NOTICE
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2013 IL App (5th) 130341-U

NO. 5-13-0341

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

In re D.L.H, Jr., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	St. Clair County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 12-JD-235
	)	
D.L.H., Jr.,	)	Honorable
	)	Walter C. Brandon, Jr.,
Respondent-Appellant).	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justice Chapman concurred in the judgment.
Justice Wexstten dissented.

ORDER

¶ 1 *Held*: The trial court erred in denying the respondent's motion to suppress as the respondent's *Miranda* waivers were not voluntary.

¶ 2 BACKGROUND

¶ 3 In the early morning hours of August 23, 2012, 14-month-old T.W. was admitted to Cardinal Glennon Children's Hospital in St. Louis with nonaccidental injuries. On August 26, 2012, T.W. died from his injuries after being removed from life support.

¶ 4 On August 28, 2012, the State filed a petition for adjudication of wardship charging the respondent, D.L.H., Jr., a nine-year-old minor, with first-degree murder (720 ILCS 5/9-1(a)(2) (West 2012)). The petition alleged, *inter alia*, that on August 22, 2012, the respondent had "repeatedly struck T.W. *** about the head, knowing such acts created a strong probability of death or great bodily harm to T.W., thereby causing the death of T.W."

At his first appearance, the trial court appointed counsel to represent the respondent and, as a pretrial condition, ordered that he submit to a psychological evaluation to determine his fitness to stand trial. See 705 ILCS 405/5-505(1)(j) (West 2012); 725 ILCS 5/104-11(a) (West 2012).

¶ 5 On August 31, 2012, Dr. Daniel Cuneo examined the respondent as to his fitness to stand trial and ultimately found that he was unfit. Cuneo's psychological examination revealed, *inter alia*, that the respondent had an IQ of 78 and intellectually functioned at the level of a seven- or eight-year-old. Cuneo diagnosed the respondent with borderline intellectual functioning and dysthymic disorder (chronic depression) and opined that the respondent's mental illness, age, and developmental immaturity substantially impaired his ability to understand the nature and purpose of the proceedings against him and to assist in his defense. Cuneo further opined that even if provided with a course of psychological treatment, there was not a substantial probability that the respondent would attain fitness within a year.

¶ 6 On October 25, 2012, following a hearing at which Cuneo testified regarding his examination of the respondent, the trial court entered an order finding that the respondent was unfit to stand trial and that there was not a reasonable probability that he would attain fitness within one year. The trial court subsequently remanded the respondent to the custody of the Department of Human Services (DHS) (see 725 ILCS 5/104-23(b)(3) (West 2012)) and ordered the State to contact the Department of Children and Family Services (DCFS) on the respondent's behalf. The court further granted the respondent's motion for the appointment of a guardian *ad litem* (GAL).

¶ 7 On December 12, 2012, the State filed a motion for a discharge hearing. See 725 ILCS 5/104-23(b)(1), (3), 104-25 (West 2012). On December 19, 2012, following a hearing during which it was disclosed that DHS had determined that the respondent was not a danger

to himself or others, the trial court entered an order placing the respondent in the custody of a great-aunt. The court also set the respondent's cause for a discharge hearing and ordered appointed counsel to find suitable outpatient mental health services for him.

¶ 8 On January 22, 2013, appointed counsel filed a motion to suppress statements that the respondent made to a detective during the course of the investigation into T.W.'s death. An amended motion to suppress was subsequently filed February 19, 2013, and a hearing on the amended motion was held on March 14, 2013. On March 25, 2013, the trial court entered an order denying the amended motion.

¶ 9 On March 27, 2013, the previously scheduled discharge hearing was continued on the GAL's motion to have the respondent examined as to his sanity at the time of the offense. See 720 ILCS 5/6-2 (West 2012). On May 6, 2013, Cuneo evaluated the respondent and concluded that he was legally sane. In his evaluation report, Cuneo noted, *inter alia*, that the respondent was able to "appreciate the wrongfulness of severely beating a 14-month-old" and could further appreciate that "beating a child could cause the child's death." When asked what had happened to T.W. on the night in question, the respondent told Cuneo that Drequon had hit the baby and thrown him against a wall. Drequon then ordered the respondent to hit the baby, and when he refused, Drequon hit the respondent in the face. The respondent stated that he had then hit T.W. one time out of fear that Drequon would hit him again if he did not.

