2018 IL App (5th) 150349-U

NO. 5-15-0349

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Union County.
	)	
v.	)	No. 13-CF-156
	)	
JAMES D. DUTY,	)	Honorable
	)	Mark M. Boie,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court. Justices Goldenhersh and Barberis concurred in the judgment.[*]

ORDER

¶ 1 *Held*: The record supports the circuit court's conclusion that the defendant gave a voluntary confession; the appellate court lacked jurisdiction to review the circuit clerk's clerical data entries with respect to the assessment of fines and fees stemming from the defendant's conviction.

¶ 2 The defendant, James D. Duty, was convicted of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)) after a stipulated bench trial and was sentenced to four years in the Department of Corrections and two years of mandatory supervised release. Prior to the stipulated bench trial, the defendant filed a motion to suppress

[*]Justice Goldenhersh fully participated in the decision prior to his retirement. See *Cirro Wrecking Co. v. Roppolo*, 153 Ill. 2d 6 (1992).

statements he made to police officers during an interrogation, arguing that the statements he gave were not voluntary. The circuit court denied the motion to suppress. The defendant now appeals his conviction and sentence and argues that the circuit court erred in denying the motion to suppress his statements. The defendant also takes issue with the circuit clerk's assessment of fines and fees stemming from his conviction. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In July 2013, K.L. was 14 years old and lived in Anna, Illinois, with her mother, Serena, her stepfather, Kevin L., and two other children. The defendant and his wife knew K.L. and K.L.'s mother and stepfather. They lived close to each other on the same street in Anna, and K.L. babysat for the defendant and his wife on occasion.

¶ 5 Law enforcement officers began investigating the defendant on July 29, 2013, when Kevin called the Federal Bureau of Investigation (FBI) to report that he had recently discovered that K.L. had sent nude photographs of herself to the defendant with her cell phone. At that time, the defendant was 28 years old. FBI agent Scott Zmudzinski inspected K.L.'s cell phone and confirmed that her phone had been used to send nude photographs of herself to the defendant's cell phone. Illinois State Police agent Alicia Barr interviewed K.L., who told her about sexual encounters with the defendant that involved sexual penetration. Agents Zmudzinski and Barr then scheduled an interview of the defendant that took place on August 23, 2013, at the Anna police department. The defendant voluntarily agreed to be interviewed by the officers at the police department.

¶ 6 Prior to the interview, Barr read the defendant his *Miranda* rights. The defendant stated that he understood the rights, put his initials next to each right, and signed a waiver form that stated that he understood his rights and was willing to answer questions. Barr began the interview by asking the defendant if he knew why he was called in for questioning, and the defendant stated that he assumed that it had something to do with an investigation involving K.L. Barr asked the defendant to tell her what he "knows about that." The defendant then stated that, on July 14, K.L. had sent him some text messages reporting that her stepfather, Kevin, had touched her breasts and made some other derogatory comments. He added, "So I'm assuming that's what it's about and I have no idea if not."

¶ 7 Barr then stated that she needed to "back up a little bit" and had the defendant describe how he knew K.L. and when he first met her. After the defendant gave her this information, Barr then returned to the topic of the text message K.L. had sent him about Kevin. The defendant pulled out his phone and read texts that K.L. had sent him about Kevin, and he read his responding texts to K.L. He also told Barr about conversations he had with K.L. about Kevin's inappropriate behavior including touching her breasts. The defendant stated that he was concerned about Kevin's behavior because his (the defendant's) wife had been molested first by her biological father and then later by her stepfather.

¶ 8 The defendant stated that he saved the text messages from K.L. so he could show them to someone who could "get to the bottom of it." He told Barr that he thought the texts were serious and that he needed to help K.L. He explained that he told his wife

about the texts and forwarded them to her and that she, in turn, reported them to the Anna police department and filled out a statement. He told Barr that he also talked to a person from the Department of Children and Family Services who had called him about the texts. He explained to Barr that K.L. had his cell phone number because K.L. babysat for them from time to time.

¶ 9 Barr asked the defendant questions about his contacts and relationship with K.L., including whether she had a crush on him. He responded, "Not that I am aware of" and denied that K.L. ever flirted with him. Barr asked the defendant whether he had ever given K.L. alcohol and cigarettes, and he denied doing so. He denied being alone with K.L. other than an occasion when he gave her a ride to a friend's house when it was raining.

¶ 10 Forty-seven minutes into the interview, Barr asked the defendant if there was any reason why there would be inappropriate text messages and/or photos on K.L.'s phone that were shared between him and K.L. The defendant stated, "No ma'am, not that I'm aware of." He stated that when he exchanged texts with K.L. the subjects were "normal things," such as cats, kids, how she was bored with her life, and "that's about it." Barr asked the defendant, "So, at no point in time would there ever been any naked photos of her sent to your telephone or you sending naked photos of yourself to her phone?" He responded, "No," stated that he exchanged no inappropriate texts, and denied ever being in an inappropriate relationship with K.L. During the interview, the defendant allowed Barr to inspect the photos on his phone.

