

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-661-2019
v.	:	
	:	
MARCUS DEGARMO,	:	MOTION IN LIMINE
Defendant	:	

OPINION AND ORDER

Under the above docket, Marcus Degarmo (Defendant) was charged on April 26, 2019 with one count of Criminal Solicitation – Rape of a Child,¹ one count of Unlawful Contact with a Minor,² one count of Criminal Solicitation – Child Pornography,³ one count of Corruption of Minors,⁴ one count of Sexual Abuse of Children – Child Pornography,⁵ and one count of Criminal Use of Communication Facility.⁶ Defendant filed a Motion in Limine on July 14, 2020 seeking to preclude the Commonwealth from introducing his interview conducted by police on April 25, 2019.⁷ A hearing on the Motion was held by this Court on August 18, 2020.⁸ Defendant raises one issue to be addressed in the present Opinion, whether Defendant’s

¹ 18 Pa. C.S. § 902(a).

² 18 Pa. C.S. § 6318(a)(1).

³ 18 Pa. C.S. § 902(a).

⁴ 18 Pa. C.S. § 6301(a)(1)(ii).

⁵ 18 Pa. C.S. § 6312(d).

⁶ 18 Pa. C.S. § 7512.

⁷ The Court notes that although styled as a Motion in Limine, the motion is clearly seeking to suppress the interview and should have been filed accordingly. Although untimely, the Court finds in the interest of justice it is better to allow Defendant to litigate the claim and make a determination on the merits. *See* Pa. R. Crim. P. 581 (B) (“Unless the opportunity did not previously exist, or the interests of justice otherwise require . . . [i]f timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.”).

⁸ At the same hearing, the Court addressed a Motion to Compel Discovery from each party. Defendant was provided with discovery at the time of the hearing and the record has been kept open, but Defendant indicated the information would most likely dispose of the Motion to Compel. The Commonwealth based on Defendant’s representations of lack of the requested information withdrew its Motion to Compel.

intellectual disability at the time of his interview kept him from validly waiving his *Miranda* rights, such that the statements must be precluded.

Background and Testimony

Sergeant Chris Kriner (Kriner) of the Old Lycoming Township Police Department testified on behalf of the Commonwealth. The Commonwealth also provided a written waiver of Defendant's *Miranda* rights, a video recording of the interview of Defendant that occurred on April 25, 2019, a transcript of that interview, and the criminal complaint from Defendant's prior criminal case with the docket number CR 85-2009 as exhibits. Based on this evidence the following was established.

Kriner's Testimony

Kriner testified that he had conducted over one hundred interviews in which he administered *Miranda* warnings. Additionally, Kriner has interviewed individuals with intellectual disabilities. During the interview, Defendant was not handcuffed and Kriner was in plain clothes, but identified himself as a police officer. Kriner stated that throughout the interview Defendant seemed to comprehend the process and the questioning. Kriner had known Defendant had been arrested prior and was familiar with being interviewed by police. Although Defendant admitted to things he denied in the beginning, he continued to deny sexual touching or possessing child pornography throughout the interview. At the end of the interview, Defendant stated that he had a learning disability. On cross examination, Kriner admitted he is not an expert in intellectual disabilities, but his determination was based on his limited experience. Kriner stated at no point did he believe Defendant was unaware of what was going on. Defendant was responsive and seemed to comprehend the questions based upon his relevant answers. Towards the end of the interview, Kriner was made aware that prior to working at

Sam's Club Defendant had collected disability for his intellectual disability, he had never had a driver's license, and Defendant believed he was passed through high school although he should not have been. Kriner stated, despite his intellectual disability, he was believed Defendant fully comprehended the interview.