¶ 10 On May 22, 2013, the cause proceeded to a discharge hearing where the following evidence was adduced. Tara Welch, a physical therapist assistant employed by Lajoy Pediatric Therapy, testified that on the afternoon of August 22, 2012, she had seen T.W. and his mother, Alisha Johnson, at the home where they lived in Cahokia. Tara testified that she had gone to the home to provide therapy for T.W. because he had been diagnosed as developmentally delayed. When Tara saw T.W., he was "happy" and "fine" and had no observable injuries or health problems. Tara testified that she had left the home around 2:20

p.m.

¶ 11 Edna Norman of DCFS testified that on August 23, 2012, she and a coworker had gone to the home where T.W. had resided in Cahokia in response to a report that the children in the home were at risk of physical injury. Edna testified that she had met with Melissa Wilbourn and her two children, 11-year-old Drequon and 9-month-old Daveon; Alisha's "two other children," Todd and Tymeirian Willis; and the respondent. Edna testified that she had interviewed Drequon and the respondent separately during the meeting.

¶ 12 Edna testified that when she asked the respondent what had happened to T.W., he had stated that he and the infant had been alone in the playroom and that no adults were home at the time. The respondent explained that T.W. had been crying, so he punched him twice in the head and once in the side. The respondent indicated that one of the punches to T.W.'s head had left a bruise near his eye and that T.W. "had thrown up some white stuff" after being struck in the side. After that, T.W. stopped crying, and the respondent carried him to a bedroom and laid him on a bed.

¶ 13 Edna testified that when she was done interviewing the respondent, she had noticed that Todd's lip "seemed a little swollen" and "had a little abrasion on it." Edna testified that when she asked what had happened to him, the respondent admitted that he had punched two-year-old Todd in the mouth the same night that he had punched T.W. Edna testified that the respondent seemed "very shy" when answering her questions.

¶ 14 Edna testified that when she interviewed Drequon, he had stated that he had been in the master bedroom of the house with Todd and Tymeirian while the respondent and T.W. were in the playroom. Drequon further told Edna that after seeing the respondent carry T.W. into an adjacent bedroom, he had checked on T.W., and T.W.'s "stomach was jumping."

¶ 15 At the discharge hearing, Drequon testified that on the night in question, he, the respondent, Todd, Tymeirian, and T.W. were left at home without adult supervision.

Drequon indicated that while he watched a movie in the master bedroom, the other children had been watching television in the playroom. Drequon further indicated that when he checked on the other children after hearing a "boom, boom" sound that "sounded like somebody was hitting the wall," it did not appear that there was anything wrong with T.W. After hearing another "boom, boom" sound, however, he checked on T.W. again, and T.W. seemed "like he was dead or something." Drequon testified that at that point, he had brought T.W. into the master bedroom and called his mother, who had him talk to Alisha. When Drequon told Alisha that he thought something was wrong with T.W., she and Melissa indicated that they would be home soon. Drequon testified that they had returned home "like an hour and 30 minutes" later. Meanwhile, T.W. was "laying on the bed making *** funny noises" that sounded "like he was hurt or something." T.W.'s fists were also "balled up," and his "stomach was going in and out." Drequon indicated that when the adults finally arrived home, they had not immediately checked on T.W. but had instead gone to bed. Drequon testified that at approximately 2 a.m., his mother woke him up, and the police arrived shortly thereafter.

¶ 16 Drequon admitted that in a prior statement, he had lied about he and the other children being left unsupervised because he did not want his mother to get into trouble. He further admitted that he had not seen anyone hit T.W. on the night in question and that he had never seen the respondent hit any other kids. Drequon testified that he and the respondent got along and that he considered him a brother. Drequon denied having ever hit the respondent or having ever forced him to do something he did not want to do. Drequon further denied hitting T.W. on the night in question. Drequon indicated that after the incident, the respondent's father, David, had told him to not implicate the respondent.

