

NOT DESIGNATED FOR PUBLICATION

No. 96,197

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF L.M.

MEMORANDUM OPINION

Appeal from Finney District Court; PHILIP C. VIEUX, judge. Opinion filed
December 22, 2006. Affirmed.

Paul Shipp, of Kansas Legal Services, for appellant.

Lara Blake Bors, assistant county attorney, *John P. Wheeler, Jr.*, county attorney,
and *Phill Kline*, attorney general, for appellee.

Before CAPLINGER, P.J., ELLIOTT and JOHNSON, JJ.

Per Curiam: L.M. appeals his adjudication as a juvenile offender based upon the offense of aggravated sexual battery. L.M. contends that he was constitutionally entitled to a jury trial, that his suppression motion should have been granted, and that the evidence

was insufficient to establish that he committed the offense of aggravated sexual battery.

We affirm.

The incident giving rise to L.M.'s adjudication involved a midnight encounter with a female neighbor, R.P., who was walking home. L.M. asked R.P. for a cigarette and she gave him one. L.M. then grabbed or hugged R.P., requesting a kiss. When R.P. refused the request; L.M. allegedly licked and kissed her on the cheek and held onto R.P. as she attempted to walk away. R.P. contends that L.M. also asked her if she "liked to fuck."

L.M. was subsequently arrested and taken to a hospital for a medical evaluation because he had been drinking alcohol. At the hospital, L.M. was questioned by the police.

During his prosecution, L.M. moved to suppress the statements that he made to the police and moved for a jury trial. Both motions were denied. After being found guilty at a bench trial, part of L.M.'s sentence required him to register as a sex offender.

REQUEST FOR JURY TRIAL

L.M. first contends that the Due Process Clause of the United States Constitution, as well as the provisions of the Kansas Constitution, mandate that he be provided a jury trial. The parties agree that our review should be unlimited. *Cf. State v. Cooper*, 275 Kan. 823, 825, 69 P.3d 559 (2003); *State v. Hitt*, 273 Kan. 224, 226, 42 P.3d 732 (2002), *cert. denied* 537 U.S. 1104 (2003).

The right to a jury trial in juvenile offender proceedings is dictated by statute:

"In all cases involving offenses committed by a juvenile which, if done by an adult, would make the person liable to be arrested and prosecuted for the commission of a felony, the judge may order that the juvenile be afforded a trial by jury. Upon the juvenile being adjudged to be a juvenile offender, the court shall proceed with sentencing." K.S.A. 38-1656.

In *Findlay v. State*, 235 Kan. 462, 466, 681 P.2d 20 (1984), our Supreme Court opined that the decision to grant or deny a jury trial in a juvenile offender proceeding (1) is entirely at the district court's option, (2) does not involve the rights of the State or the respondent, and (3) is not subject to appellate review. L.M. makes some rather good arguments as to why the rationale of the *Findlay* decision is no longer compelling under

the current juvenile offender system. L.M. will be subjected to serious, life-altering consequences for his drunken attempt to steal a kiss, including registering as a sex offender.

However, we are duty bound to follow Kansas Supreme Court precedent, absent some indication that the court is departing from its previous position. *In re A.C.W.*, 26 Kan. App. 2d 468, 472, 988 P.2d 742, *rev. denied* 268 Kan. 886 (1999). We perceive that our Supreme Court has remained steadfast in its belief that juvenile offender proceedings in this State are constitutionally sound notwithstanding the absence of a right to a jury trial. Therefore, we must affirm the denial of L.M.'s motion for jury trial.

SUPPRESSION MOTION

Next, L.M. contends that he was drunk when he made his incriminating statements to the police. Further, he alleges that he did not understand his rights, notwithstanding that the officer read him the *Miranda* warnings in Spanish, repeating part of the warning twice. Accordingly, L.M. argues that his confession was not voluntarily given.

"On appeal, an appellate court will not reverse a determination that a confession was freely, voluntarily, and intelligently given if there is substantial competent evidence to support the determination. The legal

conclusion drawn from those facts is reviewed de novo.' *State v. Jacques*, 270 Kan. 173, Syl. ¶ 4, 14 P.3d 409 (2000)." *State v. Payne*, 273 Kan. 466, 477, 44 P.3d 419 (2002).

However, the courts exercise the greatest care in assessing the validity of a confession by a juvenile. *State v. Donesay*, 265 Kan. 60, 69, 959 P.2d 862 (1998). The following factors are to be considered when determining whether the confession of a juvenile is voluntary: "(1) the age of the minor, (2) the length of the questioning, (3) the minor's education, (4) the minor's prior experience with the police, and (5) the minor's mental state." *State v. Davis*, 268 Kan. 661, 674, 998 P.2d 1127, cert. denied 531 U.S. 855 (2000). "Where an examination of the record shows that under the totality of the circumstances, the juvenile's confession was voluntary, the district court's decision will not be overturned on appeal." *State v. Ramos*, 271 Kan. 520, 525, 24 P.3d 95 (2001).

We are hampered in our assessment of the district court's decision because the journal entry denying suppression does not state the grounds for the court's denial and the transcript of the hearing at which the court announced its decision is not in the record on appeal. See *State v. Holmes*, 278 Kan. 603, 612, 102 P.3d 406 (2004) (appellant's burden to furnish a record which affirmatively shows that prejudicial error occurred).

Nevertheless, we have reviewed the testimony presented and feel comfortable that sufficient evidence existed upon which a court could find that, under the totality of the circumstances, L.M. made his statement freely, voluntarily, and knowingly. We note that he was aware enough of what he was doing to describe the event in a manner that placed him in a more favorable light. We affirm the district court's denial of L.M.'s motion to suppress.

SUFFICIENCY OF THE EVIDENCE

Finally, L.M. challenges the sufficiency of the evidence to establish the requisite element of aggravated sexual battery that "the victim is overcome by force or fear." K.S.A. 21-3518(a)(1). Our review standard is well settled. See *In re B.M.B.*, 264 Kan. 417, 433, 955 P.2d 1302 (1998).

L.M. argues that the facts are insufficient to prove beyond a reasonable doubt that R.P. was overcome by fear. While there was some evidence indicating that L.M.'s actions provoked fear in the victim, we need not discuss it in detail. The crime can be committed by overcoming the victim by *force* as well as by fear. Even L.M.'s more benign description of the incident described how he hugged R.P. and continued to hold onto her while she walked to the corner. R.P. refused L.M.'s request for a kiss. R.P. testified that

L.M. nevertheless effected that kiss and face-licking through force. The evidence was sufficient to establish that element of the crime.

Affirmed.