¶ 11 When Barr told the defendant that they had been told that there were nude photos of K.L. on her phone that had been sent to his phone, the defendant initially continued to deny ever receiving any nude photos from K.L. but then admitted to receiving a nude photo one time, emphasizing that he told her "don't send me those anymore." The defendant explained that K.L. asked for cigarettes on an occasion, and he told her no. She then sent a nude photo two days later asking for cigarettes again. He stated that he deleted the photo.

¶ 12 Barr then told the defendant that she appreciated him being honest with her because sometimes she asks questions to which she already knows the answer, and she wants to see if the person being questioned is going to be honest with her. She asked the defendant if he can think of anything else that she was going to find out about or that she might already know about that he wanted to tell her regarding K.L. The defendant stated, "Not that I'm aware of, ma'am."

¶ 13 Barr asked the defendant whether he ever got more than one photo from K.L., and he said, "Yeah, she tried the cigarette ploy again." Barr asked him how many times, and he responded, "I'm going to say roughly about five." He admitted that one of the photos included a close-up of K.L.'s genital area, and Barr asked the defendant if he responded to that picture. The defendant stated, "Yeah." Barr asked, "What did you say?" The defendant answered, "Okay, I said something that wasn't right." He told Barr that he responded, "That's nice but you're not getting cigarettes."

¶ 14 The defendant stated that every time K.L. sent the nude pictures she was wanting money or cigarettes, but he never gave her either. Barr asked the defendant if he ever had

sex with K.L. or if he ever tried to have sex with K.L., and he responded, "No." She asked the defendant if K.L. ever tried to have sex with him, and he responded, "Yeah." The defendant then explained that she told him that she would have sex for cigarettes. As the interview progressed, the defendant continued to deny having sex with K.L. or trying to have sex with K.L. and that he was not aware of any reason why she would say that he had done so. He also explained that he was initially reluctant to mention the nude photos because K.L. was 14 years old and that he did not want to "get in trouble for it." He admitted to Barr that he should have told her about the photos.

¶ 15 Barr asked the defendant if there was anything else that he needed to tell her that he had not told because he was afraid of getting in trouble. She added that it would only get worse for him if she found out something later when he had the opportunity to tell her the truth but did not do so. She told the defendant that she thought that there was more going on than he was telling because teenage girls did not usually send nude photos of themselves to grown men unless they feel comfortable with that person or were in some sort of a relationship with that person. The defendant insisted that there was no relationship. The defendant said that, looking back, he should have reported the photos to K.L.'s parents.

¶ 16 Barr asked the defendant whether he sent any nude photos from his phone to K.L.'s phone, and he initially denied sending any such photos. Barr then stated, "Okay, do you understand how phone records work?" The defendant responded, "Yeah." Barr stated, "So you know that I can go back and find out whether certain images were sent or whatever, and so I'm not going to find any nude photos coming from your phone to any

of her phones?" The defendant responded, "Yeah." Barr asked how many, and the defendant stated, "About three." Barr asked, "What were they of?" and the defendant responded, "What she asked for." He then told Barr that she had asked for pictures of his erect penis. Barr asked him whether K.L. responded to the photos, and he answered, "I think," but that he did not remember what she responded.

¶ 17 Barr asked the defendant again if he and K.L. ever tried to have sex, and the defendant responded that they talked about it, but did not. At that point in the interview, FBI agent Zmudzinski spoke for the first time, and the following took place:

Zmudzinski: "You do know how DNA works, right?"

The defendant: "Yeah, I know how DNA works."

Zmudzinski: "So if we have your semen on some of her clothing"

The defendant: "That's fine. You're not going to find any."

¶ 18 Upon further questioning by Barr, the defendant explained that he exchanged texts with K.L. about having sex prior to their exchanges of the nude photos, but he again stated that he never tried having sex with K.L. He stated that the first nude photo from K.L. came "couple three days" after they first texted about having sex. Upon further questioning, the defendant continued to deny having sex with K.L. or touching her, but added that they would make plans to have sex, set a date, but something would come up. He admitted that they had made "several" plans to have sex. Barr then asked, "So there's no way in hell that we are going to find any of your DNA on any of her clothing or anything that she owns?" The defendant shook his head. At that point, Zmudzinski interjected into the interview again:

Zmudzinski: “Are you scared right now J.D.?”

The defendant: “Yeah.”

Zmudzinski: “Why are you scared?”

The defendant: “Because I broke the law.”

Zmudzinski: “I always admonish everybody I talk to because she is with the State Police and I am with the FBI. The worst thing that you can do is make a false statement to us, okay. We got a lot of information. There’s some that we don’t have. Some things we know conclusively. Other things we’re waiting on results for. Alright. One of the quickest ways you can jam yourself up without having to do anything else is lie to us. It’s five years in the federal prison. Alright. I know you are a man, okay. I know you’re a husband. You’re a good stepdad. You work hard.”

The defendant: “Hmmhm.”

Zmudzinski: “You made a mistake.”

The defendant: “Yeah, and I’m going to pay for it.”

