IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27484-5-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
T. C.,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — T.C. appeals his conviction for third degree rape. He contends that the trial court erred by admitting his statements to police, and that there was not enough evidence to support the verdict. He also argues that the trial court exceeded its authority by imposing invalid terms of community service and delegating too much of its authority to the probation officer. We disagree with his initial arguments, find his last argument moot, and affirm.

FACTS

K.H., a fifteen-year-old female, had known fourteen-year-old T.C. for most of her

life. Her stepfather considered T.C. to be his "nephew;" K.H. considered him a very good friend in whom she could confide. On June 15, 2008, T.C. arrived at K.H.'s house to spend the weekend. The two young people decided to camp approximately a quarter-mile from the house, as they had done on previous occasions. After setting up camp, they returned to the house to watch television. While at the house, each drank a beer that was given to them by T.C.'s mother, Ms. Hart. When they returned to the campsite, they brought with them some food and a three-quarters full container of vodka that they had taken from the family trailer. At the campsite, T.C. and K.H. drank approximately half the contents of the vodka bottle, and became intoxicated.

K.H. then went inside the tent and lay down, with her legs crossed and her hands behind her head. Approximately 45 seconds later, T.C. came in, removed her pants, and, with her consent, performed oral sex on K.H. After approximately 7 minutes, T.C. began moving up her body, and pinned her arms above her head, pressing down with most of his body weight. He then penetrated her vagina with his penis. K.H. started to push T.C. away and told him to "get off me" or "stop" approximately 15 times. T.C. continued before eventually stopping. K.H. was unsure as to how long T.C. continued after she told him to stop. T.C. told a deputy sheriff that it was approximately 30 seconds before he stopped.

A few days later, K.H. informed her stepfather of the rape, and he contacted her mother and Ms. Hart. T.C. denied any wrongdoing. His mother did not believe him and took him to the police station. Cle Elum Police Chief Ferguson was informed and requested a deputy to take an assault report. Chief Ferguson met Deputy Green in the hallway and informed him that a woman was turning in her son for rape. Deputy Green then privately spoke to the mother and learned from her that she believed T.C. had committed rape. Deputy Green then asked T.C. to speak with him alone in the department's break room. After closing, but not locking, the door and sitting down, the deputy asked T.C., "What's going on, [T.C.]? Why are we here?"[1] T.C. responded, "I got drunk and raped her." Deputy Green then read T.C. his *Miranda*[2] and juvenile warnings. He acknowledged and waived his rights. T.C. told Deputy Green about the events of June 15, 2008 and gave a written statement. When the statement was finished, the deputy arrested T.C. The entire interview took approximately an hour and a half to two hours.

The prosecutor charged T.C. in the Kittitas County Juvenile Court with one count of second degree rape. Defense counsel moved to suppress all statements made to the deputy. The court denied the motion, finding that T.C. understood and voluntarily waived his rights.

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[1] The deputy testified that it was not his intent to elicit a confession, but merely to open up lines of communication with T.C.

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

Following bench trial, the court convicted T.C. of the lesser crime of third degree rape. He timely appealed to this court.

ANALYSIS

"A defendant is in custody for purposes of *Miranda* when his or her freedom of action is curtailed to a 'degree associated with a formal arrest.'" *State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)), *review denied*, 149 Wn.2d 1025 (2003). "Whether the defendant was in custody is a mixed question of fact and law." *Id.* The factual inquiry determines the circumstances surrounding the interrogation, while the legal inquiry determines whether, given the factual circumstances, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. *Id.* at 787-788.

In a CrR 3.5 hearing, the trial court addresses the factual prong of the inquiry. *Id.* at 789. These factual findings are reviewed for substantial evidence. *Id.* A *de novo* standard of review applies to the legal conclusion drawn by the trial court from the facts. *Id.* Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). This appeal challenges solely the trial court's conclusions of law.

Admissibility of Statements

T.C. first argues that his initial statement[3] to the police officer should have been suppressed by the trial court because it was a statement given in custody without the benefit of *Miranda* warnings. He primarily relies upon *State v. D.R.*, 84 Wn. App. 832, 930 P.2d 350, *review denied*, 132 Wn.2d 1015 (1997). In *D.R.*, this court held that a fourteen-year-old student was in custody for *Miranda* purposes when questioned by a police officer after being called to the assistant principal's office. *D.R.* was not informed that he was free to leave, and this, along with the boy's youth, the "naturally coercive" nature of the principal's office, and the leading questions asked by the officer contributed to the custodial nature of the interrogation. *D.R.*, 84 Wn. App. at 838.

However, this case is distinguishable from *D.R.* T.C. was not brought to the police station by officers. Rather, he was brought by his mother "precisely to have him speak with a policeman." T.C. claims that the fact he was brought by his mother made his presence at the station involuntary. However, this fact is irrelevant for purposes of *Miranda* since his mother was not a state agent. Further, Deputy Green did not lock the door to the "break room," nor did he ask the initial questions in an accusatory or threatening manner, as did the officer in *D.R.* Though T.C.'s youth, and the coercive nature of a police station must certainly be taken into account, these factors do not

[3] "I got drunk and raped her."

outweigh the voluntary nature of his presence. T.C. was not in custody for purposes of *Miranda* at the time of his initial statement to Deputy Green.[4]

T.C. next contends that the record fails to support the trial court's conclusion that his responses to Deputy Green were voluntary.

"Whether a juvenile has knowingly and voluntarily waived his *Miranda* rights is determined by a 'totality-of-the-circumstances' approach." *State v. Jones*, 95 Wn.2d 616, 625, 628 P.2d 472 (1981) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979)).

