

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09-2361
	:	
v.	:	
	:	On Appeal from the Cuyahoga County Court of
Robert Bates,	:	Appeals, Eighth Appellate District, Case No.
	:	92323
Defendant-Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT BATES**

William D. Mason, 0037540
Cuyahoga County Prosecutor

Fred D. Middleton, 0025555
Counsel for Defendant-Appellant

Mary McGrath, 0041381
Assistant Prosecuting Attorney

1717 The Superior Building
815 Superior Avenue, East
Cleveland, Ohio 44114-2702
(216) 566-8000
(216) 574-9945 – Fax
infor@fredmiddletonlaw.com

Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
(216) 698-2270 - Fax

Counsel for Plaintiff-Appellee

Counsel For Defendant-Appellant

FILED
DEC 5 1 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page Number

**EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION.....1**

STATEMENT OF THE CASE AND FACTS5

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....7

PROPOSITION OF LAW I:

A child has the right to counsel at all stages of the proceedings against him. Because interrogation is a stage of the proceedings, a child must be represented by his parent, guardian, custodian, or an attorney before the child can waive his right to counsel pursuant to Miranda.7

PROPOSITION OF LAW II:

If a written waiver of Miranda rights has been executed, the juvenile court judge must consider the form used and the juvenile’s literacy level to ensure that the child has an intelligent understanding of the document and an appreciation of the gravity of signing it.9

CONCLUSION11

CERTIFICATE OF SERVICE11

APPENDIX

State v. Bates, Decision and Journal Entry, Cuyahoga County Court of Appeals, Case No. 92323, November 16, 2009 A-1

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

I. Introduction

Unlike adults, children cannot walk into a drug store and receive a flu shot without being accompanied by a parent, guardian, or custodian. But children can be interrogated by law enforcement without any involvement by their parent, guardian, or custodian, or an attorney, so long as they have been advised of their Miranda rights and waive those rights.

Current research suggests that youthfulness is a cause of wrongful convictions.¹ This is because, in part, children “are taught to trust the police and categorically are unable to view long-term consequences like adults.” *Id.* But in Ohio, children can face very serious and sometimes adult consequences as a result of their conduct. In this case, 9th grader Robert Bates—who had turned 16 the day before his arrest, has an IQ of 81, and takes various medications for his mental health problems—confessed to very serious crimes without the advice of his custodial grandmother or an attorney. After he confessed to Cleveland police, he was transferred to criminal court for prosecution, was convicted of kidnapping, rape, and robbery, and was sentenced to serve nine years in an adult prison.

Twenty years ago, this Court set forth the standard for determining whether a juvenile’s confession is involuntarily induced: “the court should consider the totality of the circumstances, including the age, mentality and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; and the existence of physical deprivation or inducement.” In re Watson, 47 Ohio St.3d 86, 548 N.E.2d 210, at paragraph one of the syllabus. In Watson, this Court affirmed its earlier decisions in which it “declined to adopt the ‘independent

¹ Center for Wrongful Convictions of Youth, *Why Youth Contributes to Wrongful Convictions*, available at <http://cwcy.org/WhyYouthContributes.aspx>, (last visited Dec. 31, 2009).

advice/interested adult' standard" and reasoned that "the trial court can properly determine whether the juvenile appreciated his rights and voluntarily waived them in the absence of an interested adult or parent." *Id.* at 90.

Two years ago, this Court recognized that in Ohio, children have a right to counsel at all stages of the proceedings that is both statutory and constitutional. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919 at ¶83, citing R.C. 2151.352; *Id.* at ¶78, citing *In re Gault* (1967), 387 U.S. 1, 36, 87 S.Ct. 1428. This Court held that "the word 'represent' in the fifth sentence of R.C. 2151.352 means to counsel or advise the child in a delinquency proceeding." *Id.* at ¶98. This Court also held, "If the child is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel." *Id.*

Under *Gault* and R.C. 2151.352, children have a right to legal representation at "all stages of the proceedings" against them; therefore, if interrogation is a "stage of the proceedings," then *C.S.* should control. Because children are questioned by law enforcement in Ohio every day without a parent or the advice of counsel, whether *C.S.* governs interrogations of children is of great public interest.

II. Discussion

In *C.S.* this Court recognized that, "[i]n essence, the fifth sentence of R.C. 2151.352 is an 'independent advice/interested adult' standard that we have declined to adopt, absent legislative action, in other circumstances." *Id.* at fn. 3, citing, *Watson* at 89-90. It reasoned that "[t]hough there may be a number of policy reasons to support the legislative imposition of a bright-line rule requiring a juvenile to consult with an attorney before waiving his constitutional rights * * * we do not believe that it is required by the Due Process Clause." *Id.* But, although a child's right to

consult with an attorney before waiving his rights is not required by the Due Process Clause, consultation with a parent, guardian, custodian, or attorney before waiving is required by statute.

Specifically, R.C. 2151.352 provides, “A child * * * is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code.” Accordingly, if interrogation is a stage of the proceedings outlined in Chapter 2151 or 2152, then R.C. 2151.352 applies.

