St.3d at 91. Accordingly, I would conclude that T.F. validly waived his *Miranda* rights.

{¶46} I also would conclude that T.F.'s confession was voluntary based on the totality of the circumstances. The sound recording of T.F.'s interview reveals that Detective Van Kerkhove maintained an even, friendly tone throughout the interview, clarified questions when possible, and allowed T.F. time to respond. The sound recording also confirms Detective Van Kerkhove's and Mother's testimony that T.F. gave nonverbal responses throughout the course of his interview. It is apparent from the pauses that occur in the sound recording after a question is posed to T.F. and the inflection of Detective Van Kerkhove's and Mother's voices when they then ask T.F. "[i]s that a yes or no?" that T.F. had responded nonverbally to a question. It is also apparent when T.F. did not respond to a question at all. When T.F. did not understand or hesitated to answer a question, Detective Van Kerkhove explained the question to T.F. again or waited for a response. He did not ask T.F. "yes or no?" Accordingly, Detective Van Kerkhove's and Mother's "yes or no" questions to T.F. were not demands for T.F. to answer. They were simply reminders to T.F. to speak the nonverbal response that he was giving for the benefit of the recording. Based on the foregoing, I would conclude that the trial court did not err in determining that T.F.'s confession was voluntary.

{¶47} In summary, I would conclude that T.F. was not in custody, but that even if he was, his *Miranda* waiver was effective and his confession was voluntary. Accordingly, I would affirm the trial court's denial of T.F.'s motion to suppress.

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