> [This approach] permits–indeed, it mandates–inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Id. (quoting *Fare*, 442 U.S. at 725). However, where a trial court has determined that a *Miranda* waiver was voluntary, we will not disturb that finding on appeal if the record reflects substantial evidence by which the court could have reached that conclusion. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

The record shows that the trial court knew T.C.'s age. T.C. also testified that he

[4] The question of whether T.C. was in custody at the time of his initial statement is not determinative of this appeal. Even if the trial court erred in admitting the initial response, it was harmless error in light of the post-*Miranda* statements given by T.C., as discussed below.

had finished the eighth grade, and that his grades were "pretty good." T.C. further testified that, although he did not understand the meaning of the word "waiver," he did understand the meaning of the words used to comprise the written waiver. The trial court also knew T.C.'s background and lack of criminal history. This evidence, in addition to the testimony of Deputy Green, is sufficient for the trial court to have found that T.C. voluntarily waived his rights. The initial statement is admissible.

Arguing from the premise that the initial admission should have been excluded, T.C. next contends that his statements after the administration of the *Miranda* warning should be suppressed under the "cat-out-of-the-bag" doctrine. This argument fails because the initial statement was properly admitted. It also fails even if the statement should have been suppressed.

The United States Supreme Court authoritatively answered the latter question in *Oregon v. Elstad,* 470 U.S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985). There the court held that a noncoerced, pre-*Miranda* admission by a suspect does not taint the subsequent post-*Miranda* warnings statement. Thus, whether or not his first statement should have been suppressed, T.C.'s statement following his waiver of rights was properly admitted.

Nonetheless, T.C. points to *State v. Baruso*[5] for the proposition that the cat-out-of-

[5] 72 Wn. App. 603, 865 P.2d 512 (1993), *review denied*, 124 Wn.2d 1008 (1994).

the-bag doctrine still has viability in Washington, and should be applied to this case. T.C. argues that the viability of the doctrine is implicit in the analysis of *Baruso*, despite *Oregon v. Elstad*.

T.C. misreads *Baruso*. In *Baruso*, the court applied *Elstad* to admit the post-*Miranda* statements where the initial admission was voluntary, and no police coercion was present. Here, as noted above, T.C.'s initial response was noncoerced. Like the *Baruso* court, we apply *Elstad* and find that the trial court properly admitted T.C.'s post-*Miranda* statements.[6]

Sufficiency of Evidence

T.C. also challenges the sufficiency of the evidence to support the verdict, contending that two elements were not established. Such challenges are reviewed to see if there was evidence from which the trier-of-fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the

[6] T.C. also argues that the cat-out-of-the-bag doctrine should apply here because his initial statement was inculpatory. However the determinative question under *Elstad* is whether the statement was coerced rather than whether it was inculpatory or exculpatory. *See State v. Ustimenko*, 137 Wn. App. 109, 116, 151 P.3d 256 (2007) (noting that even if pre-*Miranda* statements were not admissible, post-*Miranda* statements were admissible where no evidence of police coercion present).

prosecution. *Id.*

T.C. initially argues that the State failed to prove beyond a reasonable doubt that he was not married to K.H., as required by RCW 9A.44.060(1). The State need not demonstrate this element through direct evidence; circumstantial evidence may suffice. *See State v. Rhoads*, 101 Wn.2d 529, 532, 681 P.2d 841 (1984) (concluding that sufficient evidence existed to prove nonmarriage through testimony at trial); *State v. Shuck*, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983) (finding evidence of a one-month acquaintance, age of complainants, school grade, and boyfriends sufficient to demonstrate nonmarriage to defendant); *State v. May*, 59 Wash. 414, 109 P. 1026 (1910) (holding evidence of victim's age, school, name use, and trial court's operative assumption of non-marriage sufficient to support rape conviction where nonmarriage an element).

Here, there is sufficient circumstantial evidence to demonstrate that K.H. and T.C. were not married. K.H. testified that at the time of the trial she was sixteen and about to enter the eleventh grade. The court had evidence that T.C. was 14. Further, K.H. testified that her relationship to T.C. was that of a "good friend" and that T.C. was her "stepdad's nephew." This evidence is sufficient to demonstrate beyond a reasonable doubt that K.H. was not married to T.C., particularly in light of RCW 26.04.010.[7]

[7] RCW 26.04.010 requires an individual be eighteen years old in order to enter into a marriage contract absent a superior court order.

T.C. next contends that he acted within a reasonable time after consent to sexual intercourse was withdrawn and clearly communicated to him. There are two problems with this claim. First, the record never shows that the victim ever consented to the charged act of intercourse, so there is no issue of withdrawal of consent. Second, the case was charged on a theory of lack of consent that was clearly expressed by the victim's words or conduct. RCW 9A.44.060(1)(a). The State did not rely upon a theory of withdrawn consent; rather, it relied upon a theory that T.C. continued to have sexual intercourse with complainant after she said "stop." The trial court entered findings of fact that reflect a lack of consent to intercourse that was expressed by the victim. Viewed most favorably to the State, there is substantial evidence in the record to support the verdict. The evidence was sufficient.

Community Supervision

T.C. contends that the trial court exceeded its authority by imposing invalid terms of community service, and delegating too much of its authority to the probation officer. We need not address these contentions because the issue is moot.

An issue is moot if a court can no longer provide effective relief, though a court may still consider the issue if it is one which is of continuing and substantial public interest. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004).

This court is unable to provide T.C. effective relief, as the term of his supervision presumably ended September 19, 2009. The issue is not one of substantial or continuing public interest because it is of a private nature. Accordingly, it is moot.

The conviction is affirmed.

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.

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Korsmo, J.

WE CONCUR:

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Kulik, A.C.J.

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Sweeney, J.