Zmudzinski: “I know that. I know that you made a mistake. Are you a bad guy? Are you a bad person? I don’t think you’re a bad person. I know bad people, honestly. I don’t think you’re a bad person. The sex thing, it’s out there. Okay. And the fact of the matter is when it comes to physical evidence that stuff doesn’t lie.”

The defendant: “I know.”

Zmudzinski: “You know what I mean.”

The defendant: "Hmmhm."

Zmudzinski: "So she asked you a lot of different times, you said no. When she asked you about the pictures, you said no. Then you came off on the pictures."

The defendant: "Hmmhm."

Zmudzinski: "Alright. That was the right thing to do. When it comes to this sex thing, you know as well as I do."

The defendant: "Yeah, that physical evidence don't lie."

Zmudzinski: "It doesn't lie. So, follow her advice and do the right thing and tell us the truth."

The defendant: "Okay, I jacked off in front of her a couple of times. We were alone two times. Once in my basement. Once in my living room. I ain't never touched her. She never touched me."

¶ 19 Zmudzinski told the defendant that he knew that the defendant had intercourse with K.L. and that the defendant needed to do the right thing "because when that physical evidence comes back." The defendant cut off Zmudzinski, "there ain't no physical evidence." Zmudzinski continued, stating that the physical evidence is going to "tell us the whole story anyway." He told the defendant that if he was lying, he was going to have to "jam [him] up" for lying to him. The defendant replied, "I'm already going to jail." Zmudzinski told the defendant to be a man and tell them what they already knew, and the defendant responded, "Okay, we tried having sex but it didn't work out." The defendant continued to deny any sexual penetration, but Zmudzinski stated, "I think you know that you did," adding that he felt that the defendant was just trying to protect himself.

Zmudzinski told the defendant, "We got doctors. We got DNA." He stated, "You don't know what we know about locations, places, things about you."

¶ 20 As Zmudzinski told the defendant that they just wanted him to be honest, the defendant hung his head down and said that he made a big mistake and was going to pay "big time." Zmudzinski then came closer to the defendant and, with one hand, massaged the defendant's shoulders and neck as the defendant held his head down. While this happened, Barr told the defendant that there were two kinds of people in this world: people who intentionally hurt others and good people whom "shit happens to" and take responsibility. Barr asked the defendant what kind of person he was going to be, whether he was going to "man up and take responsibility for his actions." With his head down, the defendant said, "We had sex twice." He explained that the first time they started to have sex, K.L. "chickened out." The second time, however, involved sexual penetration.

¶ 21 The State subsequently charged the defendant with one count of aggravated criminal sexual abuse in violation of section 11-1.60(d) of the Criminal Code of 2012 (720 ILCS 5/11-1.60(d) (West 2012)). The State alleged that the defendant knowingly committed an act of sexual penetration with K.L., who was at least 13 years of age but under 17, in that he placed his penis in her vagina, and that he was at least five years older than K.L.

¶ 22 Prior to trial, the defendant filed a motion to suppress the statements that he gave during the August 23, 2013, police interrogation. He argued that, under the totality of the circumstances, his statements were involuntary because he initially denied any inappropriate contact with K.L., but the officers falsely told him "that they had physical

evidence which established that [he] had in fact had sexual contact with K.L." Also, the defendant argued that Zmudzinski told him that he would get five years in federal prison for making a false statement if he did not admit to sexual contact with K.L. and that Zmudzinski "placed his hands on [his] shoulder and patted and stroked [his] back and shoulder area in a fatherly way in an attempt to convince [him] that the right thing to do would be to make the admissions that the police were seeking from [him]."

¶ 23 At the hearing on the motion to suppress, Barr testified that the interview was approximately an hour and a half and that the defendant's demeanor appeared "fine," although he became nervous which was what she generally experienced when she interviewed people. To Barr, the defendant seemed to be of average intelligence and did not exhibit any apparent mental or physical issues or abnormalities. Barr did not know his educational background, but knew that he had been employed with a NAPA auto parts store in Anna for 10 years. Prior to the interview, she had reviewed the defendant's criminal history and noticed only three previous traffic citations.

¶ 24 Barr described Zmudzinski's touching of the defendant as, initially, just a hand on the defendant's shoulder, then a pat, "and then more of like a massaging, like I'm here for you, it's 'okay' type." She testified that she did not make any statements to the defendant that she believed were false or deceitful. During cross-examination, she admitted that there were no doctors, DNA evidence, or physical evidence involved in their investigation of the defendant. She admitted that both she and Zmudzinski wore visible holstered firearms during the questioning.

¶ 25 The defendant testified that he was 28 at the time of the interrogation. He agreed that he had average intelligence and testified that he had a high school diploma and was home-schooled by his mother through high school. He stated that this police interview was the first time he had been interrogated by police officers. He believed that when he met with the officers, he was there to talk about a pending investigation of K.L.'s stepfather. The defendant admitted that, at the time of the interview, he was not under any physical distress.

¶ 26 On July 3, 2014, the circuit court entered an order denying the defendant's motion to suppress the statements he made during the police interrogation. The circuit court found that the officers read him his *Miranda* rights, that the defendant fully understood them, and that he knowingly and voluntarily waived those rights. The court then looked at the totality of the circumstances surrounding the interview to determine whether the defendant's statements were involuntarily. The court focused on Zmudzinski's physical touching of the defendant and the officers' misleading statements with respect to the existence of DNA and other physical evidence.

