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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-2531
)	
CONSTANTINO F. MODUGNO,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion to suppress his statements under *Miranda*, as under the circumstances defendant was not in custody when he made his pre-warning statements, which thus did not taint his post-warning statement.

¶ 2 Defendant, Constantino F. Modugno, appeals a ruling of the circuit court of Du Page County denying his motion to suppress statements he made while being questioned by investigators. He contends that he was in custody and made statements before he was given *Miranda* warnings. Because defendant was not in custody before he received *Miranda* warnings, we affirm.

¶ 3

I. BACKGROUND

¶ 4 The following facts are taken from the suppression hearing. Defendant and his wife were the foster parents of a three-year-old boy and his six-year-old sister, J.D. The Department of Children and Family Services (DCFS) received a telephone-hotline report that J.D. had been sexually molested. Jessica Furio, an investigator for DCFS, was assigned to the case.

¶ 5 Furio met with J.D., who had been removed from defendant's home, and determined that defendant had possibly had inappropriate sexual contact with J.D. Furio contacted Boris Vrbos, an investigator from the Du Page County State's Attorney's office assigned to the Children's Center, and they agreed that they should interview defendant at the DCFS office in Glen Ellyn.

¶ 6 Furio, in turn, called defendant to arrange a meeting. Although she told defendant that she wanted to meet with him about J.D.'s removal, she did not tell him about the sexual allegations or that Vrbos and another investigator would be present. Defendant agreed to come to the DCFS office to meet with Furio.

¶ 7 On August 31, 2010, at about 9 a.m., defendant arrived alone at the DCFS office. He entered a public waiting area and met with Furio, Vrbos, and Patrick Dempsey, another investigator from the State's Attorney's office.

¶ 8 Vrbos and Dempsey were wearing plainclothes. They both identified themselves and showed defendant their badges, which were in their wallets. No weapons were displayed or were otherwise visible. Vrbos was unarmed, but Dempsey never testified as to whether he carried a weapon that day.

¶ 9 Defendant and the three investigators met in an adjacent interview room. The windowless room was about 8 by 12 feet and contained a rectangular table in the center and four

or five chairs. The door had no lock. Defendant walked into the room and chose to sit at the table facing the door.

¶ 10 Furio, Vrbos, and Dempsey sat across the table from defendant. According to Furio, she gave defendant a copy of a written notification of the allegations of sexual misconduct and a brochure regarding the investigation process. Defendant admitted receiving the brochure but denied being given the document containing the allegations. Furio explained to defendant what the allegations were regarding J.D. and then left the room.

¶ 11 Furio did not observe any “language barriers or cultural barriers” when communicating with defendant. She denied promising him anything or threatening him. She described defendant as “very cordial and willing to talk.” According to her, defendant willingly accompanied them to the interview room.

¶ 12 After Furio exited the room, Vrbos and Dempsey interviewed defendant. Defendant did not exhibit any difficulty understanding, or communicating with, the investigators. Vrbos told defendant that he was not under arrest and that he was free to leave at any time. Defendant stated that he understood.

¶ 13 Vrbos told defendant that J.D. had stated that defendant lied when he told his wife that he had been massaging J.D.’s feet. Vrbos told defendant that J.D. had said that defendant put his mouth on her vagina. Defendant denied doing so. Defendant explained that J.D. had told him that her stomach hurt so he kissed her on the stomach. Dempsey asked if that was when defendant kissed J.D.’s vagina, and defendant said yes. Defendant added that his lips were on J.D.’s vagina for about two seconds. Defendant started crying, said that he never meant to hurt J.D., and admitted that he did not tell his wife, because he knew that what he had done was wrong.

¶ 14 After defendant admitted to having kissed J.D.'s vagina, Vrbos asked him if he wanted to have his statement recorded, to which defendant responded okay. Vrbos then presented defendant with a preprinted form containing the *Miranda* warnings, and defendant waived his rights.¹

¶ 15 After defendant waived his *Miranda* rights, he gave an audio-recorded statement.² On the CD recording, defendant initially stated that he was advised of his *Miranda* rights. He reiterated that he had kissed J.D. on her vagina. He admitted that what he had done was wrong and that he was sorry. The recorded statement began at about 10:15 a.m. and ended at about 10:21 a.m.