¶ 17 Melissa's stepmother, Joyce Wilbourn, testified that she knew the respondent because David and Melissa had dated. Joyce testified that she used to see the respondent

approximately twice a month, and she treated him as if he were one of her own grandchildren. Joyce stated that on the night of August 22, 2012, Melissa, Alisha, David, and baby Daveon had stopped by to visit her at her apartment in Centreville. Toward the end of the visit, Drequon had called to tell Alisha and Melissa that the respondent had hit T.W. They left shortly thereafter, sometime between 8:30 and 9 p.m.

¶ 18 Joyce testified that Melissa had subsequently called her indicating that something was wrong with T.W. Melissa later called Joyce again from the hospital. After leaving the hospital, Melissa stopped by Joyce's apartment with David, Drequon, and the respondent. Joyce testified that she had asked the respondent if he had hit T.W., and he had stated that he had. Joyce testified that the respondent had not indicated that anyone else had also hit T.W.

¶ 19 Detective Sean Adams of the Cahokia police department testified that he had been a trained juvenile officer since 2006 and had investigated the incident involving T.W. After gathering background information about the case by speaking with numerous witnesses, Adams interviewed the respondent on August 24 and 26, 2012. Both interviews occurred in the kitchen of the residence where the respondent had lived in Cahokia. Detective Adams gave the respondent a list of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) at the first interview on August 24, 2012. When questioned by Detective Adams, the respondent repeated what was said. When asked to initial the document, the respondent instead signed his name, apparently not understanding what was asked. The respondent indicated at the second interview that he still understood his *Miranda* rights. His father was present at both interviews, but no attorney was present at either interview (see 705 ILCS 405/5-170(a) (West 2012) (minor under 13 must have counsel during entire custodial interview); see also 705 ILCS 405/5-170(b) (West 2012) (prohibited from waiving counsel in custodial interviews).

¶ 20 During the first interview, the respondent stated that he had never hit T.W. on the night in question, but Drequon had. The respondent indicated that Drequon had repeatedly hit T.W. because the baby had been crying and would not stop. The respondent indicated that Drequon had also struck T.W. in the head with a green bouncy seat, leaving a mark near T.W.'s eye. The respondent claimed that he had unsuccessfully tried to stop Drequon. The respondent advised that he had made a mistake when telling DCFS that he had struck T.W. and that he had claimed responsibility to protect the adults.

¶ 21 During the second interview, the respondent again blamed Drequon for what had happened to T.W. Asserting that Drequon had "anger problems," the respondent stated that he had watched as Drequon repeatedly struck the baby in the face and sides. Drequon then had the respondent carry T.W. into the children's bedroom and put him on the respondent's bed. After denying numerous suggestions that he had hit T.W. and was falsely blaming Drequon for what had happened, the respondent stated that he had "joined in" and hit the baby one time in the side. The respondent also demonstrated what had allegedly occurred during the beating. The respondent indicated that after he had put T.W. to bed after the attack, T.W. had continued to cry.

¶ 22 Adams testified that a green bouncy seat with what appeared to be vomit on it was found behind the house during the investigation. What appeared to be vomit was also found on the comforter on the respondent's bed. Adams testified that while interviewing witnesses, he had learned that T.W. had been dropped on a glass table a month or two prior to the incident in question. Adams testified that he had not learned of T.W.'s death until after he had interviewed the respondent the second time.

¶ 23 Dr. Jennifer Forsyth of the City of St. Louis medical examiner's office testified that she had performed the autopsy of T.W. on August 27, 2012. Forsyth testified that the death was deemed a homicide and that the cause of death was closed-head injury. She stated that

the mechanism of death was diffuse axonal injury (neurological trauma throughout the brain) and cerebral edema (brain swelling).