¶ 27 With respect to Zmudzinski physically touching the defendant, the circuit court noted that the defendant described the touching in his motion as the agent placing his hands on his back and shoulders in a "fatherly" manner, intending to induce him to make the statements that he made. The circuit court then found as follows:

> "[T]he Defendant was not physically harmed by Special Agent Zmudzinski's actions. In addition, the Defendant made certain incriminating statements prior to Special Agent Zmudzinski's actions. Therefore, it is the Court's opinion that

Special Agent Zmudzinski's actions do not rise to the level necessary to find that they undermine the Defendant's will to resist or that they induced the Defendant to make the inculpatory statements."

¶ 28 With respect to the officers' statements concerning the existence of DNA and other physical evidence, the court found as follows:

"As the Court has noted, the Defendant made certain inculpatory statements as the interview progressed. There is no doubt that after Special Agent Barr and Special Agent Zmudzinski made the misleading statements, the Defendant made further and more serious inculpatory statements. However, at the end of the interview, the Defendant stated that he was not threatened, coerced or promised anything during the interview. It is the Court's opinion, after considering the totality of the circumstances, that the Special Agents' misleading statements do not render the Defendant's statements involuntary."

¶ 29 Following the circuit court's denial of the defendant's motion to suppress, the parties appeared in court for a stipulated bench trial. The State and the defendant filed a statement of stipulated facts. The circuit court found the defendant guilty of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)) and sentenced him to four years in the Department of Corrections and two years of mandatory supervised release. The defendant now appeals his conviction and sentence.

¶ 30 ANALYSIS

¶ 31 I

¶ 32 Voluntariness of the Defendant's Confession

¶ 33 The defendant first argues that the circuit court erred in denying his motion to suppress his statements.

¶ 34 A defendant's confession must be the product of "rational intellect and free will." *People v. Foster*, 168 Ill. 2d 465, 475-76 (1995). "[A] conviction based 'in whole or in part, on an involuntary confession, regardless of its truth or falsity' violates a defendant's constitutional rights.' " *People v. Hughes*, 2015 IL 117242, ¶ 31 (quoting *Miranda v. Arizona*, 384 U.S. 436, 464 (1966)). "The test for voluntariness is whether the individual made his confession freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overborne at the time of the confession." *People v. Morgan*, 197 Ill. 2d 404, 437 (2001). Courts weighing the voluntariness of a confession consider the "totality of the circumstances," including the defendant's "age, intelligence, background, experience, education, mental capacity, and physical condition at the time of questioning," along with the duration and legality of the detention. *People v. Murdock*, 2012 IL 112362, ¶ 30. Courts also consider whether there was any physical or mental abuse, including if police made threats or promises to a defendant. *Id.* The court may also consider the investigator's fraud, deceit, or trickery in obtaining a confession (*People v. Bowman*, 335 Ill. App. 3d 1142, 1153 (2002)) as well as threats or promises made to the defendant (*People v. Richardson*, 234 Ill. 2d 233, 253-54 (2009)). No single factor is dispositive. *Murdock*, 2012 IL 112362, ¶ 30. The court's analysis involves weighing "the circumstances of pressure against the power of resistance of the person confessing." *Stein v. New York*, 346 U.S. 156, 185 (1953). The State has the

burden of establishing the voluntariness of the defendant's confession by a preponderance of the evidence. *People v. Gilliam*, 172 Ill. 2d 484, 501 (1996).

¶ 35 "In reviewing a trial court's ruling concerning whether a confession is voluntary, the trial court's factual findings will be reversed only if those findings are against the manifest weight of the evidence. [Citation.] Ultimately, however, the trial court's ruling on whether the confession was voluntary is subject to *de novo* review." *Murdock*, 2012 IL 112363, ¶ 29.

¶ 36 In the present case, the defendant's age, intelligence, education, mental capacity, physical condition at the time of questioning, and the duration of the interrogation weigh in favor of a voluntary confession. At the time of the police interview, the defendant was 28 years old, had a high school education, was of average intelligence, had worked 10 years in sales at an auto parts store dealing with customers on a daily basis, and was not suffering from any physical or mental abnormalities. The interview lasted only about an hour and a half, and the defendant testified that during the interview he was not under any physical distress. These facts weigh in favor of the voluntariness of the defendant's confession. Considering the totality of these circumstances, the circuit court found, "It is clear that the interview's duration was not unduly lengthy and the [d]efendant was not subjected to any physical harm."

¶ 37 The circuit court did note that this case was the defendant's first criminal charge and his first experience with the criminal justice system, other than routine traffic matters. However, we note that the defendant does not raise any issues with respect to his understanding of his *Miranda* rights or the voluntariness of his waiver of those rights

prior to the questioning. Instead, we believe that the issues surrounding the voluntariness of the defendant's confession center primarily on three factual considerations: (1) that Zmudzinski touched and massaged the defendant's shoulder and neck in a comforting or "fatherly" manner moments before the defendant's confession, (2) that Zmudzinski suggested to the defendant that lying to a federal agent could result in five years in a federal prison, and (3) that the officers made misleading statements concerning the possible existence of DNA and other physical evidence that might prove the defendant's guilt at some point after the interview.