¶ 16 During the interview, defendant never indicated that he was having difficulty understanding what was being said or that he has trouble communicating in the English language. Dempsey explained that the interview took an hour and 10 minutes, not because defendant had difficulty understanding, but because defendant initially denied the allegations.

¶ 17 No threats or promises were made to defendant. Vrbos denied telling defendant that he was not going to get to go home, telling him that if he talked to them he would not be arrested, or telling him that if he talked he would get to go home. Nor did he and Dempsey accuse defendant of lying.

¹ Defendant does not raise any issue on appeal concerning the validity of his waiver.

² The State stipulated that defendant was not given any *Miranda* warnings until just before he gave his recorded statement.

¶ 18 Vrbos denied that either of them raised their voices, pointed their fingers at defendant, or pounded their fists on the table. According to Vrbos, he and Dempsey maintained a calm demeanor, and defendant acted normally, other than when he started crying.

¶ 19 Defendant testified that he was 51, was born in Italy, and moved to the United States when he was eight years old. After moving, he attended the fourth grade and eventually graduated from high school. He was held back his sophomore year in high school because he failed an English course. He can read and write English but “[n]ot fluently.” According to defendant, English is his second language and he thinks in Italian “[v]ery much.” He had worked as a machinist for the past 13 years and speaks English at work. Defendant did not have any problem understanding any of the court proceedings related to his case.

¶ 20 Furio told defendant to come to the interview alone. He did not know when he went to the interview that there would be other investigators there. He admitted that Furio told him at the outset of the meeting that “there [was] some evidence against [him] that [was] alleged” by DCFS.

¶ 21 When Furio left the interview room, and defendant was alone with Vrbos and Dempsey, he did not feel that he could get up and leave. The investigators told defendant that he was free to leave only after the recording was over. At no time before he was told that he could leave at the end of the interview did he feel that he could get up and leave. That was because he was “scared [and] intimidated” and felt like he was in custody.

¶ 22 Defendant admitted that no one ever blocked the door during the interview and that he could have gotten up and left the room. He further admitted that he understood “what they were saying during the interview.” There were times when Vrbos’s and Dempsey’s voices were “elevated a little bit,” but they did not yell at him. According to defendant, Vrbos slammed his

hand down on the table during the interview, they accused him two or three times of lying, and he felt “horrible.”

¶ 23 The trial court ruled that, in light of the totality of the circumstances, a reasonable person would have felt free to leave. This was so because the interview occurred in an unlocked room in an office building in Glen Ellyn as opposed to a “police department or [being] locked away in some dungeon or some maze of a basement of a building.” There were no weapons displayed or other show of force. Additionally, the court characterized the length of the interview as a “relatively short time for interrogation, for questioning.” The court noted that the investigators were not legally prohibited from choosing the location of the interview. Finally, the court observed that it had listened to the recorded statement and did not detect defendant having any difficulty communicating in English. Thus, the court denied the motion to suppress.

¶ 24 Following a jury trial, defendant was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). Defendant’s motions for a judgment notwithstanding the verdict and for a new trial were denied, and he was sentenced to eight years’ imprisonment. He filed a timely notice of appeal.

¶ 25

II. ANALYSIS

¶ 26 On appeal, defendant contends that the trial court erred when it decided that he was not in custody during the portion of the interview that preceded the *Miranda* warnings. Specifically, he posits that, under the totality of the circumstances, he was in custody before he received the *Miranda* warnings and the statements made during that timeframe should have been suppressed. Additionally, he maintains that his recorded statement, which was given after he was advised under *Miranda*, was also inadmissible as the product of the prior unlawful custodial interrogation.

