NO. 14-24-00873-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

MICHAEL SHANE DUKE

APPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

APPELLANT'S BRIEF

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LIST OF PARTIES

The Appellant is Michael Shane Duke.

The Appellant's trial counsel are Cary Faden & Michael Diaz.

The Appellant's appellate counsel is Crespin Michael Linton.

The Trial Judge is The Honorable Jessica Pulcher.

The appellate attorney representing the State is Trey Picard, Assistant District Attorney, Brazoria County, Texas.

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PRELIMINARY STATEMENT

On October 31, 2024, a jury found Michael Shane Duke (Duke) guilty of seven counts of Possession of Child Pornography. On November 1, 2024, the jury sentenced Duke to 91 years in TDC on Counts 1 through 6 and sentenced him to 99 years in TDC on Count 7. The trial court ordered that the sentences for Count 1 and Count 7 would run consecutively. Appellant Duke perfected his appeal on November 5, 2024. (TR. at 182)

STATEMENT OF FACTS

PRETRIAL HEARING – OCTOBER 29, 2024

On October 29, 2024, the trial court conducted a pretrial hearing on Appellant's Motion To Suppress Oral Statement of Defendant.

A. State's Witnesses

1. Cecil Arnold

Pearland Police Department Detective Cecil Arnold testified that he is part of the Internet Crime Against Children Task Force and on January 10, 2024 he and other officers executed a search warrant at 204 Hackberry Street #2203 in Clute, Texas which was the location

associated with the internet IP address which he was investigating. (R.R. Vol. 3 at 6-10) Arnold stated that he and Agent Dwayne Lewis spoke with Appellant in Arnold's squad car and recorded their interview. (R.R. Vol. 3 at 12-13) He explained that Appellant claimed that he described himself as scared, a ward of the State, and a special education student. (R.R. Vol. 3 at 16) Arnold admitted that he told Appellant not to worry about his intellectual disability. (R.R. Vol. 3 at 17) He explained that he provided Appellant with Miranda warnings even though Appellant was not in custody and informed Appellant that that he was giving a voluntary statement to the police. (R.R. Vol. 3 at 17) Arnold admitted that Appellant said that he did not understand his right to terminate the interview at any time and claimed that he needed to speak with a psychologist. (R.R. Vol. 3 at 18-19) He conceded that Appellant kept saying that he was special education and was taking medication. (R.R. Vol. 3 at 19) Arnold admitted that he was lying to Appellant when he told Appellant that he wasn't going to jail. (R.R. Vol. 3 at 20)

On cross-examination, Arnold noted that Appellant was not handcuffed during the interview and even left the vehicle for a short time. (R.R. Vol. 3 at 20) Arnold stated that he even allowed Appellant

to smoke a cigarette. (R.R. Vol. 3 at 21) He admitted that at about 29 minutes into the interview that Appellant claimed that he didn't know what was going on. (R.R. Vol. 3 at 23)

The trial court denied Appellant's Motion To Suppress Appellant's statements to Arnold in the squad car while parked outside of Appellant's residence after finding that it was a non-custodial interrogation and finding that Appellant understood the Miranda warnings given to him. (R.R. Vol. 3 at 31)

TRIAL PHASE

A. State's Witnesses

1. Cecil Arnold

Pearland Police Department Detective Cecil Arnold testified that he is a member of the Internet Crimes Against Children Task Force and executed a search warrant on Appellant's apartment in Clute, Texas. (R.R. Vol. 3 at 48) Arnold stated that he received notice of someone with a specific IP address that was using a file-sharing network and downloading child pornography. (R.R. Vol. 3 at 50) He explained that he was able to identify the images as child pornography based on hash

values assigned to every picture and video posted on the internet. (R.R. Vol. 3 at 50) Arnold noted that a picture's hash value is similar to a VIN number for a car so that he can monitor the file-sharing network for hash values that are known to be images of child pornography. (R.R. Vol. 3 at 51) He further explained that every person on a file-sharing network has a publicly-viewed folder to share pictures and videos. (R.R. Vol. 3 at 51) Arnold testified that he sent a subpoena to Comcast which was the Internet provider for the specific IP address he was investigating so that he could obtain the subscriber information. (R.R. Vol. 3 at 52) He stated he prepared a search warrant for the Clute, Texas residence listed in the subscriber information and assembled the task force to execute the search warrant. (R.R. Vol. 3 at 55-56)

Arnold testified that Appellant answered the door and the task force also found that Appellant's girlfriend's 17 year old son was at the residence. (R.R. Vol. 3 at 55-58) He explained that he interviewed Appellant in his squad car and recorded the interview with his bodyworn camera. (R.R. Vol. 58) Arnold stated that Appellant described himself as special education so that he might not understand the questioning. (R.R. Vol. 3 at 61) He believed that Appellant's special education claim did not match with high school graduate educational level and his high

level of computer knowledge. (R.R. Vol. 3 at 65) Arnold stated that Appellant claimed that he goes on the internet and finds illegal stuff. (R.R. Vol. 3 at 66) He noted that Appellant brought up the topic of child pornography before he even questioned Appellant about it. (R.R. Vol. 3 at 68) Arnold testified that Appellant admitted that he downloaded everything on his computer. (R.R. Vol. 3 at 69)

Arnold explained that Appellant said he used BitTorrent which is a search engine like Google in which a user would type a phrase like "preteen hard porn" or "daddydaughter" to find images in a publicly-viewed shared folders on the internet. (R.R. Vol. 3 at 71) He noted that their surveillance system does not alert him based on internet search phrases but only alerts him if someone has downloaded and possesses child pornography with known hash values. (R.R. Vol. 3 at 72) Arnold acknowledged that Appellant initially told him that Appellant was only searching for adult pornography and stumbled upon child pornography. (R.R. Vol. 3 at 74) He said that Appellant moved these downloaded files from his computer to storage devices like flash drives. (R.R. Vol. 3 at 76)

Arnold claimed that during his investigation on December 14 and December 15 of 2023 that Appellant sent him 256 files of child

pornography even though Appellant denied trading child pornography. (R.R. Vol. 3 at 79) He testified that Appellant admitted that Appellant probably possessed hundreds of thousands of child pornography images. (R.R. Vol. 3 at 84) Arnold noted that nothing Appellant said convinced him that Appellant did not understand the consequences of talking with him about the child pornography. (R.R. Vol. 3 at 85)