¶ 38 With respect to Zmudzinski touching and massaging the defendant's neck and shoulders, we do not believe that this evidence weighs in favor of an involuntary confession. In his motion to suppress, the defendant described Zmudzinski's actions as touching him "in a fatherly way." When he testified, the defendant acknowledged that he was not under "any physical distress" during the interrogation. A "fatherly" touching that does not cause physical distress does not amount to pressure to confess against a person's free will. If anything, the purpose of this conduct was to ease the defendant's anxiety, not to magnify his anxiety or otherwise exert undue pressure. Also, we find it significant that the defendant did not testify that Zmudzinski's actions were intimidating, resulted in increased anxiety, or otherwise impaired his ability to exercise his free will.

¶ 39 The circuit court considered the totality of the circumstances and concluded that Zmudzinski's physical touching did not undermine the defendant's will to resist or induce the defendant to make inculpatory statements against his will. Based on our review of the record, including the videotape of the interview, we cannot reverse this finding.

¶ 40 In arguing that his confession was involuntary, the defendant notes that the totality of the circumstances included Zmudzinski emphasizing that he was a federal agent and that the defendant could get five years in prison for lying to a federal agent. In addition, Zmudzinski and Barr suggested that they may have had DNA and other physical evidence relevant to whether he had sex with K.L.

¶ 41 We do not believe that Zmudzinski's statement with respect to the consequences of lying to a federal agent was so compelling that it prevented the defendant from exercising his free will. Zmudzinski stated, "One of the quickest ways you can jam yourself up without having to do anything else is lie to us. It's five years in the federal prison." When the defendant continued to deny having sex with K.L., Zmudzinski told the defendant that if he was lying, he was going to have to "jam [him] up" for lying to him.

¶ 42 Zmudzinski did not tell the defendant that he had to confess to having sex with K.L. in order to avoid a sentence in federal prison. Instead, he insisted that the defendant had to tell the truth and that it was in his best interest that he not lie in answering Barr's questions. In addition, Zmudzinski's statement with respect to the consequences for lying to a federal agent was not misleading. See 18 U.S.C. § 1001(a) (2012) (imprisonment up to five years for making any material false statement in any matter within the jurisdiction of the U.S. government). Nothing about Zmudzinski's statement with respect to the consequences for lying to a federal agent compels us to reverse the circuit court's finding that the defendant gave a voluntary confession.

¶ 43 With respect to the statements of Zmudzinski and Barr concerning the existence of DNA and physical evidence, the circuit court found that Barr and Zmudzinski made "misleading statements" and that the defendant made further and more serious inculpatory statements following the misleading statements. The court, however, considered the totality of the circumstances and concluded that the officers' misleading statements did "not render the [d]efendant's statements involuntary." In analyzing the circuit court's conclusion, we are obligated to follow the analysis set out by our supreme court in cases in which the supreme court has addressed the voluntariness of defendants' confessions following false statements by interrogating police officers.

¶ 44 For example, in *People v. Martin*, 102 Ill. 2d 412, 416 (1984), a defendant was in custody on a rape charge when he was taken from his cell to be questioned by investigators about a murder. The defendant initially stated that he did not know anything about the murder. *Id*. An investigator showed the defendant a statement from a codefendant and falsely told the defendant that the codefendant named him as the "triggerman" in the murder being investigated. *Id*. at 417. The defendant then described what happened during a shooting event, admitting his participation in the offense but implicating the codefendant as the "shooter." *Id*.

¶ 45 The supreme court noted that the defendant was told that the codefendant had identified him as the triggerman "in spite of the fact that the interrogators knew that this was not true." *Id*. at 418. On appeal, the supreme court addressed the lower court's ruling that the defendant gave a voluntary confession even though it was undisputed that the confession followed deception by the interrogators. *Id*. at 426-27. The supreme court held

that the deception did not invalidate the confession as a matter of law, but that the deception was only one factor for the court to consider in determining voluntariness. *Id*. at 427. In considering all of the surrounding factors in that case, the supreme court concluded that the defendant's confession was voluntary as follows:

> "[T]he defendant was advised of his *Miranda* rights and was neither subjected to a lengthy interrogation nor physically abused or threatened. Although not a high school graduate, defendant is literate, and the record supports the inference that he understood his constitutional rights and the questions he was asked, as well as his own written statement. Further, his confession is not rendered involuntary because he may not have understood the principles of criminal accountability and the implications of the acts admitted." *Id*.

¶ 46 Similarly, in *People v. Kashney*, 111 Ill. 2d 454, 461-62 (1986), during an interrogation about a rape allegation, the defendant denied having seen the complainant or having been in her apartment on the date of the alleged rape. As the questioning continued, an assistant state's attorney falsely told the defendant that his fingerprints were found in the complainant's apartment. *Id.* at 462. At that point, the defendant admitted being in the complainant's apartment but claimed that they had engaged in consensual sexual intercourse. *Id*. Later, the defendant maintained that this statement was made involuntarily because it was elicited as a result of the deliberate misrepresentation made by the assistant state's attorney. *Id*. at 465.