¶ 27 In determining whether a trial court has properly ruled on a motion to suppress, its findings of fact and credibility determinations are given great deference and will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). The ultimate question raised by a legal challenge to the court's ruling on a suppression motion, however, is reviewed *de novo*. *People v. Nicholas*, 218 Ill. 2d 104, 116 (2005). Where a defendant challenges the admissibility of a confession via a motion to suppress, the State bears the burden of proving by a preponderance of the evidence that the confession was voluntary. 725 ILCS 5/114-11(d) (West 2010); *People v. Braggs*, 209 Ill. 2d 492, 505 (2003).

¶ 28 Before the start of a custodial interrogation, a person being questioned by law enforcement officers must first be warned that he has a right to remain silent, that any statement he makes may be used against him, and that he has a right to the presence of a retained or appointed attorney. *Slater*, 228 Ill. 2d at 149 (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). Custody is necessary because the purpose of pre-interrogation *Miranda* warnings is to assure that any inculpatory statement by the defendant is not the product of the compulsion inherent in custodial surroundings. *Slater*, 228 Ill. 2d at 149-50 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004)).

¶ 29 The determination of whether a defendant is in custody for purposes of *Miranda* involves two discrete inquiries. *Slater*, 228 Ill. 2d at 150. First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt that he was not at liberty to terminate the interrogation and leave. *Braggs*, 209 Ill. 2d at 505-06. The following factors are relevant in determining whether a statement was made in a custodial setting: (1) the location, time, length, mood, and mode of questioning; (2) the number of officers present during the interrogation; (3) the presence or absence of the defendant's family and

friends; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking, or fingerprinting; (5) the manner by which the individual arrived at the place of the questioning; and (6) the age, intelligence, and mental makeup of the defendant. *Braggs*, 209 Ill. 2d at 506.

¶ 30 In addition to those factors, in some situations an officer's beliefs as to the defendant's guilt may be considered. *Slater*, 228 Ill. 2d at 153. This is so, however, only if those beliefs are conveyed, by word or deed, to the person being questioned. *Slater*, 228 Ill. 2d at 153. In turn, such disclosed beliefs would be relevant only to the extent that they would affect how a reasonable person in the position of the suspect would assess the extent of his freedom of action. *Slater*, 228 Ill. 2d at 153. Even if that circumstance exists, it is to be considered only as one of many factors that bear on the question of whether the individual was in custody, and not the sole determinant of that issue. *Slater*, 228 Ill. 2d at 153.

¶ 31 No single factor is dispositive, and the court must consider all of the circumstances. *People v. Reynolds*, 257 Ill. App. 3d 792, 800 (1994). After examining and weighing the factors, the court must objectively determine, under the facts presented, whether a reasonable person innocent of any crime would have believed that he was free to terminate the encounter and leave. *Slater*, 228 Ill. 2d at 150.

¶ 32 We now apply the foregoing factors to the circumstances of this case to determine whether a reasonable person in defendant's position would have felt free to terminate the questioning and leave. As to the first factor, the interview occurred in the offices of a public agency open for business and located in a major metropolitan area. It occurred during normal business hours. The interview room was not locked, and defendant's egress from the room was

not restricted in any meaningful way. The fact that there were no windows and the door was closed reflects nothing more than the private nature of such an interview.

¶ 33 The mood and mode of the questioning was for the most part cordial, relaxed, and non-confrontational. Although defendant cried during part of the interview, it appears he did so because of his remorse over what he had done. There is no evidence that he did so because of how the questioning was conducted. The fact that defendant felt “horrible” during the interview, without more, does not show a custodial environment. Defendant claimed that Vrbos slammed his hand down on the table during the questioning and that the investigators accused him of lying. However, the investigators denied those claims, and we must presume that the trial court credited their testimony. See *People v. Winters*, 97 Ill. 2d 151, 158 (1983). We must defer to that finding. See *People v. Pitman*, 211 Ill. 2d 502, 512 (2004) (trial court’s findings of fact on issue of custody will not be disturbed unless against the manifest weight of the evidence).

¶ 34 Defendant emphasizes the length of the interview as indicative of his being in custody. The length of the interview, however, does not strike us as excessive, considering the nature of the investigation. Moreover, the length of the interview is only one facet of the first factor. Considering the other aspects of the interview as to location, time, mood, and mode, its length was not so excessive as to suggest to a reasonable person that he was not free to leave. The first factor favors a conclusion that defendant was not in custody.