Arnold explained that Pearland Police Department Detective examined all of the electronic devices in the residence to find and collect any devices that contained child pornography for further examination at the police department. (R.R. Vol. 3 at 86-87) He described that at 8:17 of the second part of the interview that Appellant talked about children being sexually abused from the child pornography that he downloaded. (R.R. Vol. 3 at 88-89) Arnold testified that he found self-produced child pornography of a 5 year old which Appellant had not downloaded from the internet. (R.R. Vol. 3 at 91) He noted that Appellant claimed that the self-produced video was more real to him because it was not downloaded from the internet. (R.R. Vol. 3 at 95)

Arnold stated that Appellant denied that children excited him, but he noted that most offenders claimed such denials. (R.R. Vol. 3 at 96) He stated that Appellant accused his father of being a pedophile and

claimed that he did not want to be like his father. (R.R. Vol. 3 at 99) Arnold said that Appellant admitted to taking the video of the child to prove that he was not a pedophile. (R.R. Vol. 3 at 100) He testified that Appellant claimed that he would create a different account to continue file-sharing if he got kicked out of any of the file-sharing groups. (R.R. Vol. 3 at 101)

Arnold testified that Appellant took responsibility for these images of child pornography. (R.R. Vol. 3 at 102) He noted that Appellant mentioned 4 videos named “chica,” “Angel 5y,” “3,” and “1-2-6.” (R.R. Vol. 3 at 103) He noted that their office found prepubescent children on Appellant’s devices which he considered as abnormal child pornography. (R.R. Vol. 3 at 103) Arnold testified that they seized 45 devices from Appellant’s apartment. (R.R. Vol. 3 at 105) He claimed that the images found on Appellant’s devices were some of the most egregious child pornography that he had ever seen. (R.R. Vol. 3 at 106) Arnold noted that some of the images contained sexual assault of children among the 200,000.00 images found. (R.R. Vol. 3 at 107)

On cross-examination, Arnold believed that Appellant’s downloading of child pornography had been going on for a long time. R.R. Vol. 3 at 108) He admitted that identifying the IP address of the

computer which downloaded child pornography does not identify the person who downloaded the contraband. (R.R. Vol. 3 at 109) Arnold noted that their office went to Appellant's apartment to verify that his apartment did not have open Wifi so that strangers could access his internet to download the child pornography. (R.R. Vol. 3 at 110) He stated that they executed the warrant on January 10, 2024 without forced entry because Appellant was cooperative. (R.R. Vol. 3 at 112-113)

Arnold admitted that Appellant informed him that he was a ward of the state. (R.R. Vol. 3 at 114) He conceded that Appellant told him that Appellant did not understand the Miranda rights but Appellant was going to tell him yes anyway. (R.R. Vol. 3 at 116) Arnold even admitted that Appellant said that he needed a psychologist. (R.R. Vol. 3 at 116) He believed that Appellant's statements were voluntary. (R.R. Vol. 3 at 117) Arnold admitted that he did not know if Appellant viewed all of the 200,000 images, but he denied that a pop-up ad could advertise child pornography. (R.R. Vol. 3 at 121) He believed that Appellant knew how to navigate a computer. (R.R. 3 at 122) Arnold noted that Appellant claimed that he had no interest in the child pornography, but he claimed that he was collecting it. (R.R. Vol. 3 at 122) He stated that even if

Appellant had not viewed all of the 200,000 images did not mean that he didn't possess them. (R.R. Vol. 3 at 126) Arnold explained that a person would have to know the size of the file if that person wanted to download onto an external device. (R.R. Vol. 3 at 127) He feared that a person who downloaded 200,000 images would likely graduate to victimizing children. (R.R. Vol. 3 at 129)

Over Appellant's objection, the trial court admitted the photographs taken by Appellant of a young child classified as State's Exhibits 4, 5, and 6. (R.R. Vol. 3 at 130)

Arnold testified that he had knowledge that Appellant was acting on his sexual desires. (R.R. Vol. 4 at 7) He did not believe that the child pornography belonged to anyone else in the apartment. (R.R. Vol. 4 at 8) Arnold admitted that the multiple external devices could have come from a place other than Appellant's apartment. (R.R. Vol. 4 at 9) He noted that Appellant provided him with his computer's password, but admitted that the password probably opened all of the electronic devices. (R.R. Vol. 4 at 12) Arnold admitted that Appellant's girlfriend, Dena Gayle, was the owner of the Internet account at the apartment. (R.R. Vol. 4 at 14-16) He conceded that many people had access to the

apartment and could have downloaded the child pornography. (R.R. Vol. 4 at 15)

2. Jonathan Cox

Pearland Police Department Detective Jonathan Cox testified that he is a computer and mobile forensic investigator. (R.R. Vol. 3 at 137) Cox explained that he was present for the execution of the search warrant at Appellant's apartment, and he examined all the electronic devices at the scene for the child pornography to determine which items to seize for further examination at the police station. (R.R. Vol. 3 at 138-139) He stated that they seized 45 electronic devices for a full forensic examination. (R.R. Vol. 3 at 139) Cox noted that 20,750 pictures and 1730 videos were real while numerous images were computer generated. (R.R. Vol. 3 at 140) He stated that he looked for pictures and videos with hash values because they are the equivalent of a digital fingerprint. (R.R. Vol. 3 at 141)

Cox testified that he first used a program called Axiom that locates all the pictures and videos and then imports them into the Griffeye Analyzer that looks at every picture and video. (R.R. Vol. 3 at 141) He explained that Appellant's devices had so many images that it took him 5 to 6 months to review all of them. (R.R. Vol. 3 at 142) Cox testified

that he sent the images to national clearinghouse so that they can attempt to identify the children. (R.R. Vol. 3 at 143) He noted that he had seen some of the children before in other investigations, but many of the images he viewed were far more egregious than the ones he had seen in previous investigations. (R.R. Vol. 3 at 144) Cox testified that he saw images of necrophilia child pornography, S&M, child torture, and bestiality of children. (R.R. Vol. 3 at 145)

Cox testified that an image found on a thumb drive showed a 12-14 year old performing oral sex on an adult penis. (R.R. Vol. 3 at 155) He noted that Appellant's white iPhone contained pictures and videos recorded by Appellant of a 6 year old's buttock who is wearing pink underwear. (R.R. Vol.3 at 156) Cox explained that the phone's geotag application showed that those pictures and videos were taken at Appellant's apartment. (R.R. Vol. 3 at 157)