Interview of Defendant

Commonwealth's Exhibit #2A is a DVD containing the recording of Defendant's interview by Kriner and Commonwealth's Exhibit #2B is a transcript of that interview. Upon entering the room, Defendant was instructed that there was audio and visual recording and that the door was being shut for privacy. Commonwealth's Exhibit #2B at 2. Kriner informed Defendant that he was in custody for unlawful contact with a child and that he had to read him his *Miranda* rights prior to them having a discussion. *Id.* at 2-3. Defendant was then read the waiver form verbatim. *Id.* at 3-4; *see also* Commonwealth's Exhibit #1. Defendant then signed the form. Commonwealth's Exhibit #2B at 4. Kriner then explained the non-waiver and waiver portion of the sheet and instructed him to determine if he wanted to talk to him or not and to sign accordingly. *Id.* at 4; *see also* Commonwealth's Exhibit #1. Defendant then signed the waiver portion stating he wished to talk without an attorney present. Commonwealth's Exhibit #2B at 5. Defendant then verified that he can read and write English, he graduated high school, he is employed at Sam's Club, and that he was not under the influence of drugs or alcohol. *Id.* at 5-6. To reaffirm Defendant could read, Kriner had him read the waiver section that he had signed out loud. *Id.* at 6.

Defendant stated that although he does not live with the alleged victim and her mother, he has been dating the mother for approximately a year and occasionally stays over to help with the alleged victim. *Id.* at 7-8. The alleged victim, who Defendant knew was ten at the time, got

a phone activated recently at the time of the events. *Id.* at 11-12, 19. Defendant stated that he occasionally messages the alleged victim, but it is typically regarding school or video games. *Id.* at 16. Occasionally, Defendant stated he will contact the alleged victim through a “kids messenger” app for when she needs to be picked up from school and related conversations. *Id.* at 19. Defendant also stated that he communicates with the alleged victim through Snapchat as well, but predominately sends her pictures of him “mak[ing] weird faces.” *Id.* at 31-32.

When asked about the text messages on the alleged victim’s phone, Defendant stated that when he sent the text message asking to “show me your pussy” that he intended the message to go to her mother. *Id.* at 10-11. He stated the mistake occurred because he was “halfway asleep.” *Id.* at 22. Defendant stated he would occasionally “chat dirty” with the mother. *Id.* at 20. The mother’s cell phone number was saved in his phone under her first name. *Id.* at 13. Defendant stated he was embarrassed when the mother confronted him about the messages because they were not supposed to go to the daughter, but he apologized to her and he told the alleged victim in the presence of the mother “next time I send something to you like that please tell me.” *Id.* at 14-15. Defendant stated that no one responded after he sent the message and he deleted them when the mother told him. *Id.* at 14, 21. Kriner also discussed inappropriate Snapchats with Defendant, which at first he denied. *Id.* at 34. Defendant also adamantly denied having sex with the alleged victim. *Id.* at 38. After some prodding, Defendant stated the multiple forms of messaging were not to elicit sex from the alleged victim, but were “get a rouse out of her.” *Id.* at 39. Defendant admitted that he messaged her asking if she wanted to have sex with him, but he was just joking around. *Id.* at 40, 54. Even if the alleged victim had said yes, Defendant claimed that he would have told her no. *Id.* at 56. Defendant also admitted to asking the alleged victim if he could touch her butt. *Id.* at 41. When asked if

when the alleged victim sat on his lap it gave him an erection, Defendant stated no, but if it did it was not his intention. *Id.* at 42. The alleged victim also sent a photo through Snapchat of her lifting her shirt up to the Defendant. *Id.* at 44. Defendant denied asking for it at first, but when pressed he admitted that he did because he did not think she would send it. *Id.* at 45. When she did Defendant stated he told her he was sorry for asking and that he did not think she was going to send it. *Id.* at 47. Defendant stated on multiple occasions throughout the interview that he did not know why he asked the alleged victim these things, but Defendant continued to deny ever actually physically touching the alleged victim. *Id.* at 45, 52. Kriner then asked Defendant if he possessed any child pornography, which he denied. *Id.* at 60-62. Kriner also expanded and asked if Defendant understood that based on what he had asked the alleged victim why Kriner would be asking about child pornography, which Defendant stated he understood. *Id.* at 62. Defendant then stated that his “goal was really to teach [the alleged victim] that when somebody asks [her] that that you need to come forward and say something.” *Id.* At the end of the interview, Defendant also proffered that he deleted the messages prior to the mother confronting him about the messages. *Id.* at 64.