¶ 35 As for the number of officers, there were three investigators. However, for the bulk of the interview, only two participated. That is not an excessive number for such an interview and does not indicate that defendant was in custody.

¶ 36 Defendant was alone with the investigators during the questioning and had no family or friends waiting for him. That certainly supports a finding of custody. Defendant further points

out that Furio told him to come alone. Furio may well have had justifiable reasons for wanting defendant to meet alone, not the least of which would have been to avoid any embarrassment to defendant and his family or friends because of the nature of the investigation. Having said that, the fact that defendant was alone is evidence of custody.

¶ 37 Next, there were no indicia of any formal arrest procedures. There was no evidence of any show of weapons or force, any physical restraint, or any booking or fingerprinting. The investigators wore civilian clothes. Although they displayed their badges to defendant, they did so momentarily and for obvious identification reasons. Additionally, Vrbos testified that he told defendant that he was not under arrest and was free to leave. Defendant argues that the fact that they were investigators would suggest to a reasonable person that, notwithstanding their wearing plainclothes, they were armed. This argument lacks merit for two reasons. First, it is not reasonable to assume that investigators from the State's Attorney's office would be armed.³ Second, even if one reasonably could assume as much, the fact that they were merely armed does not bear on the question of custody. The issue is whether they made a "show of weapons," which they clearly did not. The lack of any formal arrest procedures supports the conclusion that defendant was not in custody.

¶ 38 As for the manner in which defendant arrived at the interview, he did so under his own power. Further, he agreed over the telephone to meet with Furio at that particular location. There is no indication that defendant was compelled to go there as opposed to some other location. This factor does not indicate custody.

³ In fact, Vrbos testified that he was unarmed, and Dempsey did not testify as to whether he was carrying a weapon.

¶ 39 Defendant's age, intelligence, and mental makeup do not show that he was in custody. He was 51 years old, was a high school graduate, and worked fulltime as a machinist. He demonstrated a reasonable degree of intellect during his testimony and appeared to have all of his faculties. There was nothing about his age, intelligence, or mental makeup that would support a finding of custody.

¶ 40 Defendant points to his difficulty communicating in English as evidence of his being in custody. His testimony at the suppression hearing belies his purported lack of understanding of English. It shows that he appeared to understand the questions and responded appropriately. He testified that he spoke English at work and could understand the various proceedings in his case. Additionally, he had lived in the United States for over 40 years and was educated here. Further, the audio recording, which we have listened to carefully, demonstrates that he is able to speak and understand English. That he may have struggled with English in high school, and oftentimes thinks in Italian, does not significantly detract from the substantial evidence that he could communicate in English. The trial court found that he understood English, and that finding was not against the manifest weight of the evidence.

¶ 41 That brings us to the last inquiry as to custody, whether the investigators conveyed to defendant that they believed he was guilty. Defendant asserts that during the interview the investigators slammed their fists on the table and accused him of lying. The investigators denied doing so, and as noted, we presume that the court believed their version of events. Further, even if the investigators exhibited to defendant some belief that he was guilty, that is only one of many factors we are to consider. When weighed against the substantial number of factors that indicate that no custody occurred, it does not alter our conclusion that defendant was not in custody during the interview at any time before being given the *Miranda* warnings.

¶ 42 Having examined and weighed the various factors, we objectively determine that, under the facts of this case, a reasonable person innocent of any crime would have believed that he could terminate the encounter and leave. See *Slater*, 228 Ill. 2d at 150. Thus, the trial court correctly ruled that defendant was not in custody and that the investigators were not required to have given him *Miranda* warnings at any point before they did. Additionally, the statement given after defendant was advised of his *Miranda* rights was necessarily untainted by his pre-*Miranda* statements and was not rendered inadmissible. See *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 54.

¶ 43

III. CONCLUSION

¶ 44 For the reasons stated, we affirm the ruling of the circuit court of Du Page County denying defendant's motion to suppress his statements.

¶ 45 Affirmed.