Cox testified that he took many electronics devices to his office, categorized the pictures and videos, and then sent a copy to the National Center For Missing and Exploited Children and to the Brazoria County District Attorney's Office. (R.R. Vol 3 at 159) The trial court overruled Appellant's objection to State's Exhibits 8 and 9 that the prejudicial effect of the pictures and videos on these two thumb drives

outweighed their probative value. (R.R. Vol. 3 at 160-161) He stated that one video shows a penis striking the vagina of a 3-5 year old while another video showed a man attempting to insert his penis into the anus same child while that child was screaming and kicking him. (R.R. Vol. 3 at 162) Cox testified that another video showed a mother holding her 3 year old daughter in her lap while the child's father and 9 year old son had intercourse with the child. (R.R. Vol. 3 at 162) He stated that in a video entitled "8YThai" that an eight year old girl is sexually assaulted by an adult penis in her vagina. (R.R. Vol. 3 at 163) Cox testified that in a video entitled "Girl With Dad" that an adult man spreads apart a female toddler's vagina and inserts his fingers and his penis into her vagina. (R.R. Vol. 3 at 164) He stated that in a video entitled "NAM4 5 year old" that a 6-8 year old had a penis inserted into her anus. (R.R. Vol. 3 at 165)

Cox testified that he found a picture that showed a male penis inserted into a dead baby, a picture that showed a dead baby with ligature marks around its neck, a picture of a baby's torn vagina and anus, a picture of a 5 year old with a vibrator in her vagina. (R.R. Vol. 3 at 166) He stated that he found a picture of a 6-8 year old girl who was tied up and hung upside down with a sharpie marker inside her vagina.

(R.R. Vol. 3 at 167) Cox said he found a picture entitled “Necro Lord” which showed dead children with male penises inserted into the children’s anuses and mouths with the following words on the image – “kids mercilessly penetrated.” (R.R. Vol. 3 at 168) Cox noted that he found another picture entitled “Necro Pedo” that showed a 7 year dead old girl with a penis in her vagina. (R.R. Vol. 3 at 169) He testified that he found a video of a female adult inserting a dog’s penis into a toddler’s mouth while the child is crying. (R.R. Vol. 3 at 170)

On cross-examination, Cox admitted that Appellant provided him with the password to access Appellant’s encrypted laptop. (R.R. Vol. 3 at 173) He conceded that he did not find any child pornography on the laptop. (R.R. Vol. 3 at 174) Cox noted that he collected 45 electronic devices at Appellant’s apartment. (R.R. Vol. 3 at 174) He stated that Appellant’s phone contained pictures of child pornography and pictures of Appellant. (R.R. Vol. 3 at 179) Cox mentioned that a Seagate external hard drive contained 1105 videos and 12,838 pictures. (R.R. Vol. 3 at 180) He conceded that 14 of the 45 devices did not contain child pornography. (R.R. Vol. 3 at 180) Cox noted that the vast majority of these devices were found in Appellant’s bedroom. (R.R. Vol. 3 at181)

3. Danny Duke

Danny Duke testified that he is Appellant's brother and works as a Deejay. (R.R. Vol. 4 at 18) Danny admitted that he messaged his friend Officer Stackhouse to confirm rumors that his brother had been arrested for possessing child pornography. (R.R. Vol. 4 at 19-22) He stated that he asked his friend John Gray to film his brother's arrest so that his civil liberties were protected. (R.R. Vol. 23) Danny said that he was not close with his brother at the time and hadn't seen him in 3 years. (R. R. Vol. 4 at 24-25) He conceded that he texted Stackhouse the following: "I don't doubt it man. He is hacker level with computers. I believe he did it." (R.R. Vol. 4 at 27) Danny admitted that he told a police officer that his brother committed the crime. (R.R. Vol. 4 at 29) He noted that he and Appellant barely talk, and that he hadn't lived with Appellant in 20 years. (R.R. Vol. 4 at 32)

Danny admitted that during a telephone call with Appellant from the jail on January 3, 2024 that he told Appellant that Appellant had played dumb his whole life and now it's time to do it again. (R.R. Vol. 4 at 33) He admitted that within 3 days of his brother's arrest that he was anticipating that his brother would be sentenced to prison. (R.R. Vol. 4 at 35) Danny stated that he visited Appellant in jail on October 18, 2024,

and Appellant told him “this ain’t nothing but a vacation.” (R.R. Vol. 3 at 39) He admitted that Appellant wanted to get a change of venue to Harris County where he could get probation. (R.R. Vol. 3 at 40) Danny conceded that Appellant said that he would accept a 20-year prison plea. (R.R. Vol. 4 at 44) He stated that Appellant claimed that he didn’t commit the crime maliciously. (R.R. Vol. 4 at 49)

On cross-examination, Danny testified that he and Appellant are not natural brothers because Appellant is one of the fosters children that lived with Danny’s grandmother. (R.R. Vol. 4 at 60) He explained that he was 3 years old when Appellant was placed with his grandmother when Appellant was only an infant. (R.R. Vol. 4 at 60) Danny said they lived together until he moved out of his grandmother’s house at age 16. (R.R. Vol. 4 at 61) He described Appellant as borderline retarded who suffered from Crohn’s disease and ulcerative colitis. (R.R. Vol. 4 at 61) Danny stated that he knew his brother had a relationship with Dena Gayle, but he didn’t know that they had moved to Clute, Texas. (R.R. Vol. 4 at 63-65) He explained that he knew Officer Stackhouse because they had become friends after he deejayed Stackhouse’s wedding. (R.R. Vol. 4 at 66) Danny stated that Appellant got his high school

diploma at the age of 24. (R.R. Vol. 4 at 71) He explained that his grandmother, Ramona Duke, is his adopted mother. (R.R. Vol. 4 at 73)

4. Dena Gayle

Dena Gayle testified that she is Appellant's girlfriend and his caregiver for the past 10 years. (R.R. Vol. 4 at 74) Gayle stated that her two sons lived with them in the apartment but denied that they possessed the child pornography. (R.R. Vol. 4 at 75) She believed Appellant only had adult pornography and was not aware he possessed child pornography. (R.R. Vol. 4 at 76) Gayle claimed that she was also not aware that he made videos of a young girl named Raiden whose parents lived with them. (R.R. Vol. 4 at 78-80) She testified Raiden may have wanted Appellant to photograph her because she loved taking pictures. (R.R. Vol. 4 at 81)

