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NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.
STATE of Kansas, Appellee,
v.
Ronnie L. PONDER Appellant.
No. 94,108.
March 2, 2007.

Appeal from Johnson District Court; John Anderson III, judge. Opinion filed March 2, 2007. Affirmed.
Michelle Davis, of Kansas Appellate Defender Office, for appellant.
Steven J. Obermeier, assistant district attorney, Paul J. Morrison, district attorney, and Phill Kline, attorney general, for appellee.

Before CAPLINGER, P.J., HILL and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.
*1 We are asked here to overturn a conviction for aggravated criminal sodomy by a defendant who claims his videotaped confession was not voluntary. He also believes that the trial court should have removed all of the portions of the videotape of the interview that he had requested and should not have given a concluding instruction to the jury, which the defendant thought forced the jury to reach a verdict. We hold that while subtle techniques were applied by the police officer conducting the interview here, none of the tactics are illegal, and we conclude the confession given by the defendant was voluntary. Since Ponder failed to object at trial over the removal of the portions of the videotape, that issue is not preserved for appeal, and the *Allen*-type instruction given before the jury retired for deliberations is not coercive. We therefore affirm.

Background Facts and Prior Proceedings

Ronnie L. Ponder was taking care of his son, Z.T.H., while Candice, the boy's mother, went to work in December 2002. Candice bathed 21-month-old Z.T.H. and changed his diaper before she went to work. Candice did not notice any injuries on Z.T.H. at that

time. When she went to work that evening, she left Z.T.H. in the care of his father. Later that night, Ponder called Candice and told her that while Z.T.H. was playing in his room alone, Z.T.H. had taken off his diaper and had fallen on a toy. Ponder informed Candice that there was some redness and bleeding from Z.T.H.'s bottom but that Z.T.H. was now sleeping. Candice assumed that the bleeding was a surface wound, so she stayed at work until her shift ended the next morning. When Candice arrived home, Z.T.H. was sleeping in his bed and Ponder was leaving for work. When Candice changed Z.T.H.'s wet diaper later that day, she did not notice any injuries on Z.T.H.'s bottom. The next day, however, after Z.T.H. had a bowel movement, Candice noticed some bleeding in his diaper. She then examined the area around his anus and realized that the outside of Z.T.H.'s rectum was very red and irritated. She took him to the hospital.

At the hospital, the medical staff examined Z.T.H., finding three fissures, one being rather deep, in his anus. The nurse practitioner believed that Z.T.H.'s injuries were consistent with nonaccidental trauma, such as penetration from a penis, fingers, or other objects, although the doctors did not identify intentional penetration as the cause of the injury. They limited their diagnoses to anal fissures. The nurse practitioner collected cultures from Z.T.H.'s throat, penis, and anus. The samples were provided to the police for DNA testing. The DNA results showed a match only for Z.T.H. and not for Ponder.

Interview With Detective

Detective Bill Wall was assigned to investigate this case. Ponder drove himself to the station and met with Wall in an interview room. Before the interview began, Wall explained to Ponder that his interview was voluntary, that he could leave at any time, and that he was not under arrest.

*2 The interview lasted for 1 hour and 45 minutes and was recorded on videotape. Ponder was neither handcuffed nor restrained during that time. In the interview, Ponder initially denied that he sexually molested his child. After a while, Ponder admitted that he inserted his index and middle finger into Z.T.H.'s rectum and that he rubbed Z.T.H.'s bottom against his penis. At the end of the interview, Wall did not place Ponder in custody. Instead, Detective Wall informed Ponder that it would be up to the district attorney whether the State would file charges.

A few days later, the State charged Ponder with aggravated criminal sodomy. Ponder filed a motion to suppress the admissions he made to Wall during the interview, claiming that his alleged admission had been coerced and, thus, was involuntary. Later, in November 2003, Ponder also filed a motion to remove portions of the videotaped interview. In that motion, Ponder requested the district court redact six portions of the videotape because they were irrelevant and prejudicial.

The court heard both motions at the same hearing where Wall's testimony and the videotaped interview were presented. Based on that evidence, the district court denied Ponder's motion to suppress, ruling that Wall's conduct was “a pretty classical example of a well-conducted police interview.” The district court then reviewed Ponder's motion to

redact the videotaped interview. After discussing the questioned portions with both parties, the court granted the majority of Ponder's requests for redaction. The jury found Ponder guilty of aggravated criminal sodomy. The court sentenced Ponder to 117 months' imprisonment.

Statement to Detective

Here, we state our standard of review, examine the district court's factual findings concerning the defendant's statement and the videotape, and, after reviewing the appropriate authorities, offer our legal conclusions why Ponder's statement is voluntary.