At a point in the interview, Kriner discussed Defendant’s prior charges and conviction with Defendant. *Id.* at 33. Defendant stated in that instance he “lied to the police just so [he] c[ould] get out of there,” but assured Kriner that he was not lying to them now. *Id.* Defendant stated that he “was basically made to admit to something that [he] didn’t do.” *Id.* at 57. Again, Defendant stated that this was not the case here and despite his actions being “illegal, morally wrong; [and] unsafe” Defendant was aware of what he was saying. *Id.* at 57-58. At the end of the interview, Defendant stated prior to his current job he collected SSI for his learning disabilities. *Id.* at 62-63. When asked to expand further, Defendant stated he is “basically . . .

mild to retarded disability,” which Kriner responded by saying “[y]ou don’t seem like that.” *Id.* at 63. Defendant further stated he graduated just because they passed him and he has not drove since his sister passed away in a car accident. *Id.* at 63. Defendant stated he did not think it would upset her, but acknowledged it is the fact he said it and it is wrong. *Id.* at 66. Defendant also recognized it makes the alleged victim unsafe to be around him and it was against the law. *Id.* at 66-67.

Whether Defendant Voluntarily Waived His Rights

Defendant alleges that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights, as the waiver was not knowing due to his mental incapacity. There is no disagreement between the parties that Defendant was subject to an arrest and was being subjected to a custodial interrogation. Additionally, there is no allegation by Defendant that he attempted to or did invoke either his right to remain silent or right to counsel. The sole issue before this Court is solely whether Defendant voluntarily, knowingly, and intelligently waived his rights pursuant to his *Miranda* warnings.

Statements made during custodial interrogation are presumptively involuntary unless given *Miranda* warnings prior. *Commonwealth v. Williams*, 941 A.2d 14, 30 (Pa. Super. 2008). An individual must be informed the following rights prior to interrogation: his right to an attorney; that one will be appointed if he cannot afford one; if he desires an attorney, interrogation will cease until one can be consulted; he has the right to remain silent; and if he does choose to speak, anything he says can and will be used against him in court. *Miranda v. Arizona*, 384 U.S. 436, 471-74 (1966). A defendant’s waiver of his *Miranda* warnings must be “voluntary, in the sense that [the] defendant's choice was not the end result of governmental pressure [and] knowing and intelligent, in the sense that it was made with full comprehension

of both the nature of the right being abandoned and the consequence of that choice.” *Commonwealth v. Pruitt*, 951 A.2d 307, 318 (Pa. 2008). “It is the Commonwealth’s burden to establish that a defendant knowingly and voluntarily waived his *Miranda* rights [and] [a] defendant must explicitly waive his *Miranda* rights by making an outward manifestation of that waiver.” *Commonwealth v. Lukach*, 163 A.3d 1003, 1111 (Pa. Super. 2017) (internal citations omitted). The validity of a waiver is dependent upon

whether the waiver was voluntary, in the sense that defendant’s choice was not the end result of governmental pressure, and whether the waiver was knowing and intelligent, in the sense that it was made with full comprehension of both the nature of the right being abandoned and the consequence of that choice.

Commonwealth v. Mitchell, 902 A.2d 430, 451 (Pa. 2006).

If the totality of the circumstances shows an uncoerced choice accompanied by the requisite level of comprehension the waiver is sufficient. A proper waiver of one’s *Miranda* rights satisfies both the Fifth and Sixth Amendments of the United States Constitution.

Commonwealth v. Woodard, 129 A.3d 480, 500-02 (Pa. 2015).

When evaluating the voluntariness of a defendant’s statements a court must take into consideration “the duration and means of the interrogation; the defendant’s physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and all other factors that could drain a person’s ability to resist suggestion and coercion.” *Commonwealth v. Yandamuri*, 159 A.3d 503, 525 (Pa. 2017).