Gayle testified that she asked Appellant why he had child pornography and Appellant told her that he shouldn't have it, that he only downloaded "pop-ups," and that he didn't even look at it. (R.R. Vol. 4 at 91) She agreed that Appellant admitted to her that he wished he had never done this but that he had never hurt anyone. (R.R. Vol. 4 at 95-98) Gayle stated that Appellant would play the game of dress-up

with Raiden. (R.R. Vol. 4 at 106) She admitted that on January 20, 2024 that Appellant admitted to her that he downloaded child pornography from the Dark Web. (R.R. Vol. 4 at 110) Gayle conceded that on February 4, 2024 that Appellant admitted to her that he had a video of Raiden on his phone. (R.R. Vol. 4 at 115) She noted that Appellant took videos of Raiden all the time. (R.R. Vol. 4 at 116) Gayle agreed that on February 7, 2024, she told Appellant that she wished he had thrown away all the pictures and videos. (R.R. Vol. 4 at 117) She admitted that Appellant told her that he wanted to get a change of venue to Harris County because he might get probation there. (R.R. Vol. 4 at 124) Gayle conceded that on June 15, 2024 that Appellant referred to himself as the Diaper Bandit. (R.R. Vol. 4 at 128) She mentioned that Appellant told her that he was able to circumvent the security features on the jail-issued computer tablets. (R.R. Vol. 4 at 130)

On cross-examination, Gayle stated that she never met with the prosecutor and never reviewed Appellant's telephone calls from jail to her about which the prosecutor questioned her. (R.R. Vol. 4 at 139-140) She claimed that Appellant was born with mental retardation and fetal alcohol syndrome. (R.R. Vol. 4 at 141) Gayle noted that she and the

Appellant have been dating for 10 years. (R.R. Vol. 4 at 141) She stated that he experiences rectal bleeding. (R.R. Vol. 4 at 142) Gayle explained that she cared for him for about 5 years and then began living with Appellant. (R.R. Vol. 4 at 147) She described that their 3 bedroom Clute apartment contained 4 adults and 3 children which included Raiden. (R.R. Vol. 4 at 148) Gayle claimed that she never suspected that Appellant was looking at child pornography and never felt unsafe around him. (R.R. Vol. 4 at 152-153) She stated that she subscribed to Xfinity Comcast. (R.R. Vol. 4 at 153)

On redirect examination, Gayle admitted that she was having sex with Appellant even though she was his caregiver. (R.R. Vol. 4 at 158) She conceded that Appellant told her that he was going to appeal the fuck out of this case and even bragged that he knew more about computers than Detective Cox. (R.R. Vol. 4 at 162) Gayle admitted that on October 29, 2024 that Appellant told her that showing the child pornography to the jury was done to make him look like a sick individual. (R.R. Vol. 4 at 170) She conceded that Appellant's mental issues would not prevented him from accessing child pornography. (R.R. Vol. 4 at 175)

The State rested. (R.R. Vol. 4 at 177)

The Defense rested. (R.R. Vol. 4 at 182)

The trial court denied Appellant's for a voluntariness charge by ruling that since there was no custodial interrogation that there was no factual issue as to the voluntariness of his statement. (R.R. Vol. 4 at 187)

B. Jury's Verdict

The jury found Appellant guilty of all 7 Counts of Possession of Child Pornography. (R.R. Vol. 5 at 6-8)

PUNISHMENT PHASE

The State rested. (R.R. Vol. 5 at 10)

A. Defense Witness

1. Nicola Polizzotto, M.D.

Dr. Nicola Polizzotto testified that he is a Psychiatrist and Associate Medical Director of the Harris County Psychiatric Center at the Dunn Behavioral Center in Houston, Texas. (R.R. Vol. 5 at 11)

Polizzotto stated that he was the Medical Director for Competency Restoration Services and Director of the Psychosis Program. (R.R. Vol. 5 at 12) He noted that he was the attending physician for Appellant for a month and generated a report about his competency. (R.R. Vol. 5 at 13-18) Polizzotto explained that Appellant's issues were mild intellectual development disorder, depressive disorder, anxiety disorder, rectal prolapse, rectal bleeding, ulcerative proctitis with rectal bleeding, iron deficiency, and impairment of cognitive function. (R.R. Vol. 4 at 19) He noted that some people can be higher functioning in one area yet lower functioning in another area. (R.R. Vol. 5 at 22) Polizzotto testified that although he prescribed Celexa for Appellant's depression and Mirtzapine for his insomnia there was no medicine for intellectual development disorder. (R.R. Vol. 5 at 23)

On cross-examination, Polizzotto noted that his report stated that Appellant had a poorly documented history of Major Depressive Disorder and General Anxiety Disorder even though he had been in a guardianship. (R.R. Vol. 5 at 25) He conceded that he did not have any legal documents which showed that Appellant was in a guardianship. (R.R. Vol. 5 at 26) Polizzotto further conceded that a guardian should not be having a sexual relationship with her ward. (R.R. Vol. 5 at 26)

He admitted that he did not administer any cognitive testing on Appellant, and he denied that Appellant was a malingerer. (R.R. Vol. 5 at 29) Polizzotto admitted that he did not verify Appellant's mental history. (R.R. Vol. 5 at 30)

Polizzotto noted that Intellectual Development Disorder can impair judgment and cause impulsivity. (R.R. Vol. 5 at 32) He claimed that it would not surprise him that he told officers where he obtained the child pornography. (R.R. Vol. 5 at 32) Polizzotto testified that a guardianship is often warranted for an adult who has an intellectual disability. (R.R. Vol. 5 at 39) He admitted that it was concerning behavior that Appellant took Raiden's clothes off to test himself if he had an urge to molest her. R.R. Vol. 5 at 41) Polizzotto conceded that it concerned him that Appellant was able to circumvent the county's firewall on the inmate computer tablet at the jail. (R.R. Vol. 5 at 43) He agreed that it was a fair assessment that if Appellant was looking at thousands of images of child pornography then Appellant likely did so for his sexual gratification. (R.R. Vol. 5 at 48) Polizzotto concluded in his report that Appellant was not a danger to himself or others. (R.R. Vol. 5 at 50) He conceded that his conclusion meant that Appellant was not a threat on the grounds of psychosis or depression or a treatable mental illness. (R.R. Vol. 5 at 52)

