AFFIRM; and Opinion Filed August 18, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00106-CR

JACOB LEE BOYD, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause No. F15-33746-U

SUPPLEMENTAL MEMORANDUM OPINION ON REMAND

Before Justices Lang-Miers, Myers, and Boatright[1]
Opinion by Justice Lang-Miers

Appellant was 17 years old when he strangled his estranged girlfriend. A jury convicted him of murder and assessed punishment at 80 years in prison and a $10,000 fine. On original submission, we affirmed the trial court's judgment. *Boyd v. State*, No. 05-17-00106-CR, 2017 WL 1149667, at *6 (Tex. App.—Dallas Mar. 28, 2017) (mem. op., not designated for publication), *judgm't vacated*, No. PD-0330-17, 2017 WL 3091402 (Tex. Crim. App. June 28, 2017) (per curiam) (not designated for publication). The Court of Criminal Appeals, however, concluded that we did not address the third issue under Supreme Court jurisprudence, vacated our judgment, and asked us to address the third issue. *Boyd*, 2017 WL 3091402, at *1. Having

[1] The Honorable Martin Richter, Justice, Fifth District Court of Appeals at Dallas, Retired, sitting by assignment, participated in the original submission of this cause. The Honorable Jason Boatright has reviewed the record and the briefs in this cause.

now considered appellant's third issue under Supreme Court jurisprudence, we resolve it against him and affirm the trial court's judgment.

BACKGROUND

Because we set forth the facts in detail in our opinion on original submission, we only briefly summarize them here. *See Boyd*, 2017 WL 1149667, at *1–*4. Appellant and RW dated in high school in an on-again, off-again relationship. After their last break-up, appellant pleaded with RW to meet him at his friend's house. RW finally agreed. At the friend's house, appellant and RW began arguing and RW tried to leave. The argument led to a fight during which appellant strangled RW. Appellant told the Irving police officer who responded to the 911 call that he "choked" RW.

At the police station, two detectives interviewed appellant and recorded the interrogation. Before the detectives asked questions of appellant, one of the detectives read to him the rights afforded under *Miranda v. Arizona*, 384 U.S. 436 (1966). The detective asked appellant if he understood these rights; appellant nodded and said "yes." The officer said, "Yes?" Appellant nodded again. The detective asked appellant for his full name, date of birth, home address, and work history, and they talked about school and appellant's work at Braum's. Then the detective asked appellant about his relationship to the deceased. The detective did not ask appellant to expressly waive his rights under *Miranda* before he started questioning appellant about the murder.

The State offered the recording of this custodial interrogation into evidence at trial, and appellant objected on the basis that appellant "was not properly Mirandized at the time of giving his statement and we feel like that because the nature of his age at the time he was giving the statement that they didn't follow the constitutional requirements." The trial court held an evidentiary hearing outside the jury's presence during which the court watched the beginning of the recorded statement and asked appellant's age at the time the statement was given. At the

conclusion of the hearing, appellant argued that the statement was not admissible under Supreme Court jurisprudence because "when interrogating individuals under . . . 18 years of age . . . police detectives need to take special precautions." He said failure to take "these special precautions" does not "per se, violate[] their constitutional rights," but in this case the officers did not take "these special precautions." The trial court overruled appellant's objection and admitted the statement into evidence.

DISCUSSION

In issue three, appellant contends that the trial court abused its discretion by admitting his statement into evidence because he was 17 years old at the time he gave the statement and was "a juvenile under Supreme Court jurisprudence" and "entitled to be treated as a juvenile, with all the additional protections that pertain thereto." His specific complaint is that Supreme Court jurisprudence requires more than reading the rights under *Miranda* to a suspect under age 18; he contends it requires police to obtain an express waiver of those rights before questioning can begin. He argues that in this case, the police "just explained the rights and then started talking to [him]."