¶ 24 Forsyth testified that other than some minor bruises and abrasions to the head, including a contusion under his right eye, T.W. had few external signs of trauma. Numerous areas of subgaleal hemorrhage consistent with impact injury were observed inside T.W.'s scalp, however, and subdural hematoma indicative of injury was also observed. There was also blood in T.W.'s cranial fossae, which suggested severe head trauma. Forsyth explained that the symptoms associated with a diffuse axonal injury are "devastating" and become apparent within minutes to hours after an injurious event. Forsyth testified that a person suffering from such an injury could quickly become lethargic, unresponsive, and limp, and might suffer seizures. The clenching of the hands into fists is also a sign that the brain has been significantly damaged. There could also be vomiting.

¶ 25 Forsyth testified that when microscopically examined, several section samples of T.W.'s brain showed signs of diffuse axonal injury. Additionally, extensive retinal hemorrhaging consistent with shaken baby syndrome and diffuse axonal injury was observed in both eyes. Forsyth indicated that T.W.'s cerebral edema was brought about by his diffuse axonal injury and that a cerebral edema in a baby generally results in death.

¶ 26 Forsyth testified that "regular childhood injuries," such as those caused by falling off a bicycle or changing table, do not result in diffuse axonal injury and that strong impact or shaking is required. Forsyth indicated that it took "significant force" to cause T.W.'s injuries and that the injuries were consistent with injuries that could have been sustained on or about August 22, 2012. Forsyth acknowledged, however, that it was not possible to determine exactly when or how T.W.'s injuries had been inflicted or whether or not he had been shaken.

¶ 27 On June 5, 2013, the trial court entered an order finding that the State had sustained its burden of proving the respondent guilty of first-degree murder beyond a reasonable doubt.

The court therefore determined that the respondent was not not guilty of the offense and that his supervised treatment period could thus be extended up to the maximum period of five years. See 725 ILCS 5/104-25(d) (West 2012); *People v. Waid*, 221 Ill. 2d 464, 470-71 (2006). On July 3, 2013, the respondent filed a timely notice of appeal.

¶ 28 ANALYSIS

¶ 29 The respondent argues (1) the trial court erred in denying his amended motion to suppress statements, (2) the trial court erred in allowing Dr. Forsyth to testify as an expert witness, (3) the trial court erred in finding him not not guilty of first-degree murder, and (4) he was prejudiced by the unavailability of T.W.'s death certificate and autopsy report. We will address the motion to suppress as the dispositive issue.

¶ 30 Motion to Suppress

¶ 31 At the hearing on the respondent's amended motion to suppress statements, Adams was the sole witness, and the trial court was shown a video recording of each of his two meetings with the respondent. Adams testified that he had interviewed the respondent much differently than he would have if the respondent had been an adult. Adams acknowledged that although he had interviewed hundreds of juveniles over the years, he had never interviewed a nine-year-old murder suspect. Adams explained that he had taken extra time to make the respondent feel comfortable and to make sure that he understood his *Miranda* rights before waiving them. Adams testified that he had also tried to soften the tone of his voice and position his body in a nonthreatening manner. Adams was not in uniform. He did carry a weapon which was holstered at his hip. The respondent was repeatedly advised that he would not be going to jail, and Adams testified that he was not going to take the respondent into custody.

¶ 32 There are numerous problems with the interviews. At the *Miranda* stage, when asked if he understood that whatever he said could be used against him, the respondent indicated

he did not understand. After further explanation, the respondent only nodded yes. Detective Adams told him he had a right to remain silent, but also that he should not keep quiet when questioned. During the course of questioning, Detective Adams made the following statements to the respondent:

> "I think you are afraid," "I think you did hit him," "you're not going to jail," "I think there is something you are not telling me," "nobody's going to jail," "I think it was an accident," a "total accident," "I don't think Drequon hit him," "I think you did," "either way you're not in trouble," "I think you made a mistake I really do," "I need to tell you that you made a mistake," "I think what happened was an accident," and "forget everything we talked about."