Revised Code section 2151.311 provides the procedure that applies when a child is apprehended. Under R.C. 2151.311(A)(1) and (2), a child who is taken into custody must be returned to the child’s parents or taken to juvenile court or detention. Under R.C. 2151.311(C), a child may be held for processing in any place where an adult placed under arrest can be held, for a limited period of time. And, under R.C. 2151.311(D)(2), “processing,” as it is used in R.C. 2151.311(C)(1) means “interrogating” the child.

Whether a child is represented during his interrogation or not, courts are required to take “‘special care’ in scrutinizing a purported confession or waiver by a child.” C.S. at ¶106, citing Haley v. Ohio (1948), 332 U.S. 596, 599, 68 S.Ct. 302. Because in R.C. 2151.311, the General Assembly has provided that interrogation of a child is a “stage of the proceedings,” this Court’s decision in C.S. provides the special care that must be given to a child who is apprehended and interrogated by law enforcement.

Robert’s First Proposition of Law concerns the fifth sentence of R.C. 2151.352, “Counsel must be provided for a child not represented by the child’s parent, guardian, or custodian” and whether C.S.’s holding regarding that sentence should apply to interrogations of children. The Second Proposition of Law addresses situations in which children execute written waivers of their Miranda rights before confessing to police. Because interrogation is a stage of the

proceedings under Chapter 2151 of the Revised Code, this Court's holding in C.S. should control interrogations of children and written waivers of Miranda rights tendered by children.

III. Conclusion

Ohio's juvenile courts and law enforcement officials need this Court's guidance to ensure that every child's right to counsel is upheld uniformly at every stage of the proceedings under the Juvenile Code. Accordingly, this Court should accept jurisdiction, reverse the decision of the court of appeals, and vacate Robert's convictions and sentence. In the alternative, this Court should remand the matter to the juvenile court for further proceedings.

STATEMENT OF THE CASE AND FACTS

One day after his 16th birthday, on May 15, 2007, 9th grader Robert Bates, who has an IQ of 81 and takes various medications for his mental health problems, was taken into custody by the Cleveland police. (T.pp. 51-53); State v. Bates, 8th Dist. App. No. 92323, 2009-Ohio-5819 at ¶48. The investigation of the alleged incidents began late on May 15, 2007, and continued into the early morning hours of May 16, 2007. Bates at ¶21. Robert testified that he asked the detective to talk to his grandmother, who had raised him since he was two years old. *Id.* at ¶50. The detective testified that Robert's grandmother was notified that Robert was in custody and was willing to speak to police, but that the grandmother declined to come to the station because she did not have transportation. *Id.* at ¶18.

Without his custodial grandmother or an attorney, Robert was read his Miranda rights, signed a waiver of those rights, and confessed to robbing a man and to robbing, kidnapping, and raping a woman.² *Id.* at ¶28; 50. On October 4, 2007, Robert was bound over from the juvenile court. *Id.* at ¶2. On October 10, 2007, Robert was arraigned on kidnapping with sexual motivation, two counts of aggravated robbery, and four counts of rape, each with firearm specifications. *Id.* at ¶2-3. On July 18, 2008, at the close of evidence before the bench, the court granted Robert's motion to dismiss all the firearm specifications and one count of armed robbery. *Id.* at ¶4-5. The court found Robert guilty of kidnapping with sexual motivation, two counts of robbery, and four counts of rape. The court sentenced Robert to an aggregate prison term of nine years with five years of post-release control. (T.p. 387).

² Robert testified at trial that he was physically assaulted by police, that the detective fabricated his confession, and that he did not sign his confession, but the court did not accept Robert's allegations as credible; therefore, those allegations are not raised in this appeal.

Robert appealed his conviction and alleged that he was denied his right to an attorney, guardian, or parent to be present at his interrogation, in violation of Gault and his Fifth Amendment right to counsel.³ Bates at ¶16-17. In its decision, the court of appeals held that a child's parental presence is not constitutionally mandated, but is just one of the factors in the totality-of-the-circumstances test. Bates at ¶10;16. The court also found that Robert's confession was voluntary, as evidenced by his written and verbal waivers of Miranda. *Id.* at ¶24-28. With regard to Robert's written waiver of Miranda, the court found that Robert "signed his name to his statement" and that the signed statement contained a "warning in bold capital letters" as follows:

Before making any written statement that may be used against you at the time of your trial, we wish to repeat the instructions issued prior to your oral interrogation, that you have the right to counsel, appointed or retained, before interrogation, that you have the right to remain silent, and that anything you say may be used against you. You have the right to have an attorney present while making this statement.

Id. at ¶26. (Emphasis in original.) The majority upheld the trial court's denial of Robert's motion to suppress his confession. *Id.* at ¶36-39.

The dissent would have affirmed Robert's first assignment of error and reversed the lower court's findings. *Id.* at ¶47-57. The dissent found that Robert's young age was a "significant factor," especially where Robert's case was transferred from the juvenile court for criminal prosecution. *Id.* at ¶49. The dissent reasoned that the question of whether a juvenile validly "waives his right against self-incrimination and right to counsel cannot always be decided by the same criteria applied to mature adults...." *Id.* at ¶55, citing State v. Noggle,

³ Robert also alleged that the court applied the rape shield law in violation of his Sixth Amendment right of confrontation. That issue is not raised in this appeal.