There are two areas examined when reviewing the suppression of a confession. The appellate court reviews the factual underpinnings of the decision under a substantial competent evidence standard and reviews the ultimate legal conclusion drawn from those facts de novo. The appellate court does not reweigh evidence, assess the credibility of the witnesses, or resolve conflicting evidence. *State v. Ackward,* 281 Kan. 2, 8, 128 P.3d 382 (2006).

To determine whether a defendant's confession is voluntary, a court must look at all of the circumstances while considering the following four factors: (1) the duration and manner of the interrogation; (2) the ability of the accused to communicate on request with the outside world; (3) the age, intellect, and background of the accused; and (4) the fairness of the officers in conducting the investigation. "The key inquiry is whether the statement is a product of the accused's free and independent will. [Citation omitted.] Coercion in obtaining a confession can be mental or physical." *State v. Jackson,* 280 Kan. 16, 36, 118 P.3d 1238 (2005), *cert. denied* 126 S.Ct. 1363 (2006); see *State v. Swanigan,* 279 Kan. 18, 23-24, 106 P.3d 39 (2005). The prosecution must prove by a preponderance of the evidence that the confession is voluntary. *Swanigan,* 279 Kan. at 23.

*3 Ponder's complaints about the interview are straightforward. He asserts that his will was overborne by Detective Wall's coercion. Ponder points to the following reasons: (1) Wall's false misrepresentation of the evidence, and (2) Wall's promises and threats that his admission would result in minimal consequences. Ponder states that this allegation is evidenced in the videotape when one compares Wall's aggressive questioning technique against Ponder's vulnerability and limited intellect.

The district court when ruling on the motion to suppress made extensive findings concerning the interview:

"The Court has viewed the tape and heard the testimony of the detective. First, it's clear to the Court this was a voluntary statement that was given. The defendant was invited down to the police station by the officer. He drove his own car. He clearly told him he was free to leave at any time during the course of the interview.

"The detective went into some preliminary information that took a significant period of time at the beginning of the interview, background information, discussions concerning

the defendant and his family and relationships with his family and hometown and so on. The entire, what I'm going to characterize as the first portion of the interview right up until the first time the detective departs for, what, somewhere in the neighborhood of six minutes was composed of that sort of questioning. Then moving on into some general questioning concerning the facts of the offense that the defendant is charged with. All very low key.

"The defendant, during the course of the interview, of course, did indicate to the detective that he hasn't finished high school, that he had been involved in Special Education classes. The information, of course, is that perhaps he had some learning disabilities, but the case law is clear that in viewing these interviews and considering these suppression motions, the course is to consider the totality of the circumstances. And I had the opportunity for-even with the period that the defendant wasn't actually talking with the detective, I think we still have very close to an hour and ten minutes or so, or 15 minutes or so on actual discussion. What appeared to the Court is that defendant was reasonably articulate and intelligent, understood the questions, and did not come across as an individual that was suffering from any mental disease or defect or lack of ability to understand the questions and participate in the interview process. The interview or interrogation, whatever you want to call it, was freely and voluntarily given. Under the circumstances, that did not require *Miranda.*

"The simple fact of the matter is that police interviews are and interrogations deal with the subject matter that folks aren't enthusiastic about talking about ordinarily. And that an interview or interrogation cannot consist of bringing an individual into an interview room, asking if they committed a crime, and then accepting the end of interview and go on about our business.

*4 "Techniques are used by law enforcement officers that include half truths and sometimes out and out deceit. These are both valuable tools in this process. The case law is clear promising things and enticements of that nature are not to be done. That didn't occur in this case. And indeed the tools, deceit or half truths, if you will, are pretty de minimus. The detective was making references to getting help, mental health counseling and treatment.

"Interestingly enough, the last program that's still in effect at the Kansas State Penitentiary is the sexual offender treatment program. That is something that continues to be a part of rehabilitative process of incarceration. At no time did I hear this detective promise any disposition or that the defendant wouldn't go to jail in the event he were convicted of the offense. This was frankly, in the Court's mind, a pretty classical example of a well-conducted police interview."

After making those findings, the district court denied Ponder's motion to suppress.

Our standard of review requires us to first determine whether the factual underpinnings of the district court's decision were supported using the substantial competent evidence standard.

"Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Stated another way, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. [Citation omitted.]" *State v. Luna,* 271 Kan. 573, 574-75, 24 P.3d 125 (2001).

After reviewing the videotape and Wall's testimony, it appears that this standard has been met. Here, the district court pointed to facts relevant to the four factors discussed in *Jackson* and *Swanigan* that determine whether a confession is voluntary. In addition, the record corroborates the facts that the district court utilized in making its decision. We find that substantial evidence supported the district court's denial of Ponder's motion to suppress his confession.