Appellant cites several Supreme Court cases discussing how suspects who have not attained the age of 18 have a disadvantage in criminal proceedings. Those cases recognize that suspects under age 18 are more vulnerable to the pressures of custodial interrogation and may confess to a crime they did not commit because they lack the maturity and judgment to assess the consequences of their decisions. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). But none of those cases established a rule requiring police to obtain an express waiver of *Miranda* rights from suspects under age 18 before questioning them about their involvement in criminal activity.

In *Miller*, *Graham*, and *Roper*, the Supreme Court dealt with issues of punishment for defendants under the age of 18, not with matters related to custodial interrogation or *Miranda*. In those cases, the Court conducted thoughtful analyses about the differences between juveniles and adults in criminal proceedings. For example, those cases recognized that "juveniles have diminished culpability and greater prospects for reform" and, as a result, "'are less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). The Court also referred to juveniles' "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking," and the difficulty "'even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id*. (quoting *Roper*, 543 U.S. at 569, 573).

For those reasons, in *Roper*, the Court established a categorical rule that the death penalty for a defendant under age 18 was "disproportionate punishment for juveniles" and constituted cruel and unusual punishment in violation of the Eighth Amendment. 543 U.S. at 564, 568. Five years later in *Graham*, the Court established another categorical rule: a sentence of life in prison without the possibility of parole for a nonhomicide crime committed by a juvenile offender was cruel and unusual in violation of the Eighth Amendment. *Graham*, 560 U.S. at 79. And two years after that, the Court held that a mandatory sentence of life imprisonment without the possibility of parole for an offender under age 18 violated the Eighth Amendment. *Miller*, 567 U.S. at 479. The Court said that a mandatory sentencing scheme "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' . . . and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id*. at 465 (quoting *Graham*, 560 U.S. at 68, 74). The Court held that an appropriate sentencing scheme requires the factfinder "to take into account how children are

different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 479 & n.8.

Appellant also cites *Eddings v. Oklahoma* to support his argument; it also involved a sentencing issue. In that case, the 16-year-old Eddings killed a police officer and was convicted of murder and sentenced to death. 455 U.S. at 105–06. It was undisputed that the trial court considered Eddings' age as a mitigating factor when assessing the death penalty. *Id*. at 109. But the trial court refused to consider the "substantial evidence" that Eddings offered concerning his violent background and troubled youth. *Id*. at 107–08. The Supreme Court said this was error because "'the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Id*. at 110 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)).

The case appellant relies on most heavily, *J.D.B. v. North Carolina*, involved a failure to provide the warnings required by *Miranda*. In that case, a 13-year-old student was removed from his class and questioned by police about a crime. 564 U.S. at 265. The police did not read the child his *Miranda* warnings, did not allow him to speak with his grandmother, and did not inform him he was free to leave the room. *Id*. at 266. The child sought suppression of his statements arguing he was interrogated without having been warned under *Miranda*. *Id*. at 267. The trial court concluded the child was not in custody at the time he gave the statements and denied the motion. *Id*. at 268. The North Carolina Court of Appeals and the North Carolina Supreme Court agreed with the trial court, expressly declining to consider the child's age when conducting the custody analysis. *Id*. After examining the purpose of *Miranda* and reviewing its prior decisions about how children are different from adults, the Supreme Court held "that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer," age is a factor to be considered in determining whether a child

was in custody such that *Miranda* warnings were required to be read before questioning. *Id*. at 277. The Court concluded that it was "beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." *Id*. at 264–65. The Court remanded the case to the state courts to address the custody determination, "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time." *Id*. at 281.