140 Ohio App.3d 733, 743, 2000-Ohio-1927. It also found that Robert's age, "significant medications, lower IQ, stern treatment by the police, lack of presence by the minor's parent or grandparent, and the lack of presence by an attorney all combine to render this juvenile's statement involuntary." Id. at ¶56. This timely discretionary appeal follows.

ARGUMENT

FIRST PROPOSITION OF LAW

A child has the right to counsel at all stages of the proceedings against him. Because interrogation is a stage of the proceedings, a child must be represented by his parent, guardian, custodian, or an attorney before the child can waive his right to counsel pursuant to Miranda.

As this Court held in In re C.S., 115 Ohio St.3d 267, 2007-Ohio-4919, "through R.C. 2151.352, the legislature provided a statutory right to counsel that goes beyond constitutional requirements." C.S. at ¶83, citing In re Williams, 101 Ohio St.3d 398, 2004-Ohio-1500, ¶ 15, citing State ex rel. Asberry v. Payne (1998), 82 Ohio St.3d 44, 46, 1998-Ohio-596. Specifically, R.C. 2151.352 provides that "[a] child * * * is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code."

In C.S. this Court considered a child's right to counsel in juvenile court proceedings and the child's parent's role in the proceedings when a child wishes to waive his right to counsel. This Court "reinforce[d] the vital role a parent can play in a delinquency proceeding." Id. at ¶102. And, this Court noted that "[a] juvenile typically lacks sufficient maturity and good judgment to make good decisions consistently and sufficiently foresee the consequences of his actions." Id. at ¶82.

Construing the fifth sentence of R.C. 2151.352—"Counsel must be provided for a child not represented by the child's parent, guardian, or custodian"—this Court held that "represent"

means “to counsel or advise the juvenile,” and that a juvenile may waive his right to counsel “if he is counseled or advised by his parent, custodian, or guardian.” *Id.* at ¶98. Further, “[i]f the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel.” *Id.*

In this case, 9th grader Robert Bates, who was one day past his 16th birthday at the time of his interrogation, was not counseled or advised by his custodial grandmother before he waived his right to counsel and his other Miranda rights before he spoke to police. Bates at ¶50; 28. But, if the General Assembly has provided that interrogation is a stage of the proceedings that is outlined in Chapter 2151 or 2152, then the right-to-counsel provisions in R.C. 2151.352 apply to this case.

Revised Code section 2151.311 provides the procedure that applies when a child is apprehended. Under R.C. 2151.311(A)(1) and (2), a child who is taken into custody must be returned to the child’s parents or taken to juvenile court or detention. Under R.C. 2151.311(C), a child may be held for processing in any place where an adult placed under arrest can be held, for a limited period of time. And, under R.C. 2151.311(D)(2), “processing,” as it is used in R.C. 2151.311(C)(1) means “interrogating” the child.

Indeed, through R.C. 2151.311, the General Assembly has designated the interrogation of a child to be a stage of the proceedings. Therefore, just as Ohio has created a right to counsel that goes beyond constitutional requirements, it has created a right to “representation” by a child’s parent, guardian, or custodian where no such constitutional right exists. Accordingly, this Court should hold that C.S. applies to waivers of counsel pursuant to Miranda during a child’s interrogation, and that a child not represented by his parent, guardian, or custodian or an attorney

regarding his waiver of his right to counsel during an interrogation may not waive his right to counsel.

In this case, because Robert was permitted to waive his right to counsel without being properly advised by his grandmother or an attorney, the police deprived him of his right to counsel. A complete denial of counsel has been identified as one of very few errors that are so serious that they have been found to “defy analysis by ‘harmless error’ standards because they ‘affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.’” State v. Fisher, 99 Ohio St.3d 127, 2003-Ohio-2761, ¶9, quoting Arizona v. Fulminante (1991), 499 U.S. 279, 310, 111 S. Ct. 1246. Accordingly, this Court should accept jurisdiction in this case and vacate Robert’s convictions. In the alternative, because Robert’s bindover proceeding was tainted by his uncounseled confession to police, the matter must be reversed and remanded to the juvenile court for further proceedings.

SECOND PROPOSITION OF LAW

If a written waiver of Miranda rights has been executed, the juvenile court judge must consider the form used and the juvenile’s literacy level to ensure that the child has an intelligent understanding of the document and an appreciation of the gravity of signing it.

In C.S., this Court held, “If a written waiver [of counsel] has been executed, the juvenile court judge must consider the form used and the juvenile’s literacy level to ensure that the juvenile has an intelligent understanding of the document and an appreciation of the gravity of signing it.” Id. at ¶109. Although waivers of Miranda need not be in writing, the same special scrutiny outlined by this Court in C.S. regarding written waivers of counsel by children should be provided to children who execute written Miranda waivers.

Applying this standard to Robert’s case makes sense, because the court of appeals relied on Robert’s signing his name to a document that would not have been easily comprehended by a

9th grade child like Robert, who has an IQ of 81 and takes a number of medications for his mental health issues. See Bates at ¶26-27.

Specifically, the court found that Robert “signed his name to his statement” and that the signed statement contained a “warning in bold capital letters” as follows:

Before making any written statement that may be used against you at the time of your trial, we wish to repeat the instructions issued prior to your oral interrogation, that you have the right to counsel, appointed or retained, before interrogation, that you have the right to remain silent, and that anything you say may be used against you. You have the right to have an attorney present while making this statement.

