IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOCEPHUS OSBORN, Appellant.	No. 40049-9-II UNPUBLISHED OPINION

Johanson, J. — A jury found Jocephus Osborn guilty of 14 counts of residential burglary, 5 counts of first degree trafficking in stolen property, 5 counts of first degree theft, 2 counts of second degree theft, 1 count of theft of a motor vehicle, and 1 count of first degree burglary. On appeal, he argues that statements by interrogating officers constituted promises that made his confession involuntary under both due process and *Miranda*.[1] We disagree and affirm the trial court's denial of Osborn's suppression motion and affirm his convictions.

FACTS

In June and July 2008, Jocephus Osborn and several companions broke into a number of homes in Pierce County and stole property. A Tacoma Power line crew noticed Osborn and his

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

companions at 2026 121st Street East in Tacoma, one of the homes burglarized, and informed law enforcement. One of the Tacoma Power employees identified Osborn as one of the men at the scene.

On July 21, 2008, Deputy Kevin Fries arrested Osborn for burglary and took him to the South Hill precinct for questioning. At the station, Detective Deborah Heishman advised Osborn of his *Miranda* rights. Osborn initialed each line of the warning form, indicating that he understood his rights, that he waived those rights, and that he wished to voluntarily answer questions. After Osborn waived his rights and agreed to talk, Deputy Fries told Osborn that a witness had identified Osborn and his companions and asked for his cooperation. Deputy Fries told Osborn that his cooperation would help and the fact that he cooperated would be conveyed to the prosecutor. At some point, Detective Heishman also informed Osborn that honesty would make him look better, and with so many charges honesty would only help him.

Osborn agreed to talk about the burglaries he had committed and he gave a verbal and written statement listing 10 homes that he had burglarized. Because the facts began to get complicated due to the high number of burglaries to which Osborn confessed, the officers asked to tape record Osborn's statement. He agreed. Detective Heishman readvised Osborn of his *Miranda* rights, and Osborn gave a tape-recorded statement. The interview lasted about one-and-a-half hours. After the tape-recorded interview, Osborn agreed to Deputy Fries's request to go with the deputy to point out the various residences that he and his co-defendants had burglarized.

The State charged Osborn with 17 counts of residential burglary, 6 counts of first degree trafficking in stolen property, 8 counts of first degree theft, 1 count of theft of a motor vehicle,

and 1 count of first degree burglary. At the CrR 3.5 hearing, both Deputy Fries and Detective Heishman denied making any threats or promises to get Osborn to give a statement. They also denied ever promising that if Osborn cooperated, he would be charged for only one crime, rather than the several to which he confessed. Detective Heishman stated that she normally tells suspects that if they are "honest, it always makes [them] look better. And when there are so many charges, the honesty is only going to help [them]." Verbatim Report of Proceedings at 31. Detective Heishman stated that she would never offer to have charges eliminated for a suspect because she does not have that authority.

At the CrR 3.5 hearing, Osborn testified that after the interview and before the deputy put him in the car, Deputy Fries told him that if he were to point out all the houses he burglarized, Osborn would be charged with only one crime. Osborn testified further that Deputy Fries told him that if he did not point out all the houses he burglarized, he would be charged with each crime separately.

The trial court found that Osborn signed the *Miranda* form, that he initialed the form indicating he understood his rights, and that he voluntarily wished to answer questions. The trial court also found that Deputy Fries did not promise that if Osborn cooperated that the prosecutor would roll all the charges into one, only that he would tell the prosecutor that Osborn had cooperated. The trial court found that this was not a coercive situation and that Osborn's statements were freely and voluntarily made, and thus admissible.

The jury found Osborn guilty of 14 counts of residential burglary, 5 counts of first degree trafficking in stolen property, 5 counts of first degree theft, 2 counts of second degree theft, 1

count of theft of a motor vehicle, and 1 count of first degree burglary.[2] Osborn appeals.