¶ 47 After analyzing the totality of the circumstances surrounding the defendant's statements, the supreme court concluded that there was "no indication that defendant's

will was overborne such that any inculpatory statements were involuntary." *Id*. at 466 (citing *Martin*). The court noted that the defendant voluntarily presented himself to the police station, he was not restrained during questioning, the questioning lasted for approximately four hours, and the record contained no indication that the defendant was threatened, intimidated, or physically mistreated. *Id.* The supreme court also found it significant that the defendant continued to participate in the questioning after being given his *Miranda* rights and waiving those rights. *Id*. The supreme court also noted that the defendant was literate and educated, had an intelligence quotient of 110, and held a position as a computer programmer, thereby capable of understanding both his *Miranda* rights and the implications of waiving those rights. *Id*. Under the totality of these circumstances, the false statement during the police interrogation did not render the defendant's statement in response involuntary. See also *People v. Melock*, 149 Ill. 2d 423, 449-50 (1992) (police polygrapher falsely telling the defendant that he had failed polygraph test, in and of itself, was insufficient to make the defendant's confession involuntary even though the "deception largely contributed to defendant's decision to inculpate himself"; the deceptive conduct "was not so heavily laden with trickery so as to render defendant's statement untrustworthy").

¶ 48 Considering the supreme court's analysis of this issue as outlined above, we find no basis in the record before us to reverse the circuit court's finding of voluntariness. Similar to the defendant in *Martin*, the defendant in the present case was advised of his *Miranda* rights, was not subjected to a lengthy interrogation, and was not physically abused or threatened. The defendant had a high school education and was literate. He

understood his constitutional rights and the questions he was asked. We also find it significant that when the officers mentioned the existence of DNA and other physical evidence, they did not suggest to the defendant that they had already tested that evidence and that the test results indicated the defendant's guilt. Instead, they only suggested that future tests of that evidence would reveal the truth to them and, therefore, they encouraged the defendant to be truthful in answering their questions. Although the circuit court found that the officers' statements were misleading, the nature of these statements would not have denied the defendant the ability to exercise his free will under the totality of the circumstances.

¶ 49 The first time the issue of DNA evidence came up was when Zmudzinski asked the defendant whether he knew how DNA evidence worked. The defendant stated that he did and that they were not going to find any. Later, Barr asked the defendant, "So there's no way in hell that we are going to find any of your DNA on any of her clothing or anything she owns?" The defendant shook his head. Zmudzinski then interjected and, while emphasizing that the defendant should not lie to them, he vaguely described the evidence they had as follows: "We got a lot of information. There's some that we don't have. Some things we know conclusively. *Other things we're waiting on results for*." (Emphasis added.) He also stated, "And the fact of the matter is when it comes to physical evidence that stuff doesn't lie." The defendant responded, "I know."

¶ 50 Continuing with the interrogation, Zmudzinski noted that the defendant initially denied that he had exchanged the nude pictures after being asked "a lot of different times," but that the defendant "[t]hen came off on the pictures" which was "the right

thing to do." Zmudzinski then stated, "When it comes to this sex thing, you know as well as I do," and the defendant interrupted him, "Yeah, that physical evidence don't lie." "It doesn't lie," Zmudzinski continued, "So, follow [Barr's] advice and do the right thing and tell us the truth." Zmudzinski told the defendant that he knew that the defendant had intercourse with K.L. and that the defendant needed "to do the right thing" because "*when that physical evidence comes back*." (Emphasis added.) The defendant interrupted, "there ain't no physical evidence," and Zmudzinski continued by stating that the physical evidence would "*tell* [*them*] *the whole story anyway*." (Emphasis added.) Zmudzinski told the defendant, "We got doctors, we got DNA," and stated, "[y]ou don't know what we know about locations, places, things about you." After Zmudzinski emphasized that they wanted him to be honest and after Barr asked him if he was going to "man up and take responsibility for his actions," the defendant admitted to having sexual intercourse with K.L.

¶ 51 Zmudzinski and Barr arguably misled the defendant, but only to the extent that they possibly had DNA and other physical evidence. They did not mislead the defendant to believe that they had already tested the physical evidence, that they had the test results, and that the test results showed that the defendant had sexual intercourse with K.L. Instead, the officers only suggested the possibility of the existence of physical evidence that could be tested and that the tests would reveal the truth at some point after the interview. Their statements and questions were couched in terms of "if" they find his DNA and "when" the "physical evidence comes back," it won't "lie." The defendant's responses to the officers' questioning established that he understood the meaning of DNA

evidence and physical evidence and that he understood that, at the time of the interview, the officers were not yet aware of any test results of any physical evidence.