Id. at ¶26. (Emphasis in original.)

More importantly, this Court’s pronouncement of a uniform standard for evaluating children’s written waivers of counsel executed at any stage of the proceedings is needed to ensure that children’s rights to counsel are protected at every stage of the proceedings.

Accordingly, this Court should accept jurisdiction in this case and vacate Robert’s convictions. In the alternative, because Robert’s bindover proceeding was tainted by his invalid written waiver of counsel and his Miranda rights, this Court should reverse the decision of the court of appeals, suppress Robert’s confession, and remand to the juvenile court for further proceedings.

CONCLUSION

For all the foregoing reasons, this Court should accept Robert Bates' appeal because it involves a felony, is of great public and general interest, and raises a substantial constitutional question.

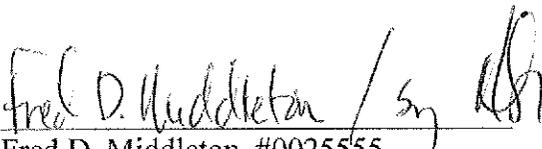
Respectfully submitted,
 /  #00764193
Fred D. Middleton, #0025555
Counsel of Record

1717 The Superior Building
815 Superior Avenue, East
Cleveland, Ohio 44114-2702
(216) 566-8000
(216) 574-9945 – Fax
infor@fredmiddletonlaw.com

COUNSEL FOR ROBERT BATES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Robert Bates**, was forwarded by regular U.S. Mail this 31st day of December, 2009, to the office of Mary McGrath, Assistant Cuyahoga County Prosecuting Attorney, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.

 /  #00764193
Fred D. Middleton, #0025555
Counsel of Record

COUNSEL FOR ROBERT BATES

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 :
 :
 Plaintiff-Appellee, : Case No.
 :
 :
 v. :
 :
 : On Appeal from the Cuyahoga County Court of
 Robert Bates, : Appeals, Eighth Appellate District, Case No.
 : 92323
 :
 Defendant-Appellant. :
 :

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT BATES**

Judge T. McMonagle

McMANCI

NOV 16 2009

FILED

2009 NOV 20 P 3:11

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION
No. 92323

STATE OF OHIO

FEE
3
TAXED

PLAINTIFF-APPELLEE

vs.

ROBERT BATES

A554311

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501710

BEFORE: Kilbane, P.J., Blackmon, J., and Jones, J.

RELEASED: November 5, 2009

JOURNALIZED:
NOV 16 2009



900693 80965

ATTORNEY FOR APPELLANT

Fred D. Middleton
815 Superior Avenue, East
1717 The Superior Building
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Mary McGrath
Assistant County Prosecutor
Justic Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 16 2009
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

NOV 05 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

CA08092323 60237190


COPIES REQUIRED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CA08092323
09442973


VOL 0693 #0966

MARY EILEEN KILBANE, P.J.:

Appellant, Robert Bates ("Bates"), appeals his convictions of one count of kidnapping with a sexual motivation specification, two counts of robbery, and four counts of rape. He argues that the trial court erred in failing to suppress his confession because he is a juvenile, and that he was denied his Fifth Amendment right to an attorney, guardian, or parent present during his interrogation. He also argues that Ohio's rape shield law was illegally applied to deny him his Sixth Amendment right of confrontation. After reviewing the facts and the applicable law, we affirm.

Procedural History

On October 4, 2007, Bates was bound over from juvenile court and charged by the Cuyahoga County Grand Jury for the rape, kidnapping, and robbery of A.S.,¹ and the robbery of Dion Milton. Count 1 of the indictment charged kidnapping, a first degree felony, in violation of R.C. 2905.01(A)(2), with a sexual motivation specification under R.C. 2941.147, and both one- and three-year firearm specifications under R.C. 2941.141 and R.C. 2941.145, respectively. Count 2 of the indictment charged aggravated robbery, a first degree felony, in violation of R.C. 2911.01(A)(1), with both one- and three-year firearm

¹Victims of sexual violence are referred to herein by their initials or as "the victim" in accordance with this court's established policy regarding nondisclosure of their identities.

VAL0693 00967

specifications under R.C. 2941.141 and R.C. 2941.145, respectively. Counts 3, 4, 5, and 6 charged rape, a first degree felony, in violation of R.C. 2907.02(A)(2). Count 7 of the indictment charged aggravated robbery, a first degree felony, in violation of R.C. 2911.01(A)(1), with both one- and three-year firearm specifications under R.C. 2941.141 and R.C. 2941.145, respectively. Each of the rape counts carried the above-mentioned firearm specifications.

On October 10, 2007, Bates was arraigned and pled not guilty to the charges.

On July 14, 2008, Bates executed a written jury waiver, and on the record verbally waived his right to a trial by jury. The State presented its case to the bench.

On July 18, 2008, at the close of evidence, the trial court granted Bates's motion under Crim.R. 29 as to all gun specifications. According to the record, the court also granted Bates's Crim.R. 29 motion with respect to the "charge of armed robbery pursuant to R.C. 2911.01." Thereafter, the trial court found Bates guilty of kidnapping with a sexual motivation specification as charged in Count 1, and guilty of the lesser-included offense of robbery, a third degree felony under R.C. 2911.02, as charged in Count 2. The court found Bates guilty of rape, as charged in the indictment in Counts 3, 4, 5, and 6. Finally, the trial

VOL0693 00968

court found Bates guilty of the lesser-included offense of robbery, a third degree felony under R.C. 2911.02, as charged in Count 7.