ANALYSIS

Voluntary Confession

Osborn argues that the trial court erred in denying his CrR 3.5 motion to suppress. The trial court did not enter written findings of fact and conclusions of law following the CrR 3.5 hearing. The trial court must state in writing: (1) the undisputed facts, (2) the disputed facts, (3) conclusions as to the disputed facts, and (4) conclusion as to whether the statement is admissible and the reasons therefore. CrR 3.5(c). Nonetheless, "failure to enter findings required by CrR 3.5 is considered harmless error if the [trial] court's oral findings are sufficient to permit appellate review." *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003). Here, the trial court's oral findings are sufficient.

We review the trial court's decision after a CrR 3.5 hearing to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997); *State v, Hughes*, 118 Wn. App. 713, 722, 77 P.3d 681 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025 (2003). Further, we review the trial court's conclusions of law de novo. *Solomon*, 114 Wn. App. at 789. We defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and

[2] The jury found Osborn not guilty of three counts of residential burglary and one count of first degree trafficking in stolen property. After both sides rested, the trial court granted the State's motion to dismiss count XIX, first degree theft.

decisions regarding the persuasiveness of evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

The Fifth Amendment right against compelled self-incrimination requires police to inform a suspect of his or her *Miranda* rights before a custodial interrogation. *Cunningham*, 116 Wn. App. at 227. Here, the parties do not dispute whether Osborn was subject to custodial interrogation. Instead, Osborn argues that he did not voluntarily waive his right to remain silent. We disagree.

Osborn assigns error to the trial court's factual finding that Deputy Fries did not promise Osborn he would be charged with a single offense if he cooperated, but promised him only that the prosecutor would learn of Osborn's cooperation. Substantial evidence supports this finding. Deputy Fries denied stating that if Osborn cooperated, the prosecutor would roll all the charges into one charge or any number of charges. Deputy Fries testified that, after Osborn waived his rights and agreed to talk, he asked for Osborn's cooperation, told Osborn that cooperation helps, and said that he (Deputy Fries) would let the prosecutor know Osborn had cooperated. While Osborn's testimony contradicted Deputy Fries's claim, this is a matter of credibility that we do not review. *Camarillo*, 115 Wn.2d at 71. Substantial evidence supports the trial court's finding of fact.

Osborn next assigns error to the trial court's conclusions of law that the officers' statements were not coercive and that Osborn voluntarily waived his right to remain silent. Osborn insists that the officers' statements about honesty and cooperation "turned Miranda on its

head" by convincing him that asserting his right to remain silent would be used against him, while incriminating himself would benefit him by earning him the officers' and prosecutor's good will. Br. of Appellant at 7. We reject this argument.

To be admissible in Washington, Osborn's confession must pass two voluntariness tests: (1) the due process test, whether the statement was the product of police coercion; and (2) the *Miranda* test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177, *review denied*, 118 Wn.2d 1006 (1991).

A. Due Process Voluntariness

Under the due process voluntariness test, we evaluate whether a law enforcement official's behavior overcame a suspect's ability to freely offer a confession. *Reuben*, 62 Wn. App. at 624.

> Whether a confession is free and voluntary is not determined by whether the officer's conduct is shocking or the confession is cruelly extorted, but whether it was extracted by any sort of threats, violence, or direct or implied promises, however slight. A confession that is the product of coercion, physical or psychological, is involuntary and not admissible.

State v. Riley, 17 Wn. App. 732, 735, 565 P.2d 105 (1977), *review denied*, 89 Wn.2d 1014 (1978). "This broadly stated rule has not been applied to invalidate, per se, all statements made by a suspect in response to a promise made by law enforcement personnel." *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988). The voluntariness of a confession is determined by examining the totality of the circumstances in which the confession was made. *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). We will not overturn the trial court's determination that statements were voluntarily made if there is substantial evidence in the record,

from which the trial court could find voluntariness by a preponderance of the evidence. *Reuben*, 62 Wn. App. at 624.

Osborn argues that the officers' promises overcame his will to make rational decisions in violation of his due process rights.[3] We disagree.

An officer's promise to inform the prosecutor about the suspect's cooperation "does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect. *Leon Guerrero*, 847 F.2d at 1366. To be involuntary, such a promise must be accompanied by threats or other coercive practices. *Leon Guerrero*, 847 F.2d at 1366 n.2.