¶ 52 This questioning falls far short of emotionally charged pressure that would have denied the defendant of his ability to exercise his free will. Police are allowed to play on a suspect's ignorance, fears, and anxieties so long as they do not magnify these emotionally charged matters to the point where a rational decision becomes impossible. See *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990). Here, the officers' questioning, as it related to DNA and physical evidence, was not emotionally charged and did not create a pressured environment that would make it impossible for the defendant to make a rational decision. When the officers specifically acknowledged that they were not yet aware of any results from the testing of the nonexistent physical evidence, their misleading suggestion of the existence of the physical evidence falls far short of creating undue pressure that would have resulted in the defendant's inability to exercise his free will or make rational decisions.

¶ 53 Based on the supreme court's reasoning in *Martin*, *Kashney*, and *Melock*, we find no basis in the record for overturning the circuit court's finding that the defendant gave a voluntary confession. In fact, the police subterfuge in the present case was far less than that found in *Martin*, *Kashney*, and *Melock*, where the investigators lied about having specific evidence that indicated the defendants' guilt. *Martin*, 102 Ill. 2d at 418 (the defendant was falsely told that a codefendant had identified him as the triggerman); *Kashney*, 111 Ill. 2d at 462 (the defendant was falsely told that his fingerprints were

found in the complainant's apartment); *Melock*, 149 Ill. 2d at 449-50 (the defendant was falsely told that he had failed polygraph test).

¶ 54 We also note that when the defendant testified at the suppression hearing, he did not state that the officers successfully misled him into believing that they had recovered his DNA, semen, or other physical evidence of his guilt. During the interrogation, he told the officers that they would not find any DNA evidence or physical evidence because there was no such evidence to be found.

¶ 55 In support of his argument that his confession was involuntary, the defendant cites *People v. Bowman*, 335 Ill. App. 3d 1142 (2002), and *People v. Payton*, 122 Ill. App. 3d 1030 (1984). Those cases are not persuasive.

¶ 56 In *Bowman*, the defendant was convicted of two murders based in part on his confession. Prior to his confession, he had been held in a county jail and was waiting to be transferred to Menard Correctional Center (Menard). *Bowman*, 335 Ill. App. 3d at 1146. Police suspected the defendant of having committed the two murders and had previously attempted to interview him about the murders, but he had invoked his right to remain silent. A detective had used one of the defendant's cellblock mates as an informant in the past, and the detective learned from the informant that the defendant was terrified of being transferred to Menard. *Id*. The detective and the informant orchestrated a plan to induce the defendant to confess to the murders which involved the informant convincing the defendant that he could help him escape from the jail before he was transferred to Menard. *Id*. The informant convinced the defendant that he needed to delay his transfer to Menard and that the defendant could delay the transfer by speaking with

the detective about the murders. *Id*. The defendant then spoke with the detective and confessed to the murders.

¶ 57 In *Bowman*, the lower court held that "the unusual facts of [that] case, including the escape scheme orchestrated through [the informant's] agency with [the detective], amounted to a type of police overreaching that could result in a false confession" and that the defendant's incriminating statements were involuntary. *Id*. at 1149. On review, the *Bowman* court held that the confession was the result of deceptive interrogation tactics calculated to overcome the defendant's free will and that his confession was not the product of a rational intellect. *Id*. at 1154.

¶ 58 In the present case, unlike *Bowman*, the officers did not orchestrate a scheme that played upon the defendant's fears and anxieties to the point where it was impossible for him to make a rational decision. In *Bowman*, "the police took advantage of the defendant's intense fear of returning to Menard and created an incentive for the defendant to confess." *People v. Minniti*, 373 Ill. App. 3d 55, 71 (2007) (distinguishing *Bowman*). See also *People v. Valle*, 405 Ill. App. 3d 46, 59 (2010) ("The facts in *Bowman* are distinguishable from those here on several bases, the most important of which by far is that the escape scheme deliberately played on the defendant's intense fear of returning to Menard. That kind of manipulation is not at issue here.").

¶ 59 The court found that the police conduct in *Bowman* made a rational decision to confess impossible. Here, by contrast, the statements by the officers were, at most, overstatements concerning the existence of physical evidence which, upon testing, might, in the future, prove that the defendant had sexual intercourse with K.L. and prove that he

had lied during the questioning. As we have explained, based on our review of the record, including the videotaped interview, we are confident that the misleading statements concerning the mere existence of untested physical evidence did not overcome the defendant's free will or make it impossible for him to make rational decisions.

¶ 60 In *Payton*, the defendant was convicted of residential burglary and theft based on evidence that included his confession. *Payton*, 122 Ill. App. 3d at 1031. During the police interrogation that resulted in his confession, an officer falsely told the defendant that he and been identified by the victim and that his fingerprints had been found at the scene of the crime. *Id*. The defendant then admitted that he had committed the offense. *Id.*

¶ 61 On appeal, the *Payton* court held that the lower court's finding that the defendant gave a voluntary confession was against the manifest weight of the evidence. *Id*. at 1033. Citing *People v. Stevens*, 11 Ill. 2d 21, 27 (1957), the *Payton* court stated that "confessions or admissions acquired by trick are inadmissible." *Payton*, 122 Ill. App. 3d at 1033. The *Payton* court, therefore, concluded that the false information given to the defendant was tainted by the "extent of the trickery" employed by the interrogating officer. *Id*. at 1034.