We now review the relevant facts as applied to the four factors cited in *Jackson* and *Swanigan.*

1. *Duration and Manner of the Interrogation.* Ponder does not complain on appeal that this factor influenced his involuntary confession. Ponder's interview lasted approximately 1 hour and 45 minutes, beginning at 11:27 a.m. and ending at 1:14 p.m. Two breaks were taken: one at 12:12 p.m., which lasted for 6 minutes, and another at 12:40 p.m., which lasted for 22 minutes. During both breaks, Ponder remained alone in the interview room. About 1 hour into the interview, Ponder made his admissions. At approximately 12:26 p.m., Ponder admitted to penetrating Z.T.H.'s rectum with his fingers, and at approximately 12:32 p.m., Ponder admitted to rubbing his penis in the same area.

The evidence also supported the argument that Detective Wall's manner was low key. Ponder testified that during the interview Wall was nice most of the time and never yelled at him. In addition, Ponder was not handcuffed or restrained while being interviewed.

*5 2. *Ability of the Accused to Communicate on Request with the Outside World.* It is clear that Ponder had the ability to communicate with the outside world. First, the videotape reveals that at the beginning of the interview. Second, at trial Ponder testified that he understood Wall's statements to mean that he could leave the interview if he desired.

3. *Age, Intellect, and Background.* In his allegation that Ponder was susceptible to Detective Wall's coercion, Ponder makes a reference to his own limited intellect. Here, Detective Wall was aware that Ponder had participated in the special education curriculum but still dropped out of high school because he had difficulty keeping up with classes. Wall, however, believed that Ponder's intellect level was adequate because of Wall's observation of Ponder's communication skills and because Ponder had a job. At the suppression hearing, the district court's observations of the videotaped interview supported Wall's conduct in continuing on with the interview.

Now, on appeal, Ponder cites to a psychological evaluation in a footnote, stating that

Ponder gave an *impression* of low average functioning and that his scale IQ was 85. This psychological evaluation was not introduced to the district court at the suppression hearing because it was created specifically for Ponder's sentencing hearing.

After reviewing the evidence before the district court and his psychological evaluation, it does not appear that Ponder's intellect or anxiety levels rendered his confession involuntary. First, Ponder's IQ was sufficient to allow him to pursue vocational training despite the possibility of a learning disability. Second, although the psychologist opined that Ponder may have been pressured into making a false confession, his anxiety levels generally resolved itself without requiring further treatment. Third, during the interview, Ponder did not appear to be mentally challenged or lacking the ability to understand Wall's questions.

4. *Fairness of the Officers in Conducting the Investigation.* Ponder posits three complaints about false information, promises, and threats given by the Detective.

False Information. During the interview, Wall told Ponder that his investigation proved that Ponder had sexually molested Z.T.H. Notably, Wall informed Ponder that DNA samples had not been analyzed, but the evidence taken by the doctors would prove who committed the sexual abuse. Nonetheless, Wall told Ponder that "[c]learly you have done something. There's no doubt about that."

At the suppression hearing, Wall admitted that he did not have any medical evidence that conclusively showed that penetration of Z.T.H.'s anus had occurred. Furthermore, Wall testified that he did not speak to the medical staff to determine whether there had been a diagnosis of sexual abuse. Rather, Wall's information came from Candice's mother that Z.T.H.'s anus was bleeding and that sexual abuse was suspected.

*6 Despite that deception, case authority holds that false information alone does not render a confession involuntary. *Ackward,* 281 Kan. at 9-11 (noting that both the United States and Kansas Supreme Courts have held that misrepresentations during law enforcement interviews alone do not make confessions involuntary) (citing *Frazier v. Cupp,* 394 U.S. 731, 22 L.Ed.2d 684, 89 S.Ct. 1420 [1969], and *State v. Wakefield,* 267 Kan. 116, 977 P.2d 941 [1999]).

Promises. Ponder cites to multiple statements by Wall in his brief. The videotape supports these statements. In these statements, Ponder suggests that Wall promised Ponder there would be minimal consequences if he admitted to the crime. At the suppression hearing, Detective Wall denied that he made any type of promises to Ponder. However, Wall admitted that he did offer to contact mental health for Ponder that day because he was concerned that Ponder may be suicidal after his confession. Wall testified that he did not pursue the matter when Ponder declined.

After reviewing the videotape, we think that Ponder's characterization of Wall's statements are inaccurate. Wall's statements should be classified in the following types: (1) if Ponder admitted to committing the crime, Ponder would get some counseling; and

(2) if Ponder admitted to committing the crime, Wall would minimize the damage by writing in his report that Ponder cooperated.