Polizzotto admitted that he never asked Appellant about Appellant's enjoyment in watching child pornography. (R.R. Vol. 5 at 56)

2. Kristen Dzeda, M.D.

Dr. Kristen Dzeda testified that she is a resident physician at the University of Texas Medical Branch who is training in psychology. (R.R. Vol. 5 at 59) Dzeda stated that she was part of the group of doctors that evaluated Appellant for competency for which she prepared a report. (R.R. Vol. 5 at 60-61) She explained that she met with him once for 2 hours and reviewed his medical history. (R.R. Vol. 5 at 61-62) Dzeda testified that their findings were consistent with his prior diagnosis of intellectual disability, depression, and anxiety with the intellectual disability being a permanent condition. (R.R. Vol. 5 at 62) She stated that Appellant reported problems with activities of daily living such as grocery shopping, managing finances, taking medication, bathing, and dressing. (R.R. Vol. 5 at 63) She explained that the severity of intellectual disability is on a spectrum so that it is possible that a person with this disability can function on a higher level in a specific area such as operating a computer. (R.R. Vol. 5 at 64)

On cross-examination, Dzeda admitted that she determined Appellant's medical history based on his responses to her questions without examining his education or medical records. (R.R. Vol. 5 at 66) She conceded that it would surprise her to know that Appellant was reading the Koran and the Bible after he claimed that he couldn't read words longer than 6 letters and only read picture books. (R.R. Vol. 5 at 69-70) Dzeda admitted that she did not administer formal IQ testing to Appellant so she did not know where his intelligence fell on the spectrum. (R.R. Vol. 5 at 72) She conceded that she would be surprised that Appellant had a valid Texas Driver's license and could bathe and dress himself at the jail. (R.R. Vol. 5 at 73) Dzeda stated that her group took his self-reported history at face value. (R.R. Vol. 5 at 73) She admitted that Appellant's history was not independently verified and further admitted that Appellant may have lied to her. (R.R. Vol. 5 at 74-76)

Dzeda conceded that she would be surprised that Appellant could calculate parole time. (R.R. Vol. 5 at 81) She agreed that Appellant showed a good level of reasoning to think about firing his lawyers to delay the trial and leverage the delay for a better plea deal. (R.R. Vol. 5 at 86) Dzeda admitted that she would be surprised that Appellant

bypassed the security on the jail's inmate computer. (R.R. Vol. 5 at 88) She conceded that she had not watched Detective Arnold's hour-long interview of Appellant. (R.R. Vol. 5 at 95) Dzeda claimed that she followed their organization's standard operating procedures for a competency evaluation. (R.R. Vol. 5 at 96) She admitted that their group believed what Appellant told them. (R.R Vol. 5 at 99) Dzeda testified that she gave Appellant a mental status examination which consisted of a series of questions to determine his concentration, memory, attention, and judgment. (R.R. Vol. 5 at 102)

3. Ramona Duke

Ramona Duke testified that she lives in Clute and that Appellant is her son. (R.R. Vol. 5 at 113) Ramona explained that she and her husband took the 8 month old Appellant into their home as foster parents after Appellant's biological mother abandoned him. (R.R. Vol. 5 at 113) She stated that she and her husband adopted Appellant in 1995 and her husband died two months later in May of 1995. (R.R. Vol. 5 at 114) Ramona noted Appellant was in the special education program in school. (R.R. Vol. 5 at 115) She described how the children teased him for having to wear pull-up diapers because of his rectal bleeding. (R.R. Vol. 5 at 115)

Ramona explained that Appellant attended Brazoswood High School where she attended many ARD meetings to address his educational disability. (R.R. Vol. 5 at 118-119) She said that Appellant graduated from high school at the age of 21. (R.R. Vol, 5 at 119) Ramona noted that Appellant moved out of her house about two years ago. (R.R. Vol. 5 at 120) She admitted that Appellant had a Texas Driver's license and could drive a car. (R.R. Vol. 5 at 121) Ramona explained that she married Kenneth Bull when Appellant was 7 years old and Bull beat Appellant with a belt over her objections. (R.R. Vol. 5 at 122) She testified that Appellant received disability payments, but he did not have a legal guardian. (R.R. Vol. 5 at 124) Ramona asked the jury to not incarcerate him for life. (R.R. Vol. 5 at 125) She noted that Appellant's biological mother abused alcohol and drugs. (R.R. Vol. 5 at 126)

On cross-examination, Ramona admitted that Appellant is slower than most children. (R.R. Vol. 5 at 127) She stated that Kenneth Bull began beating Appellant so she stopped the abuse by divorcing him. (R.R. Vol. 5 at 129) Ramona agreed that Appellant is not a ward of the State and Dena Gayle is not his legal guardian. (R.R. Vol. 5 at 130-131) She noted that Appellant got bullied so much at school for his rectal

bleeding that she removed him from school and home-schooled him for a couple years during middle school. (R.R. Vol. 5 at 137) Ramona testified that Appellant has never been convicted of a felony. (R.R. Vol. 5 at 138)

4. Stephen Duke

Stephen Duke testified that he is the supervisor of the Brazoria County Adult Probation Department High Risk Unit. (R.R. Vol. 5 at 141) Stephen stated that he manages registered sex offenders currently on probation who must attend group session counseling for the duration of their probation. (R.R. Vol. 5 at 142) Probation for sex offenders can last as long as 10 years and include polygraph evaluations, frequent home visits with a mandatory search of their electronic devices, and community service. (R.R. Vol. 5 at 143) He stated that probation is a form of punishment prescribed by law. (R.R. Vol. 5 at 144)

On cross-examination, Stephen admitted that the maximum term of punishment for the revocation of probation is 10 years. (R.R. Vol. 5 at 145) He admitted that it is a concern that Appellant circumvented the security of the inmate's tablet computer at the jail. (R.R. Vol. 3 at 147) Stephen conceded that his department can't stop him if he wants to view child pornography or touch a child. (R.R. Vol. 5 at 148) He stated that

probation requires three home visits per month. (R.R. Vol. 5 at 150) Stephen conceded that Appellant can receive counseling in prison. (R.R. Vol. 5 at 151) He admitted it is difficult to track a homeless sex offender. (R.R. Vol. 5 at 152) Stephen noted that the counseling in prison is voluntary while it is mandatory while on probation. (R.R. Vol. 5 at 158) He testified that Appellant has to register as a sex offender for the rest of his life. (R.R. Vol. 5 at 159)

The Defense rested. (R.R. Vol. 5 at 165)

B. Jury's Sentence

The jury assessed a sentence of 91 years in the Texas Department of Criminal Justice and a fine of $10,000.00 on Counts 1-6 and a sentence of 99 years in the Texas Department of Criminal Justice and a $10,000.00 fine on Count 7. (R.R. Vol. 6 at 53-55) The trial court granted the State's motion to cumulate sentence over Appellant's objection and ruled that Count 1 would run consecutively with Count 7. (R.R. Vol. 6 at 58)

POINTS OF ERROR

POINT OF ERROR ONE:

The evidence was insufficient to support Appellant's conviction for Possession of Child Pornography.