¶ 33 As previously noted, both interviews took place in the kitchen of the house where the respondent had been living, and David was present during both. Adams sat across the kitchen table from the respondent during both interviews, and David sat beside the respondent during the first. Adams testified that because David had somewhat participated in the first interview, he had David "sit away from the table" during the second, so he would not "interject anything." The first interview lasted approximately 40 minutes; the second lasted approximately 35; and both commenced at approximately 6:30 p.m. Adams testified that at no time did the respondent or David indicate that the respondent did not want to talk to him. Adams stated that the respondent appeared to understand what was going on and did not seem developmentally delayed in any way. When Adams asked David if the respondent had any "special needs," David replied that the respondent had asthma.

¶ 34 In its written order denying the respondent's amended motion to suppress statements, the trial court determined that the respondent had not been in custody when he was interviewed by Detective Adams, that the respondent had validly waived his *Miranda* rights, and that his statements to Adams had been voluntarily made. On appeal, the respondent

challenges each of these conclusions.

¶ 35 "Under *Miranda*, a statement taken from a defendant is inadmissible in the State's case unless the State demonstrates, by a preponderance of the evidence, that the defendant was first given *Miranda* warnings and that the defendant made a knowing and intelligent waiver of his or her privilege against self-incrimination." *People v. Dennis*, 373 Ill. App. 3d 30, 42 (2007). "The police need supply *Miranda* warnings only if the defendant is under 'custodial interrogation,' " however, "which means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *People v. Peo*, 391 Ill. App. 3d 815, 818 (2009) (quoting *Miranda*, 384 U.S. at 444).

> "The determination of whether a defendant is 'in custody' for *Miranda* purposes involves '[t]wo discrete inquiries ***: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.' [Citations.] Thus, in determining whether a person is 'in custody' for purposes of *Miranda*, a court should first ascertain and examine the circumstances surrounding the interrogation, and then ask if, given those circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *People v. Braggs*, 209 Ill. 2d 492, 505-06 (2003).

In cases involving juveniles, "we modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted." *People v. Lopez*, 229 Ill. 2d 322, 346 (2008).

¶ 36 "The simple giving of a defendant's *Miranda* warnings as a precautionary measure does not transform an investigative interrogation into a custodial interrogation." *People v. Willoughby*, 250 Ill. App. 3d 699, 716-17 (1993). Even where *Miranda* warnings are not

required, however, a suspect's statements must still be voluntary. *People v. Slater*, 228 Ill. 2d 137, 159-60 (2008).

> "When examining the circumstances of interrogation, the following factors have been found relevant in determining whether a statement was made in a custodial setting: the location, time, length, mood, and mode of the interrogation, the number of police officers present, the presence or absence of the family and friends of the accused, any indicia of formal arrest, *and the age, intelligence, and mental makeup of the accused*." (Emphasis added.) *Braggs*, 209 Ill. 2d at 506.

See *People v. Bernasco*, 138 Ill. 2d 349 (1990). Relevant factors used when determining whether a reasonable person would not have felt free to leave include:

> "[t]he intent of the officer; the understanding of the defendant; whether the defendant was told he was free to leave or that he was under arrest; whether the defendant would have been restrained if he attempted to leave; the length of the interrogation; and whether *Miranda* warnings were given." *Lopez*, 229 Ill. 2d at 346.

"When the defendant is a juvenile, courts have also considered the defendant's experience with the criminal justice system and his educational background." *Id.*

¶ 37 "A valid waiver of *Miranda* rights must be knowingly and intelligently made." *Braggs*, 209 Ill. 2d at 515. Whether a waiver was knowingly and intelligently made is determined by the facts and circumstances of each case, including the suspect's background and experience. *Id.*

¶ 38 The test of voluntariness is whether the defendant gave his statement freely, voluntarily, and without compulsion or inducement of any sort, or whether his will was overcome when the statement was made. *People v. Gilliam*, 172 Ill. 2d 484, 500 (1996).

> "In making this determination, we consider the totality of the circumstances surrounding the statement, including: (1) the defendant's age, intelligence, education,

experience, and physical condition at the time of the detention and interrogation; (2) the duration of the interrogation; (3) the presence of *Miranda* warnings; (4) the presence of any physical or mental abuse; and (5) the legality and duration of the detention." *Slater*, 228 Ill. 2d at 160.