This appeal followed.

Reviewing Juvenile Confessions

"When determining whether a juvenile's confession has been voluntarily given, Ohio courts are to consider the following factors: 'the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Shedwick* (Nov. 20, 1997), Cuyahoga App. No. 71749, citing *In re Watson* (1989), 47 Ohio St.3d 86, 89-90, 548 N.E.2d 210. In applying this test, this court has cautioned that "the court must scrutinize closely the validity of waivers of constitutional rights when minors are involved." *In re Greer* (Sept. 17, 1992), Cuyahoga App. No. 63037, at 6.

The state bears the burden of proving by a preponderance of evidence both the voluntariness of a defendant's custodial statements and the waiver of his *Miranda* rights. *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473; *State v. Hill* (1987), 37 Ohio App.3d 10, 523 N.E.2d 885. See, also, *Nix v. Williams* (1984), 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377, 388.

VOL0693 000969

Thus, our mandate is to examine the totality of the circumstances in order to determine whether there has been a waiver of the defendant's right to remain silent and to have the assistance of counsel. *Fare v. Michael C.* (1979), 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197; *State v. Davis* (1978), 56 Ohio St.2d 51, 381 N.E.2d 641; *State v. Carder* (1966), 9 Ohio St.2d 1, 222 N.E.2d 620; *State v. Newell* (Aug. 8, 1980), Cuyahoga App. No. 41391.

Finally, we note that "[t]hough the greatest care must be taken to assure a juvenile's admissions are voluntary, parental presence is not constitutionally mandated." *State v. Bobo* (1989), 65 Ohio App.3d 685, 690, 585 N.E.2d 429, citing *In re Gault* (1967), 387 U.S. 1, 55, 87 S.Ct. 1428, 1458, 18 L.Ed.2d 527, 561. The presence or absence of a legal guardian is but one factor to consider in determining whether, under the totality of the circumstances, there is a valid waiver of the rights to remain silent and to have the assistance of counsel. *Id.*

Standard of Review on Motions to Suppress

"When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of a witness." *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Accordingly, when reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v.*

YOL0693 200970

McNamara (1997), 124 Ohio App.3d 706, 710, 707 N.E.2d 539. However, an appellate court reviews de novo whether the trial court's conclusions of law, based on those findings of fact, are correct. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691, 654 N.E.2d 1034.

With these standards in mind, we proceed to review Bates's appeal.

Bates's first assignment of error states:

"The court failed to suppress the confession of a juvenile who was denied his rights to an attorney, guardian or parent to be present during interrogation in violation of his Fifth Amendment rights."

Within this assignment of error, Bates argues that he was physically and verbally abused by the police, and that the police intimidated him and otherwise coerced him into confessing to the crimes outlined above. He also states that the police coerced him into confessing in exchange for the chance to speak with his grandmother on the telephone. He argues that his status as a juvenile and his IQ of 81 prevented him from understanding the severity of the situation, and that the police took advantage of him in obtaining his confession. Bates argues that he was under the influence of Seroquel, a medication associated with sleeping disorders, and Aderall, a medication associated with behavioral disorders. According to Bates, these medications, coupled with his young age and low IQ level, and the alleged abuse suffered at the hands of the police officers, render his statement involuntary.

VAL0693 00971

Bates does admit that he was advised of his *Miranda*² rights "with numerous officers present," yet he argues that their presence in the room, coupled with their alleged prior physical and mental abuse, intimidated Bates to such a degree that his statement was coerced. Last, Bates argues that he should have been afforded the opportunity to have his legal guardian or attorney present during his interview with the police, because his understanding of the situation was that he could make a statement in exchange for his immediate release and return to his grandmother, who is his legal guardian. Our close scrutiny of the totality of the circumstances in this case belies these contentions.

**Whether the Absence of an Attorney or Legal Custodian
Renders Bates's Confession Unconstitutional**

Bates's contention that the law requires the presence of an attorney or legal guardian during his custodial interrogation is incorrect. Ohio law does not require the presence of a parent or a legal guardian under the constitution in order to render a juvenile confession valid. *Bobo*, supra. Therefore, their presence or absence in no way affects the validity of Bates's confession. Further, we note that, despite the evidence in the record that Bates was advised of his

²For the record, we note that the following rights are referred to when we discuss Bates's "*Miranda* rights": That prior to any custodial interrogation, the police must specifically inform the defendant that he has the right to remain silent; that if he gives up this right any statement he makes may be used against him; and that he has a right to an attorney, whether retained or appointed. See *Miranda v. Arizona*, 384 U.S. 436, at 444.

right to counsel before he gave his statement, he never requested an attorney at any time.