¶ 62 The *Payton* court's analysis based on *Stevens* is no longer valid. In *Melock*, the supreme court declined to follow *Stevens*. Instead, the court stated, "The fact that a confession was procured by deception or subterfuge does not invalidate the confession as a matter of law." *Melock*, 149 Ill. 2d at 450 (declining to follow *Stevens*, 11 Ill. 2d at 27). Also, in *Kashney*, the supreme court stated that "statements which are voluntary are not necessarily vitiated by misrepresentations by authorities." *Kashney*, 111 Ill. 2d at 466

(discussing the holding in *Martin*). "A misrepresentation which prompts inculpatory statements is only one factor to be considered in determining the voluntariness of the resulting statements." *Id*. We find the reasoning of the *Payton* court to be questionable at best in light of the subsequent decisions by our supreme court in *Martin*, *Kashney*, and *Melock*. See also *People v. Cortez*, 143 Ill. App. 3d 1024, 1027 (1986) ("*Payton* was decided before our supreme court's controlling decision in [*Martin*]."). For the reasons we have explained, we cannot reverse the circuit court's finding that the defendant gave a voluntary confession considering the totality of the circumstances.

¶ 63 II

¶ 64 Invalid Fines and Fees

¶ 65 The defendant raises an issue with respect to the fines and fees that the circuit court's clerk imposed. The defendant notes that the circuit court stated at sentencing that it would not assess any fines other than the $200 sexual assault fine, the $500 sex offender fine, and court costs. The defendant then notes that "the circuit clerk certified an official copy of the 'Payment Status Information' " that indicated that the circuit clerk improperly imposed a number of fines without authority, including: $50 for "Court," $25 for "Automation," $25 for "Document Storage," $25 for "Judicial Security," $15 for "State Police Operations Fee," $2 for "SA Automation Fee," and $500 for "Clerk." The defendant argues that these fines and fees were improperly assessed by the circuit clerk and are, therefore, void.

¶ 66 While this appeal has been pending, the supreme court issued its opinion in *People v. Vara*, 2018 IL 121823, in which the supreme court held that, on review of a judgment

of a criminal conviction, the reviewing court did not have jurisdiction to review a circuit clerk's assessment of improper fines. In *Vara*, after a bench trial, the defendant was convicted of child pornography, and the clerk of the circuit court indicated in its "electronic accounts receivable record" that the defendant was obligated to pay certain fines that were not specified in the circuit court's judgment. *Id*. ¶¶ 1, 3. On a direct appeal from his conviction and sentence, the defendant "challenged the data entries recorded by the circuit clerk that purported to assess additional fines not imposed by the circuit court." *Id*. ¶ 1. The appellate court vacated the fines. *Id*. ¶ 7. The supreme court, however, held that the appellate court lacked jurisdiction in the appeal to review the fines and fees assessed by the circuit court.

¶ 67 The supreme court held that the circuit clerk's "payment status information sheet" was a clerical document created outside the record of the trial court proceedings and was not part of the common law record or report of proceedings of the defendant's criminal prosecution. *Id*. ¶ 22. In addition, although the clerk was obligated to record the ruling of the court and had no authority to levy fines against the defendant that were not issued by the court's judgment, the clerk improperly doing so was in the nature of a clerical function that was not part of the circuit court's judgment. *Id.* ¶ 23. Therefore, the supreme court concluded, "the improper recording of a fine is not subject to direct review by the appellate court." *Id*. "Any questions as to the accuracy of the data entries included in the payment status information must be resolved through the cooperation of the parties and the circuit clerk or by the circuit court in a *mandamus* proceeding." *Id*. ¶ 31.

¶ 68 In the present appeal, the defendant's appellate counsel, as an officer of the court with an ethical duty to advise us of authority that bears on the question presented, filed a motion to cite *Vara* as adverse authority and argued that *Vara* is distinguishable. The State responded that *Vara* is controlling with respect to the defendant's argument as it relates to the fees assessed by the circuit clerk. We commend the defendant's appellate counsel for bringing adverse authority to our attention and grant the motion to cite the additional authority. However, we agree with the State that *Vara* is controlling with respect to this issue. Accordingly, we do not have jurisdiction in this appeal to review the circuit clerk's clerical data entries with respect to the assessment of fines and fees. The clerk's entries were made outside of the court proceedings below and are not a part of the judgment from which the defendant appeals.

¶ 69 The State filed a motion to strike the "Payment Status Information" from the record in light of *Vara*. However, because we hold that we lack jurisdiction to review the circuit clerk's assessment of fines and fees, we deny the State's motion to strike the document from record as moot.

¶ 70 CONCLUSION

¶ 71 For the foregoing reasons, we grant the defendant's motion to cite adverse authority, deny the State's motion to strike portions of the record on appeal, and affirm the circuit court's judgment.

¶ 72 Motion to cite adverse authority granted; motion to strike portions of the record on appeal denied as moot; and circuit court judgment affirmed.