With respect to minors, the time of day, the presence of a juvenile officer, and the presence of a parent or other adult interested in the minor's welfare are also factors to consider when assessing the voluntariness of a statement. *People v. Fuller*, 292 Ill. App. 3d 651, 665 (1997).

¶ 39 "We review a trial court's ruling on a motion to suppress evidence pursuant to a two-part test." *People v. Tramble*, 2012 IL App (3d) 110867, ¶ 10. "First, we will uphold the court's factual findings unless they are against the manifest weight of the evidence." *Id.* "Second, we assess the established facts in relation to the issues presented and review the ultimate legal question of whether suppression is warranted *de novo*." *Id.* When reviewing the trial court's ruling on a motion to suppress, "an appellate court may consider the entire record and is not confined to only that evidence presented during the pretrial motion." *People v. Walker*, 177 Ill. App. 3d 743, 746 (1988).

¶ 40 We recognize that "the receiving of an incriminating statement by a juvenile is a sensitive concern" (*People v. Prude*, 66 Ill. 2d 470, 476 (1977)). The respondent suggests that given his age and limited intellectual functioning, he would not have felt free to leave during the interviews and could not have knowingly and intelligently waived his rights or given a voluntary statement, a suspect's personal characteristics are but one factor to consider under the applicable tests, and no single factor is dispositive. *Gilliam*, 172 Ill. 2d at 500; see also *People v. Mahaffey*, 165 Ill. 2d 445, 462 (1995) ("Evidence of a defendant's limited intellectual capacity, by itself, does not indicate that a defendant is incapable of waiving his or her constitutional rights" and "is only one factor to be considered in the totality of the

circumstances under which the statement was made."). Totality of the circumstances must be decided on a case-by-case basis (*People v. Brown*, 2012 IL App (1st) 091940, ¶ 40).

¶ 41 We conclude that the waivers interviews were fatally flawed in two respects: (1) the record fails to show the respondent knowingly and voluntarily waived his *Miranda* rights, and (2) the totality of circumstances indicates that the waivers and the interviews had too many of the indicia of custodial interrogation: a noncomprehending *Miranda* waiver; an armed officer and a camera; lack of counsel and were not voluntarily and intelligently made; direction of father's actions and participation; and a mentally impaired nine-year-old who was found unfit to stand trial, impaired in understanding the nature of the proceedings against him, and intellectually functioning in the bottom 5%. *Bernasco*, 138 Ill. 2d 349 (waiver of *Miranda* rights by 17-year-old of "subnormal intelligence" was not knowingly and intelligently made, even without coercion). The trial court's findings that the *Miranda* waivers were not void and that the statements made were voluntary are against the manifest weight of the evidence. While there is a valid question as to whether the interviews were custodial (would a nine-year-old of this intellectual level feel free to leave or stop the questioning?), virtually nothing of the waivers or interviews shows they were voluntary.

¶ 42 Given our ruling as to the motion to suppress, we reverse and remand for further proceedings. The other issues raised by appellant are not likely to recur on remand, so we will not address them at this time. We reverse and remand for further proceedings.

¶ 43 For the foregoing reasons, we reverse and remand for further proceedings.

¶ 44 Reversed and remanded.

¶ 45 JUSTICE WEXSTTEN, dissenting:

¶ 46 I respectfully dissent. Even assuming that the trial court should have granted the respondent's motion to suppress his statements to Detective Adams, any resulting error was harmless. See *People v. Morgan*, 197 Ill. 2d 404, 442-44 (2001); *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 48; *People v. Parra*, 35 Ill. App. 3d 240, 269 (1975). The respondent's statements to Adams were almost entirely exculpatory in that the respondent repeatedly maintained that Drequon was responsible for T.W.'s injuries, and although the respondent eventually admitted that he had hit the baby one time, that statement was cumulative to the evidence of his statements to Edna and Joyce. See *id*.