Whether Bates's Contention That he Would be Released in Exchange for his Statement Renders his Confession Unconstitutional

First, as was established in *In re Gault*, adopted in Ohio by *In re Watson*, and adopted in this district by *Bobo* and its progeny, parental presence is not required and is only one factor to be considered in the totality of the circumstances surrounding his confession in this case. See *Bobo* at 690. The other factors to be considered when deciding whether a confession was coerced, as is discussed in more detail *infra*, include the intensity and frequency of the interrogation, the existence of physical deprivation or mistreatment, and the existence of threat or inducement. *Shedwick* at 89-90.

Detective Joyce testified at the suppression hearing and at trial that she advised Bates's grandmother, Betty Swanson, that Bates was in custody and willing to give a statement, and that she asked Swanson if she would like to be present. According to Detective Joyce, Swanson declined because she lacked transportation.

Yet, even taking all of Bates's arguments as true, Bates's confession is still constitutional.

VAL0693 PG0973

Bates argues that his statement was coerced because he believed he would be released to his legal guardian in exchange for his statement. Both Bates and his grandmother, Betty Swanson, who is also his legal guardian, testified that they were denied the opportunity to speak with one another by telephone when Detective Jeanie Joyce (Detective Joyce) of the Cleveland Police Department's First District, called the family home to advise them that Bates was being held on suspicion of robbery and rape. Yet, Swanson also testified that she was able to make it down to the First District Station that night, but did not go, essentially because Detective Joyce did not invite her to come down. (Tr. 46.)

While it is true that the investigation in this case took place in the late hours of the evening of May 15, 2007, and extending into the early morning hours of May 16, 2007, the crimes in this case also occurred that night. Despite the late hour, there is no evidence of physical deprivation or mistreatment in the record, and it is undisputed that the interview with Bates took place at a desk, in an open area of the detective bureau at the Cleveland Police Department's First District Station, with officers coming and going at all times.

When examining Bates's argument that he was induced to give his statement in exchange for his release, we note the disparate testimony on this point between the State and the defense. In essence, Bates argues that his testimony is more credible than the State's evidence, and that the trial court

should have evaluated the evidence in his favor. When assessing witness credibility "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. Indeed, the court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." *Id.*, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

In this case, the trial court, in scrutinizing the evidence, found the State's evidence more convincing and truthful than Bates's evidence on this point. Nothing in the record leads us to a different conclusion.

Whether Bates's Confession was Voluntary

Next, with respect to the voluntariness of his statement, the record on appeal indicates that Detective Joyce enunciated all of the constitutional rights to which Bates was entitled, including his *Miranda* rights. At the end of this recitation, Detective Joyce testified that she asked Bates if he was voluntarily waiving these rights. Detective Joyce then testified that Bates did so verbally

and in writing as provided on the face of the written statement itself. Bates refutes this, arguing simply that, save for a few select statements, Detective Joyce fabricated his statement in its entirety, and that Sergeant Stanton forged Bates's name (both his real name and the alias he originally gave the police) on the statement.

Bates asks us to strain credulity by imagining that a Cleveland police detective (who testified that she was called back into work to investigate the instant matter after the close of her nightly tour), would in the course of an investigation, make up an entire statement with such vivid detail, and in the presence of the only suspect, witness her supervisor's illegal forgery to the statement. In considering this argument, we will not substitute our judgment for the factfinder's judgment on this issue, especially when the trial court was in the best position to view the evidence and the credibility of witnesses. *Awan*, supra.

Even if there was no testimony by the State that Bates voluntarily relinquished his constitutional rights and admitted to the instant offenses, the evidence is clear that he assented to his statement by signing his name to it. The top of the statement itself contains a warning in bold capital letters that states:

"Before making any written statement that may be used against you at the time of your trial, we wish to repeat the

Vol 0693 #0976

instructions issued prior to your oral interrogation, that you have the right to counsel, appointed or retained, before interrogation, that you have the right to remain silent, and that anything you say may be used against you. You have the right to have an attorney present while making this statement."

After this recitation, there are two questions on the statement form. The first asks, "Do you understand your rights as stated above?" The second asks, "Do you care to make a statement?" Bates responded affirmatively to both questions by writing "yes."

Within the body of his statement, Bates admits to both the robbery of Milton, and the robbery, kidnapping, and rape of A.S. on the evening of May 15, 2007. After the body of the statement, at the bottom of the statement form there is a question that asks, "Do you find your statement to be true?" Bates answered "yes" to this question in his own handwriting, and then signed the statement with his correct name in the presence of Detective Joyce and Sergeant Stanton, who was also present in the room to witness Bates's statement.

On this point, Bates argues that, outside of a few select phrases, Detective Joyce made his entire statement up, including items detailing Bates's whereabouts before the crimes and the name of the man who gave Bates the gun with which he committed the instant offenses. Bates argues that Sergeant Stanton actually wrote Bates's name on the form, and that it was Sergeant Stanton, not Bates himself, who relinquished his rights on the statement form.

VOL 0693 PG 0977

He argues that Detective Joyce created a timeline for the offense, and that he was actually not wearing the clothes that the police photographed him wearing at the scene of the crime. As the factfinder found initially, so we now find that in light of the details contained in Bates's statement itself and the evidence and testimony presented by the State, Bates's arguments are not credible and are contrary to established facts in the record.