POINT OF ERROR TWO:

The trial court erred by denying Appellant's Motion to Suppress.

POINT OF ERROR THREE:

The trial court erred by denying Appellant's Request For Jury Instruction on Voluntariness of Confession.

POINT OF ERROR NO. 1

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR CAPITAL MURDER

Appellant Duke contends that the State has not proven its case beyond a reasonable doubt that he committed Possession of Child Pornography because the State failed to show that he was the person in the residence that possessed the child pornography.

When assessing whether sufficient evidence supports a conviction, the court considers the evidence in the light most favorable to the verdict and determines whether, based on the evidence and reasonable inferences from the evidence, a rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. **Baltimore v. State**, 689 S.W.3d 331, 341 (Tex. Crim. App. 2024) Thus, the issue on appeal is not whether the appellate court believes the State's evidence or instead believes the appellant's evidence outweighs the State's evidence. **Wicker v. State**, 667 S.W. 2d 137, 143 (Tex. Crim. App. 1984) The verdict may not be overturned unless it is irrational

or unsupported by proof beyond a reasonable doubt. **Matson v. State**, 819 S.W. 2d 839, 846 (Tex. Crim. App. 1991) The jury, as the sole judge of the facts, is entitled to resolve any conflicts in the evidence, to evaluate the credibility of witnesses, and to determine the weight to be given any particular evidence. **Jones v. State**, 944 S.W. 2d 642, 647 (Tex. Crim. App. 1996)

Section 43.26(a) of the **Texas Penal Code** provides that a person commits the offense of Possession of Child Pornography if (1) the person knowingly or intentionally possesses, or knowingly or intentionally accesses with intent to view, visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct, including a child who engages in sexual conduct as a victim and (2) the person knows that the material depicts the child as described by Subdivision (1). (West 2025)

Section 43.26(d)(3) of the **Texas Penal Code** provides that possession of child pornography is a felony of the first degree if the person possesses visual material that contain 500 or more visual depictions. (West 2025)

"Whether an image constitutes child pornography under Texas law is determined on a case by case basis, and no single factor is dispositive. This determination is made based on the overall content of the visual depiction, while also considering the minor's age. The focus is on whether the depiction – not the minor – brings forth the genitals or pubic area to excite or stimulate. **Romo v. State**, 663 S.W.3d 716, 720 (Tex. Crim. App. 2022)

The only evidence which shows that Appellant intentionally or knowingly possessed visual material that contained 500 or more visual depictions was his statement given to Detective Arnold.

Appellant contends that the following listed evidence so overwhelmingly outweighs the evidence which shows that he possessed more than 500 visual depictions of child pornography that the jury's verdict is unsupported by proof beyond a reasonable doubt.

1) Many people lived in the apartment.
2) The internet account was not in Appellant's name.
3) No proof that Appellant possessed more than 500 images.

1. Many people lived in the apartment.

Detective Arnold testified that Appellant and his girlfriend's 17-year-old son were at the apartment when he executed the search warrant. (R.R. Vol. 3 at 58) Dena Gayle testified that she and her two sons lived in the apartment with Appellant. (R.R. Vol. 3 at 75) Gayle testified that a 5-year-old girl named Raiden and her parents also lived in the apartment. (R.R. Vol. 3 at 78) Arnold admitted that many people may have come and gone from this apartment. (R.R. Vol. 4 at 15)

2. The internet account was not in Appellant's name.

Detective Arnold testified that the individual's name mentioned in the search warrant was Dena Gayle because she was the owner of the Comcast internet account for the specific IP address being investigated. (R.R. Vol. 4 at 14)

3. No proof that Appellant possessed more than 500 images.

Arnold testified that 45 electronic devices were taken from the apartment. (R.R. Vol. 3 at 105) He admitted these 45 electronic devices were primarily external hard drives that could have come from somewhere besides Appellant's apartment. (R.R. Vol. 4 at 8-9) Detective Cox admitted that he did not find any child pornography on Appellant's encrypted laptop for which the Appellant voluntarily provided

his password. (R.R. Vol. 3 at 174) Cox testified that Appellant's cellphone allegedly had child pornography of 5 year old girl named Raiden, but he never stated how many images were contained on the cellphone. (R.R. Vol. 3 at 179)

Cox testified that he found 20,750 pictures and 1,730 videos that were on the external hard drives. (R.R. Vol. 3 at 140) He noted that a Seagate external hard drive had 1105 videos and 12,838 pictures of child pornography. (R.R. Vol. 3 at 180) Cox testified that only 14 of the 45 devices contained child pornography. Arnold noted that Appellant sent him 256 images during the investigation. (R.R. Vol. 3 at 79)

The State failed to provide sufficient evidence that Appellant knowingly or intentionally possessed more than 500 images of child pornography. Detective Cox testified that he found no child pornography on Appellant's encrypted laptop and found only a few images on Appellant's cellphone. The overwhelming amount of child pornography was found on external hard drives like the Seagate external hard drive. The State failed to show that Appellant downloaded child pornography onto these external hard drives or even if he knew that these external

hard drives contained child pornography. In fact, the only evidence linking Appellant to the child pornography was the 256 images he shared with Detective Arnold and a few images found on his cellphone.

Because 7 people resided in this apartment with even more people visiting, many other people could have brought the external hard drives which contained child pornography into the apartment without Appellant's knowledge.

Even when viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact would not have found the essential elements of Possession of 500 or more visual depictions of Child Pornography beyond a reasonable doubt. Therefore, the evidence is legally insufficient to sustain Appellant's conviction for Possession of 500 or more visual depictions of Child Pornography.