---

[3] First, Osborn cites article I, § 9 of the Washington Constitution and the Fifth Amendment in support of his argument. But in discussing a *Miranda* argument, our Supreme Court has already held that "Our state constitution article I, section 9 is equivalent to the Fifth Amendment and 'should receive the same definition and interpretation as that which has been given to' the Fifth Amendment by the Supreme Court." *State v. Templeton*, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002) (quoting *City of Tacoma v. Heater*, 67 Wn.2d 733, 736, 409 P.2d 867 (1966)) (footnote omitted).

Osborn also cites article I, § 3 of the Washington Constitution and asserts that it is more protective than the Fourteenth Amendment. But our Supreme Court has performed a *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis of these two constitutional provisions in a variety of contexts and consistently determined that there are no material differences between these two constitutional provisions and that Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment. *State v. Wittenbarger*, 124 Wn.2d 467, 479-80, 880 P.2d 517 (1994); *State v. Ortiz*, 119 Wn.2d 294, 302-04, 831 P.2d 1060 (1992); *see In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001); *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 310-11, 12 P.3d 585 (2000).

Moreover, Osborn contends only that the fourth *Gunwall* factor, preexisting state law, "virtually mandates broader protection under [article I, § 3.]" Br. of Appellant at 15. Osborn cites *State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984) as authority for Washington Courts previously holding that the state constitution's due process clause is more protective than its federal counterpart. But *Davis* concerned comments on a defendant's post-arrest silence and not alleged coerced confessions. *Davis*, 38 Wn. App. at 605-06. Osborn's reliance on *Davis* is misplaced and we are not persuaded by his otherwise bald assertion that his due process rights differ under the state and federal constitution in this instance.

After Osborn waived his right to remain silent, Deputy Fries promised to report Osborn's cooperation to the prosecutor and Detective Heishman told Osborn that honesty would only help him later. Osborn does not identify any other behavior that might be deemed coercive or threatening. He does not challenge the officers' assertions that he was advised of his *Miranda* rights, acknowledged them, waived them, and agreed to talk to the officers. Substantial evidence supports that the trial court could find voluntariness by a preponderance of the evidence. Osborn's due process rights were not violated.

B. *Miranda* Voluntariness

Osborn next argues that his statements were not voluntary under *Miranda* because, by leading him to believe that "confessing to multiple offenses" would result in prosecution of only a single crime, the officers "pa[id] lip service to Miranda." Br. of Appellant at 3. This argument fails for two reasons: (1) Osborn voluntarily waived his *Miranda* rights and (2) Deputy Fries's promise to talk to the prosecutor and Detective Heishman's statement about honesty did not render Osborn's confession involuntary.

The State bears the heavy burden of showing that a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. *State v. Blanchey*, 75 Wn.2d 926, 932-33, 454 P.2d 841 (1969), *cert. denied*, 396 U.S. 1045 (1970). A confession is voluntary if made after the police advise the defendant of his or her rights and the defendant knowingly, voluntarily, and intelligently waives them. *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). The test is whether a defendant knew that he had the right to remain silent, not whether he understood the precise nature of the risks of talking. *State v. Cushing*, 68 Wn. App.

388, 393, 842 P.2d 1035, *review denied*, 121 Wn.2d 1021 (1993). Again, we review the trial court's finding of voluntariness for substantial evidence in the record, from which the trial court could find voluntariness by a preponderance of the evidence. *Reuben*, 62 Wn. App. at 624.

Here, there is substantial evidence that Osborn voluntarily waived his right to remain silent. Detective Heishman read Osborn his rights and he initialed each line of the *Miranda* form indicating that he understood his rights. Osborn also initialed the part of the form that indicated he wished to voluntarily answer questions. The officers did not make any threats or promises to Osborn in order to get him to agree to speak. When Osborn finished his verbal statement and agreed to give a tape recorded statement, the officers again read Osborn his *Miranda* rights, and Osborn again waived them. The officers did not make any threats or promises to Osborn to convince him to give a tape recorded statement. In addition, the officers interviewed Osborn in a large conference room with only two officers present. Although Deputy Fries was wearing his uniform, Detective Heishman was dressed in plain clothes. The interview lasted for about one-and-a-half hours. There is no evidence that the officers denied Osborn any necessities such as food, sleep, or bathroom facilities. Furthermore, the statements Detective Heishman made about being honest and Deputy Fries made about talking to the prosecutor did not make Osborn's confession involuntary.