Whether Bates was Physically Coerced into Confessing

Bates argues that the arresting officers physically mistreated him. Whether or not a brief physical altercation took place at the time of arrest, there is no evidence of an assault in the record. Further, Bates cannot point to any evidence in the record that shows this altercation coerced his confession and, in any case, he does not make any specific allegations of physical coercion against the interviewing officers, Detective Joyce and Sergeant Stanton.

Both during the suppression hearing and at trial, the arresting and investigating officers consistently testified that Bates was not physically assaulted or intimidated, and that he never complained of being in any physical pain. In addition, the Cleveland Police took color photographs of Bates at the scene and at the time of his interview in the detective bureau at the First District Police Station. None of these photographs show any evidence of physical injury. To the contrary, the investigating and arresting officers also testified

YOL0693 PG0978

that Bates was alert and responsive, and that at the end of his statement, he even amended it to include his correct name and birth date. The interview took place in an open area, at a desk, in the middle of a crowded office, not a locked cell or a private interrogation room. Outside of the claims that he was physically mishandled at the point of arrest, Bates points to no evidence of physical deprivation or mistreatment.

Whether Bates's age, IQ, and Competency Rendered his Confession Involuntary

Before trial, a competency evaluation was conducted at the court psychiatric clinic to ascertain whether Bates, "as a mentally disordered person," was eligible to stand trial. According to the docket, after the clinic issued its report, which found to a reasonable degree of psychological certainty that Bates was competent to stand trial despite his IQ level and attendant psychological deficits, including a family history of drug addiction, the death of his father at an early age, and differential diagnoses of attention deficit hyperactivity disorder and oppositional defiant disorder, both Bates's trial counsel and the State stipulated to the competency finding.

At no time has Bates produced any evidence to refute this finding. At trial, not only did Bates's counsel not object to the admission of this report, he in fact stipulated to its findings and never suggested that it was flawed. He has thus waived all but plain error on appeal. See *State v. Mink*, 101 Ohio St.3d 350,

VOL 693 PG 979

2004-Ohio-1580, 805 N.E.2d 1064, at ¶29 (failure to object to any aspect of competency evaluations waives all but plain error). The plain error doctrine should be invoked by an appellate court only in exceptional circumstances to prevent a miscarriage of justice. *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 227, 448 N.E.2d 452. Plain error will be recognized only where, but for the error, the outcome of the case would clearly have been different. *Id.*

In this case, we cannot say that the trial court committed plain error in admitting the report finding Bates competent to stand trial. Therefore, the mere mention of Bates's IQ and prescription medications in this appeal are facts that do not render Bates's confession involuntary.

The Trial Court's Decision to Deny Bates's Motion to Suppress

When the trial court rules on a motion to suppress, the credibility of the witness is a matter for the judge acting as the trier of fact. *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583. Moreover, when there is substantial evidence to support the factual findings of the trial court, the decision on the motion to suppress will not be disturbed on appeal absent an error of law. *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542.

In the case sub judice, the trial court observed the following factors when making its determination on the motion to suppress:

VBL0693 #0980

“And in reviewing this matter, the Court is well aware that a degree of caution or special caution should be employed when assessing whether or not a statement and/or confession rendered by a juvenile meets the Constitutional muster, pursuant to the Fifth Amendment, especially in a situation like this where there is not a parent or lawyer present.

And there are a number of things to look at in assessing that, and one of the — and the testimony in this case does not indicate any lack of voluntariness. There was an indication on behalf of the State of Ohio that at least the offer was made in terms of the contact with the grandmother * * *. And despite the claims there is not sufficient evidence to indicate that this isn't his statement.” (Tr. 83-84.)

Indeed, on this point, the State argues that the thrust of Bates's argument is not whether his statement was voluntary, but instead, whether its contents were accurate or fabricated by the Cleveland Police. Based upon the totality of the circumstances as outlined above, we agree with the trial court that there is insufficient evidence to indicate that Bates's statement was involuntary or fabricated by the investigative officers in this matter.

Bates's first assignment of error is overruled.

Bates's second assignment of error states:

“The Rape Shield Law as Applied in this Case Violates Appellant's Sixth Amendment Right of Confrontation.”

Within this assignment of error, Bates argues that Ohio's rape shield law, R.C. 2907.02, prohibited him from adequately defending himself at trial because he was prohibited from putting on evidence that the sexual encounter in this

YAL0693 000981

case was consensual. However, Bates does not specify what evidence the court prohibited him from placing in the record, nor is there any evidence that Ohio's rape shield law denied Bates his right to confront his accusers.

R.C. 2907.02(D) states in pertinent part:

“Evidence of specific instances of the victim’s sexual activity, opinion evidence of the victim’s sexual activity, and reputation evidence of the victim’s sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim’s past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact not at issue in the case and that is inflammatory or prejudicial nature does not outweigh its probative value.”

In support of his argument, Bates cites *State v. Gardner* (1979), 59 Ohio St.2d. 14, 391 N.E. 2d 337, for the proposition that the rape shield law as applied under the facts of this case denied him his confrontation rights. However, the Ohio Supreme Court in *Gardner* found that the trial court correctly barred testimony that the victim had a reputation for being a prostitute, in part because “[t]he supposed relevancy here rests on an assumption that prior unchastity with other individuals indicates a likelihood of consent to the act in question with the defendant.” *Id.* at 341. The *Gardner* court upheld the trial court’s barring such testimony “[a]s critical thought and analysis have been brought to bear on these issues, it has become apparent that in many instances a rape victim’s past

VELD 693 RBO 982

sexual conduct may have no bearing at all on either her credibility or the issue of consent." Id. (Internal citations omitted.)