POINT OF ERROR NO. 2

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS

Appellant filed his Motion To Suppress Statements on October 21, 2024. (TR. at 87) On October 29, 2024, the trial court conducted a pretrial hearing on the Motion To Suppress Statements. In his suppression motion, Appellant requested the court to exclude the statements obtained from Appellant on January 10, 2024, which were made to Detective Arnold based on Appellant's intellectual disability. (R.R. Vol. 3 at 26-28) The State contended that Appellant's statements were non-custodial so his intellectual disability was irrelevant to its admissibility. (R.R. Vol. 3 at 29)

The trial court denied Appellant's Motion To Suppress Statements by ruling that Appellant's statements were non-custodial and that based on a totality of the circumstances that Appellant understood his Miranda rights. (R.R. Vol. 3 at 31)

The appellate court reviews a trial court's ruling on a motion to suppress evidence for an abuse of discretion. **Balentine v. State**, 71

S.W.3d 763 (Tex. Crim. App. 2002) At a suppression hearing, the trial court is the sole and exclusive trier of fact and judge of credibility of the witnesses, as well as the weight to be given their testimony. **Romero v. State**, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990) In reviewing a trial court's ruling on the motion to suppress, the appellate court gives almost total deference to a trial court's determination of historical facts, and reviews de novo the court's application of the law. **Rayford v. State**, 125 S.W.3d 521, 528 (Tex. Crim. App. 2003)

Article 38.22 of the Texas Code of Criminal Procedure requires that before an oral statement is admissible, the accused must be warned that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has a right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has a right to terminate the interview at any time.

Tex. Code. Crim. Proc., Art. 38.22, §2(a) (Vernon 2025)

Courts of this state shall strictly construe the requirements of Article 38.22 of the Texas Code of Criminal Procedure and may not find a statement admissible unless all requirements have been satisfied by the state. **Davidson v. State**, 25 S.W.3d 183, 185 (Tex. Crim. App. 2000)

Article 38.23 of the Texas Code of Criminal Procedure provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of a criminal case." (West 2025)

CUSTODIAL/NON-CUSTODIAL INTERROGATION

The trial court held that Appellant's statements made to Detective Arnold were freely and voluntarily given and were not the result of a custodial interrogation. (R.R. Vol. 3 at 31)

Custody for purposes of Miranda and Article 38.22 of the Texas Code of Criminal Procedure include the following four situations: 1) the suspect is physically deprived of his freedom of action in a significant way, 2) a law enforcement officer tells the suspect he is not free to leave, 3) law enforcement officer creates a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and 4) probable cause exists to arrest the suspect and law enforcement officers do not tell suspect he is free to leave. **Gardner v. State**, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009) The fourth situation exists only when the officer communicates the knowledge of probable cause to the suspect or the suspect concedes the existence of probable cause to the officer. **Dowthitt v. State**, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996)

Appellant contends that the trial court erred in ruling that his statement to Detective Arnold was non-custodial because he asserts that he was in custody based on the third situation listed in **Gardner** when Arnold created a situation that led Appellant to believe that his freedom of movement had been significantly restricted. Arnold testified

that he was one of many law enforcement officers of the Internet Crimes Against Children Task force that raided Appellant's apartment on January 10, 2024. (R.R. Vol. 3 at 9) He described how he and Agent Dwayne Lewis placed Appellant in his squad car and interrogated Appellant. (R.R. Vol. 3 at 12) Arnold noted that Appellant was never handcuffed, was informed that he was free to leave, was allowed to smoke a cigarette, and was allowed to leave the police car to walk back into the apartment complex. (R.R. Vol. 3 at 20-21) While Arnold stated that Appellant was allowed to leave the squad car for a few minutes, Arnold always brought Appellant back into the squad car for further questioning.

Appellant claims that he has met the third situation of custody set out in **Gardner** because Arnold created a situation that would lead a reasonable person to believe that his freedom of movement had been significantly restricted when multiple officers participated in the search and instructing Appellant to sit in the squad car for the hour-long interrogation with two police officers. Appellant contends that the intimidation of seeing multiple officers descend on his apartment and the lengthy questioning in the squad car with only a few minutes break before being returned to the squad car for further questioning would lead

a reasonable person to believe that he was in custody. Therefore, since Arnold's squad car questioning was a custodial interrogation, Appellant contends that the rules of Article 38.22 of the Texas Code of Criminal Procedure must be applied.

APPELLANT'S INTELLECTUAL DISABILITY

Appellant contends that his videotaped statements to Detective Arnold were not voluntary because he had an intellectual disability and because his statements were obtained when he was mentally incompetent. Appellant contends that he was also mentally incompetent to stand trial on the date of his arrest. Appellant contends that his mental incompetency rendered him unable to effectively waive his rights under Article Section 38.22 of the Texas Code of Criminal Procedure in order to provide an admissible statement. A mental defect may be significant enough to render a confession inadmissible. **Page v. State**, 614 S.W.2d 819 (Tex. Crim. App. 1981). A confession can be rendered involuntary if the suspect lacked the mental capacity to understand his rights. **Oursbourn v. State**, 259 S.W.3d 159, 172 (Tex. Crim. App. 2008) "Involuntariness is reviewed under the Due Process Clause and articles 38.21 and 38.22 by examining the totality of the circumstances

surrounding the confession." **Lopez v. State**, 610 S.W.3d 487,494 (Tex. Crim. App. 2020)

Appellant offered into evidence as Defense Exhibit No. 2 the Competency Evaluation issued on May 8, 2024 in which Dr. Rocksheng Zhong concluded that Appellant was incompetent to stand trial. This competency evaluation was issued only 4 months after Appellant's interrogation by Arnold.

In addition to this finding of mental incompetency, Appellant also informed Detective Arnold during the interrogation that he was a ward of the State and was a special education student. (R.R. Vol. 3 at 16) Arnold admitted that after he informed Appellant that he had a right to terminate this interview at any time that Appellant said that he did not understand but would tell Arnold that he did understand anyway. (R.R. Vol. 3 at 18) Arnold also conceded that Appellant told him he needed a Psychologist to help him understand his right. (R.R. Vol. 3 at 19)

Appellant contends that based on the totality of the circumstances surrounding his confession to Detective Arnold in the officer's squad car that he did not understand the Miranda warnings given by Arnold and did not voluntarily waive those rights before speaking with Arnold.