The promise by police to talk to a prosecutor does not amount to an implied promise or render a confession involuntary. *State v. Putman*, 65 Wn. App. 606, 613, 829 P.2d 787 (1992), *review denied*, 122 Wn.2d 1015 (1993). In *Putman*, the police promised the defendant that they would talk to the prosecutor for him, but they did not promise that they would obtain reduced

charges in exchange for his confession. *Putman*, 65 Wn. App. at 613.

In contrast, a confession is involuntary when officers threaten to remove the defendant's child to Child Protective Services. In *Lynumn v. Illinois*, 372 U.S. 528, 533-34, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963), the police told a suspect that she would lose welfare benefits and custody of her children if she did not confess. The Court held that this behavior was inherently coercive because it did more than

> affect the suspect's beliefs regarding her actual guilt or innocence, and judgments regarding the evidence connecting her to the crime. It also distorted the suspect's rational choice . . . by introducing a completely extrinsic consideration . . . . This extrinsic consideration not only impaired free choice, but also cast doubt upon the reliability of the resulting confession, for one can easily imagine that a concerned parent, even if actually innocent, would confess and risk prison to avoid losing custody of her children and their welfare benefits.

Holland v. McGinnis, 963 F.2d 1044, 1051-52 (7th Cir. 1992) (construing *Lynumn*), *cert. denied*, 506 U.S. 1082 (1993).

Similar to *Putnam*, Deputy Fries promised to talk to the prosecutor, but he made no offers of leniency in exchange for Osborn's confession. The statements Deputy Fries and Detective Heishman made did not distort Osborn's rational choice or introduce extrinsic considerations to the interrogation, as occurred in *Lynumn*. *See also State v. Hepton*, 113 Wn. App. 673, 686-87, 54 P.3d 233 (2002) (finding defendant's statements voluntary and admissible where officers told defendant that his statements would show cooperation and trial court did not find credible defendant's claims that he was offered a Drug Offender Sentencing Alternative as an incentive to his confession), *review denied*, 149 Wn.2d 1018 (2003); *State v. Gonzales*, 46 Wn. App. 388, 401, 731 P.2d 1101 (1986) (holding that promises by police to talk to a prosecutor before a

confession were not an implied promise that rendered confession voluntary; however, that defendant was confronted with illegally seized evidence rendered his confession inadmissible because it was obtained by exploiting prior illegality); *State v. Riley*, 19 Wn. App. 289, 297, 576 P.2d 1311 (a promise of leniency alone does not automatically invalidate a confession), *review denied*, 90 Wn.2d 1013 (1978).[4]

We hold that substantial evidence supports the trial court's findings, that the trial court did not err in concluding that Osborn voluntarily waived his right to remain silent, and that Osborn's confession was admissible.

We affirm the trial court's denial of Osborn's suppression motion and affirm his convictions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Johanson, J.

We concur:

[4] Osborn mistakenly relies on *State v. Allen*, 63 Wn. App. 623, 821 P.2d 533 (1991). Allen, having been arrested the night before for assault, was reluctant to talk to the investigating officer about having been raped that night. *Allen*, 63 Wn. App. at 624-25. The officer assured her that she was the victim, not the suspect in "anything." *Allen*, 63 Wn. App. at 625. Based largely on the statements she made, the State charged Allen with being a minor in possession of intoxicants. *Allen*, 63 Wn. App. at 625 n.3, 627. The court held that Allen did not voluntarily waive her right to remain silent because she was promised that she was not being questioned as a suspect and was not informed about the possible minor in possession charges. *Allen*, 63 Wn. App. at 627. In contrast, officers informed Osborn that he had been arrested for burglary and that they were questioning him for that crime.

Armstrong, P.J.

Quinn-Brintnall, J.