In the case sub judice, the trial court allowed Bates's counsel to cross-examine the victim and ask her questions regarding the night in question and whether the crime at issue was really an encounter that involved sex for drugs.

At trial, Bates's counsel was allowed to argue its theory to the trial court that the victim in this case was a prostitute. In so doing, Bates's counsel admitted this theory did not fall within Ohio's rape shield law because, as he stated, it was being presented to impeach the victim's credibility. The fact that Bates was able to place this evidence in the record renders his argument under *Gardner* irrelevant. Further, in light of his counsel's admission that the evidence falls outside the rape shield law, this argument is moot. The victim in this case had no prior arrests of any kind, let alone for prostitution. Bates presented no evidence that even fit within the ambit of the rape shield law. What evidence he had was presented to the court.

Bates's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

VOL0693 PG0983

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., CONCURS
LARRY A. JONES, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

LARRY A. JONES, J., DISSENTING:

I respectfully dissent from my learned colleagues in the majority. I believe that there is substantial evidence in the record to support reversal in this case.

In the case at bar, Bates was only sixteen years old and in the 9th grade at the time of the incident. Bates's status as a juvenile and his IQ of 81 prevented him from understanding the severity of the situation. Additionally, at the time of the incident, Bates was taking Seroquel, a medication associated with sleeping disorders, and Aderall, a medication associated with behavioral disorders.

The young age of Bates in this case is a significant factor, especially since this is an atypical case, binding over a juvenile as an adult. The U.S. Supreme

VOL0693 000984

Court stated that children cannot withstand the same questioning as adults. In *Haley v. Ohio* (1948), 332 U.S. 596, 606, 68 S.Ct. 302, the Supreme Court found that the methods used against a fifteen-year-old murder suspect, which might have left "a man cold and unimpressed, [could] overawe and overwhelm a lad ***."³ Similarly, age was the dominant factor in *Gallegos v. Colorado* (1962), 370 U.S. 49, where a fourteen-year-old boy signed a confession to a charge of assault and battery. Low mental ability can also lead to the conclusion that a confession was not voluntary. *Fikes v. Alabama* (1957), 352 U.S. 191, 77 S.Ct. 281.

Here, Bates was read his *Miranda* rights and interrogated without representation. The interrogation took place at 12:45 a.m. with several police officers coming in and out of the room during that time. Bates testified that he asked to speak to his grandmother, Betty Swanson, who had raised him since he was two years old.

Detective Joyce testified that she called appellant's grandmother who indicated that she could not come down to the station. However, Swanson testified that Detective Joyce did *not* ask her to come to the station and she did

³Justice Douglas for the majority concluded: "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child — an easy victim of the law — is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. * * * He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him."

have transportation to do so. Moreover, Swanson stated that she was not allowed to talk to her grandson during his detention. Although, Bates was read his *Miranda* rights, close scrutiny of his young age, emotional instability and diminished mental capacity results in a lack of acceptance or understanding in this case.

Waivers of *Miranda* rights by minors must be scrutinized closely because the validity of the waiver is affected by the factors of age, emotional stability and mental capacity. *In re Goins* (1999), 137 Ohio App.3d 158, 738 N.E.2d 385.

Joyce's interrogation, as well as additional pressure by the police, all carried out in the absence of a defense attorney, parent, or guardian, is unduly severe and warrants suppression. Although Bates finally relented and replied that he would sign the statement, he did so only when Detective Joyce stated she would call his house when he signed it. Moreover, Detective Stanton could not provide any corroboration, he could only testify as to Bates's signature. When Bates asked to speak to his grandmother, all questioning should have stopped.

The court stated in *In re J.W.* (1997), 85 Ohio Misc.2d 1, 682 N.E.2d 1109, at headnote 2, that "the absence of a qualified person, such as special education teacher or counselor, at interrogation of juvenile with limited intellectual and social capabilities warranted suppression of statements obtained in such interrogation, though juvenile was advised of *Miranda* rights and given *Miranda*

warnings, and though interrogating officer was kind to juvenile, did not pressure him, and explained process to him." *Id.*

When a minor is sought to be interrogated, the question of whether he intelligently and voluntarily waives his right against self-incrimination and right to counsel cannot always be decided by the same criteria applied to mature adults, and such criteria necessarily varies with certain factors, such as the age, emotional stability, physical condition, and mental capacity of the minor. *State v. Noggle*, 140 Ohio App.3d 733, 2000-Ohio-1927, 749 N.E.2d 309.

The young age of the appellant, significant medications, lower IQ, stern treatment by the police, lack of presence by the minor's parent or grandparent, and the lack of presence by an attorney all combine to render this juvenile's statement involuntary. Moreover, because this is a bindover case in which Bates is subject to the same penalties as an adult, his juvenile rights should have been more carefully examined prior to any decision. Given the severity of the charges and the lack of adult supervision, I believe that the trial court should have suppressed the confession of the minor child in this situation.

Accordingly, I would grant appellant's first assignment of error and reverse the lower court.