Therefore, Appellant contends that trial court erred in failing to suppress his statement given to Detective Arnold.

POINT OF ERROR NO. 3

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A JURY INSTRUCTION ON VOLUNTARINESS OF CONFESSION

At the close of evidence, Appellant requested a jury instruction on voluntariness of confession to be included in the jury charge. (R.R. Vol. 4 at 183-184) The trial court denied Appellant's request by ruling that because there was no custodial interrogation there was no factual issue as to voluntariness. (R.R. Vol. 4 at 187)

An accused has the right to an instruction on any defensive issue raised by the evidence, whether the evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. **Granger v. State**, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999) "In analyzing a jury-charge issue, we first determine if error occurred and, if so, we conduct a harm analysis. A jury-charge error requires reversal when, after proper objection, the appellant suffers "some harm" to his rights. **Ngo v. State**, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) The Court of Criminal Appeals has interpreted this to mean that any harm, regardless of degree, is sufficient

to require reversal. **Arline v. State**, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986) When considering whether a defendant suffered harm, the reviewing court must consider: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. **Almanza v. State,** 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) "We review a trial court's decision not to submit an instruction in the jury charge for an abuse of discretion." **Wesbrook v. State,** 29 S.W.3d 103, 121-122 (Tex. Crim. App. 2000)

"In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any matter. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the

same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial."

Tex. Code. Crim. Proc., Art. 38.22, §6 (Vernon 2025)

"Article 38.22 of the Code of Criminal Procedure sets out rules governing the admissibility of our accused's written and oral statements that are the product of custodial interrogation. Under our precedents, however, section 6 of Article 38.22 applies to both an accused's custodial and non-custodial statements, because it provides that only voluntary statements may be admitted." **Oursbourn v. State**, 259 S.W.3d 159, 171 (Tex. Crim. App.2008) "Article 38.22 is aimed at protecting suspects from police overreaching. But Section 6 of that article may also be construed as protecting people from themselves because the focus is upon whether the defendant voluntarily made that statement. Period." **Oursbourn**, at 172.

Under Articles 38.21 and 38.22 and their predecessors, fact scenarios that can raise a state-law claim of involuntariness (even though they do not raise a federal constitutional claim) include the following: (1) the suspect was ill and on medication and that fact may have rendered his confession involuntary; (2) the suspect was mentally

retarded and may not have knowingly, intelligently and voluntarily waived his rights; (3) the suspect lacked the mental capacity to understand his rights; (4) the suspect was intoxicated, and he did not know what he was signing and thought it was an accident report; (5) the suspect was confronted by the brother-in-law of his murder victim and beaten; (6) the suspect was returned to the store he broke into for questioning by several persons armed with six-shooters." **Oursbourn**, at 173.

"Article 38.22§6 is the law applicable to any case in which a question is raised and litigated as to the general voluntariness of a statement of an accused. As noted above, under that statute the trial judge must then (1) make an independent determination that the statement was made under voluntary conditions; and then (2) instruct the jurors that they shall not consider the statement for any purpose unless they believe, beyond a reasonable doubt that the statement was made voluntarily. **Oursbourn**, at 180-181.

Appellant contends the trial court failed to follow the **Oursbourn** decision's requirement that if the voluntariness of a confession is questioned that the court must make a determination of its voluntariness

regardless of whether the confession was custodial or non-custodial. The trial court erred when it determined that there was no factual issue as to the voluntariness of Appellant's statement simply because the court had previously ruled that the statement was non-custodial. The trial court further erred by failing to make a finding as to whether or not Appellant's statement to law enforcement was voluntary.

Appellant contends that his statement was not voluntarily made because he was not mentally competent to make it. Detective Arnold testified that Appellant told him that Appellant was a special education student and might not understand the questions Arnold was asking. (R.R. Vol. 3 at 61) On cross-examination, Arnold admitted that Appellant told him that Appellant was a ward of the state. (R.R. Vol. 3 at 114) Arnold also conceded that he continued to interrogate Appellant after he asked Appellant if Appellant understood his Miranda rights and Appellant responded by saying "not really but I'm going to tell you yes." (R.R. Vol. 3 at 116) Arnold also noted that Appellant asked for a psychologist to help with this interview. (R.R. Vol. 3 at 116) Dena Gayle, Appellant's caregiver, testified that Appellant was born with mental retardation and fetal alcohol syndrome. (R.R. Vol. 3 at 141)

Appellant raised the question of the voluntariness of his statement when he filed his motion to suppress and in his arguments to the trial court. Therefore, the trial court had to make an independent determination of whether Appellant voluntarily made the statement. The trial court failed to conduct this independent determination based on its erroneous belief that it wasn't necessary because of its previous ruling that it was a non-custodial statement. Moreover, the Appellant contends that he presented sufficient evidence of mental incompetency that required the trial court to submit the issue of voluntariness to the jury.

HARM ANALYSIS

Appellant contend that he suffered at least "some harm" when the trial court's failed to conduct a hearing on the voluntariness of Appellant's statement and then failed to submit a charge to the jury concerning the Voluntariness of Confession. Appellant also contends that the harm affected a substantial right to a fair trial and directly contributed to the conviction of Possession of Child Pornography under Tex. Rule of App. Proc. 44.2. Appellant argues that if the jury had had the opportunity to have the Appellant's jury instruction on Voluntariness of Confession then they could have found Appellant did not voluntarily

make this statement and then disregarded it as evidence against him at trial. Without his statement as evidence at trial, the jury would be forced to consider that multiple people lived in this residence where the child pornography was found who could have possessed the pornography instead of Appellant. In addition, the internet account holder for the residence was Appellant's girlfriend who also lived at the apartment.

Therefore, the trial court abused its discretion in denying Appellant's requested instruction of Voluntariness of Confession.

CONCLUSION

For the reasons stated, Appellant Duke prays the Court to reverse and acquit or in the alternative to reverse and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 10,439 words as determined by the Word program used to prepare this document.

/s/ Crespin Michael Linton
Crespin Michael Linton

CERTIFICATE OF SERVICE

I do hereby certify that on this the 23rd day of June 2025, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Brazoria County, Texas, 111 E. Locust Street, 4th Floor Angleton, Texas 77515 at Treyp@brazoriacountytx.gov.

/s/ Crespin Michael Linton
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