For the first type of statements, the district court noted that Wall's statement was true because counseling is part of the rehabilitative program for sexual offenders. In the second type of statements, because Ponder cooperated, Wall followed up on his offer by noting in his report that Ponder "understood what he did was wrong and did not completely understand why he did this. [Ponder] stated he was very sorry for what he had done, assured [Wall] it would never happen again." Therefore, only the second type of statement could be construed as a promise.

Again, looking at case law, regarding these type of promises, our courts have held that an officer's offer to convey a person's cooperation to the prosecutor is insufficient to make a confession or statement involuntary. *Swanigan*, 279 Kan. at 33. Additionally, encouragement from the police to tell the truth does not render a confession involuntary. 279 Kan. at 34. Therefore, Ponder has failed to demonstrate on appeal that Wall's promises coerced him into making an involuntary confession.

Threats. Ponder also argues that Wall threatened Ponder into making an involuntary confession. Ponder claims that Wall threatened him with negative consequences, such as being known as a monster child predator and spending the rest of his life in jail, if he continued to deny that he committed the crime. At the suppression hearing, Wall denied that he made any threats to Ponder but conceded that one could interpret the "jail for the rest of your life" statement as a threat.

*7 The following is at the heart of this issue:

"So I can say: 'Listen, I talked to Ronnie. He's *not that bad of a guy, confused, needs counseling, doesn't need to be thrown in jail for the rest of his life.'* You know what I am saying? But, *if you continue to deny,* then it makes it look like *you're some kind of monster:* That, hey, has he done this before? Hey, has he *done it with his other child?* Does he *do it with the neighborhood kids?* Is Ronnie the kind of guy that's going to grade schools and *stalking little kids?* That's what people will think." (Emphasis added by Appellant.)

For a confession to be considered inadmissible hearsay, K.S.A.2006 Supp. 60-460(f)(2)(B) requires that the officer's threats or promises are "likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same."

In this case, it was not reasonable for Ponder to believe that Wall had the power or authority to make people believe that he was a "monster child predator" or to put him in jail for the rest of his life. Upon review of the videotape, at 11:45 a.m. Wall informed Ponder that "my job is to find out what happened, so I'm investigating what the State calls aggravated criminal sodomy, that means that there's serious suspicion that something sexually happened to [Z.T.H.]." Here, Wall explained to Ponder that his scope

of authority was limited to only the investigation of the crime. Therefore, Ponder could not reasonably believe that Wall's authority extended to the point where it could affect his reputation among the community or sentence him for life in jail.

Examining these four factors against the facts in this case, Wall's misrepresentation of his investigation is the only circumstance that could viably produce an involuntary confession. However, since false information alone does not render a confession involuntary, we conclude that Ponder's confession was freely and voluntarily made. Accordingly, the district court did not err when it denied Ponder's motion to suppress.

Removing Portions of the Videotape

After examining the transcript, we find Ponder's first objection specifically referred to his motion to suppress. Ponder's second objection referred to his previous objection that was his renewed objection based on his motion to suppress. Therefore, because Ponder failed to make an objection at trial specifically towards his motion in limine to redact the videotape, Ponder has failed to preserve this issue for appeal. When the court denies a motion in limine, the moving party must object to admitting the evidence at trial to preserve the issue on appeal. *State v. Franklin,* 280 Kan. 337, 340, 121 P.3d 447 (2005).

Allen-Type Instruction

In this case, jury instruction 11 repeated verbatim the deadlocked jury instruction found in PIK Crim.3d 68.12, which is also known as the *Allen* instruction. See *Allen v. United States,* 164 U.S. 492, 501-02, 41 L.Ed. 528, 17 S.Ct. 154 (1896); *State v. Anthony,* 282 Kan. 201, 215-16, 145 P.3d 1 (2006). When the district court discussed jury instruction 11 with the parties, Ponder made an objection. The district court, however, overruled Ponder's objection, holding that the phrase, "[l]ike all cases, it must be decided sometime," was appropriate as long as it was given before the jury deliberated. Consequently, prior to closing arguments, the district court conveyed this instruction to the jury.

*8 Kansas cases have upheld the use of "like all cases, it must be decided sometime" in a jury instruction so long as it is given to the jury before deliberations take place. See *Anthony,* 282 Kan. at 216 (noting that the *Allen*-type instruction, " '[like] all cases, [this case] must be decided sometime," ' does not constitute error if given before deliberations begin); *State v. Gomez,* 36 Kan.App.2d 664, 675-76, 143 P.3d 92 (2006) (holding that " '[l]ike all cases, it must be decided sometime" ' does not mislead or pressure the jury to reach a verdict as long as the *Allen* instruction is given before the jury commences deliberations).

Therefore, since the district court instructed the jury prior to jury deliberations on the identical language questioned in *Anthony* and *Gomez,* no reversible error occurred.

Affirmed.

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