Here, it is undisputed that appellant received *Miranda* warnings before making a statement. Consequently, *J.D.B.*'s facts are different. As additional support for his argument, however, appellant compares the method of interrogation used by the detective in this case to the "question-first tactic" used by the police in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the police had a "protocol for custodial interrogation" in which they did not give *Miranda* warnings until after they got a confession, then they would provide the warnings and "lead[] the suspect to cover the same ground a second time." *Id*. at 604. Appellant contends that the detective's tactic here of reading the *Miranda* warnings to him and then immediately talking to him without getting an express waiver had the same effect as the tactic used in *Seibert*. We disagree that the facts in this case are similar to those in *Seibert* or that *Seibert* supports appellant's argument for the requirement of an express waiver of *Miranda* for suspects under age 18. In *Seibert*, the Supreme Court condemned the "question-first tactic" because it "effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted" and "reveal[ed] a police strategy adapted to undermine the *Miranda* warnings." *Id*. at 616–17 (footnote omitted). But the Court did not require an express waiver of those warnings. *See id*.

More applicable to the issue here, in *North Carolina v. Butler*, the Court "rejected the rule" that would have required police officers to obtain an express waiver of *Miranda* rights before interrogation began. 441 U.S. 369, 379 (1979). The Court saw "no reason" to require

such "an inflexible *per se* rule." *Id*. at 375. And the Court reaffirmed this ruling in *Berghuis v. Thompkins*, 560 U.S. 370, 387 (2010) ("The *Butler* Court . . . rejected the rule . . . which would have 'requir[ed] the police to obtain an express waiver of [*Miranda* rights] before proceeding with interrogation.'") (quoting *Butler*, 441 U.S. at 379). As the Court stated, the primary "purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Id.* at 383. In determining whether a defendant has waived the rights under *Miranda*, a court examines whether the waiver was "'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id.* at 381 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). And this determination does not necessarily turn on whether there was an express oral or written waiver. *See Butler*, 441 U.S. at 373 ("An express written or oral statement of waiver of the right to remain silent . . . is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.").

Whether a particular defendant has waived his rights under *Miranda* is determined by a review of "'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id*. at 374–75 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 454 (1938)). One of the "facts and circumstances surrounding [the] case" would include a suspect's age. *See id*.; *see also J.D.B.*, 564 U.S. at 281 (requiring custody analysis to include review of all relevant circumstances, including suspect's young age); *Berghuis*, 560 U.S. at 388 (waiver based on review of "the whole course of questioning").

Appellant does not argue that his statement was involuntary or that he was unaware of the nature of the right or the consequences of his decision to answer the detective's questions. He also does not argue that the trial court refused to consider his age in ruling on his objection to the

admission of his statement. Instead, he asks this Court to draw a bright line and create a rule that suspects under age 18 must expressly waive rights under *Miranda* before being questioned about their involvement in a crime or else the custodial statement is inadmissible. But the Supreme Court has not drawn this bright line.[2] *See id*. And we decline to create this "inflexible rule" when the Supreme Court has chosen not to do so. *See Berghuis*, 560 U.S. at 387; *Butler*, 441 U.S. at 376.

In this case, the record shows that the trial court asked about appellant's age and was aware appellant was 17 years old at the time he gave his statement. There is nothing in the record to indicate the trial court did not factor appellant's age in determining the admissibility of appellant's statement. Based on our review of Supreme Court jurisprudence, we conclude that the trial court did not abuse its discretion by admitting the statement into evidence. We resolve issue three against appellant and affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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[2] Appellant acknowledges that current Supreme Court jurisprudence does not require an express waiver, but he argues he is "trying to see where the Supreme Court might take this rule." He asked "this Court to look at where the evolution of the law might go or should go." He said "it could take the Supreme Court another 5 to 10 years to finally decide this issue," but he believed the requirement of an express waiver from a suspect under age 18 before questioning could begin was "consistent with the Supreme Court cases" and there was "no reason Texas law couldn't be at the cutting edge of the evolution instead of following in the wake of the evolution."

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JACOB LEE BOYD, Appellant	On Appeal from the 291st Judicial District Court, Dallas County, Texas
No. 05-16-00106-CR V.	Trial Court Cause No. F15-33746-U.
	Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Myers and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 18th day of August, 2017.