Additional factors for the court’s consideration include: the individual’s age and level of education; his previous experience with law enforcement; whether the individual was advised of his rights; and whether he was abused or threatened with abuse. *Id.* Intellectual disabilities and cognitive shortcomings do not *per se* make a defendant’s waiver of *Miranda* rights involuntary or unintelligent. *Commonwealth v. Keaton*, 45 A.3d 1050, 1068-69 (Pa. 2012). A

court may take into consideration “a defendant's mental age and condition, low IQ, limited education, and general condition” in evaluating whether a waiver was voluntary, knowing, and intelligent. *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1137 (Pa. 2012). If a court finds a “mental defect at the time of his confession that was or should have been obvious to police,” or “the evidence suggest[s] that [the defendant] alleged mental health issues interfered with his waiver” then the confession may be suppressed. *Id.*

The Commonwealth presented a number of cases to bolster their position. In *Commonwealth v. Tucker*, the defendant was nineteen, had an IQ of 75-79, a 2.7 reading grade level, and only completed a few grades. 335 A.2d 704, 707 (Pa. 1976). A psychiatrist also testified that the defendant was “a constitutional psychopath and a mild mental defective.” *Id.* The Pennsylvania Supreme Court found that this was insufficient to grant suppression when his testimony was “completely coherent and rational . . . the hearing judge was justified in concluding that appellant was fully capable of understanding his situation and reacting accordingly.” *Id.* Similarly, in *Commonwealth v. Darden*, the Pennsylvania Supreme Court found that an individual intellectually aged between eight and eleven and a half years old was capable of giving a voluntary, knowing, and intelligent waiver. 271 A.2d 257, 260-61 (Pa. 1970). In *Commonwealth v. Hughes*, the Pennsylvania Supreme Court found that previous experience with the justice system, more specifically previously being *Mirandized*, weighed in favor of finding the subsequent waiver voluntary, knowing, and intelligent. 555 A.2d 1264, 1274-75 (Pa. 1989). Lastly, the Commonwealth cites *Commonwealth v. Whitney*, in that case the defendant was found to voluntarily, knowingly, and intelligently waive his *Miranda* rights when it was clear that he was capable of taking self-direction and he refused to implicate other individuals. 512 A.2d 1152, 1156-57 (Pa. 1986).

Based on the totality of the circumstances, Defendant's waiver of his *Miranda* rights was voluntary, knowing, and intelligent. Defendant was not handcuffed during the actual interview and the officers were in plain clothes. *See* Commonwealth's Exhibit #2A. It is clear from Kriner's testimony and the tape of the interview that there was not "a mental defect at the time of his confession that was or should have been obvious to police." *Sepulveda*, 55 A.3d at 1137. Kriner testified that based on his observations Defendant throughout the interview seemed to comprehend the questioning and was aware of what was going on. Defendant had been arrested prior and was familiar with the process, and more specifically with being interviewed and waiving his *Miranda* rights in connection with those charges. *Hughes*, 555 A.2d at 1274-75. Kriner testified that based on his observations, despite the intellectual disability, Defendant comprehended the entire interview.

At the outset of the interview Kriner instructed Defendant what he was being questioned regarding, unlawful contact with a child, and that was why he was being detained. Commonwealth's Exhibit #2B at 2-3. Defendant was read the waiver form verbatim. *Id.* at 3-4. Defendant signed the form and moreover read a portion of the waiver out loud to verify he could read. *Id.* at 4-6. Although Defendant contends he has an intellectual disability and was just pushed through high school, he graduated, answered Kriner's questions appropriately, denied certain allegations, and acknowledged the actions he made were not legal and inappropriate. Most telling to this Court is how Defendant changed his story multiple times based upon the information presented to him by Kriner. At first Defendant stated that he had meant to send the pictures to the alleged victim's mother, but upon being presented with evidence of him engaging the victim on several different communication platforms, he stated he was just trying to get a rouse out her and joking around. Finally at the end of his interview,

Defendant again changed the story, attempting to justify his actions by saying he was trying to teach her what to do in that scenario. Defendant's actions show that he comprehends the seriousness of the situation and is aware of the implications of his statements. Additionally, nothing from the interview indicates Defendant had any issue understanding the nature of his *Miranda* rights or that he was hindered in voluntarily, knowingly, and intelligently waiving those rights. Also, Defendant has failed to provide any form of evidence of a serious mental disability, which would render Defendant *per se* incapable of understanding the interview, his *Miranda* rights, or the ramifications of waiving such rights. Therefore, the Court finds Defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights.

ORDER

AND NOW, this 24th day of August, 2020, based upon the foregoing Opinion, Defendant's Motion in Limine is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (MW)
Matthew Welickovitch, Esquire

NLB/kp