IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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**STATE OF IOWA,**

Plaintiff-Appellee, )

vs. )

**EDWARD EUGENE NELSON,** )

Defendant-Appellant. )

8-68
87-348

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Appeal from the Iowa District Court for Polk County (No. 33045), Richard Strickler and Theodore H. Miller, Judges.

Defendant appeals from his convictions, following a jury trial, for the crimes of willful injury and assault resulting in bodily injury. **REVERSED AND REMANDED.**

Charles L. Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Nan Horvat, Assistant County Attorney, for plaintiff-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but decided en banc.

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**SACKETT, J.**

We address defendant's challenge to the trial court's refusal to suppress his incriminating statements. Defendant contends the statements should be suppressed because at the time they were made he was seventeen years old and his parents were not notified of their right to confer with him prior to his making the statement.

Defendant was arrested on several charges stemming from the assaults of three teenage girls. Defendant was taken to the Des Moines police station. Police Officer Barbara Dennis was called to the police station to talk with the defendant. The defendant's parents were already in her office. Officer Dennis read defendant his Miranda rights. Defendant's parents were present. Officer Dennis then gave the defendant and his parents a document titled "Juvenile Waiver and Parental Consent." The waiver and consent form was read by defendant and his parents. Officer Dennis also read the form to them. Defendant indicated to Officer Dennis he had completed the ninth grade, understood his Miranda rights, and knowingly and voluntarily would waive said rights to talk with Officer Dennis. Defendant's mother, after reading the form and indicating she understood it, signed the form and allowed her son to talk with Officer Dennis.

Defendant contends the waiver of his right to counsel is invalid because his parents were not informed of their right

to confer with him prior to the execution of such waiver in violation of Iowa Code sections 232.1(1)-(2) (1987). He contends only incriminating statements made following the invalid waiver should have been suppressed according to Iowa Code section 232.45(9) (1987).

Iowa Code section 232.11(1) (1987) provides as follows:

> A child shall have the right to be represented by counsel at the following stages of the proceedings within the jurisdiction of the juvenile court under division II:
>
> a. From the time the child is taken into custody for an alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony under the Iowa criminal code, and during any questioning thereafter by a peace officer or probation officer.

Iowa Code section 232.11(2) (1987) provides in relevant part that:

> . . . The waiver by a child who is at least sixteen years of age is valid only if a good faith effort has been made to notify the child's parent, guardian, or custodian that the child has been taken into custody and of the alleged delinquent act for which the child has been taken into custody, the location of the child, and the right of the parent, guardian or custodian to visit and confer with the child. (emphasis supplied).

Iowa Code section 232.45(9) (1987) provides with reference to evidence obtained in violation of sections 232.11(1)-(2):

> If the court waives jurisdiction, statements made by the child after being taken into custody and prior to intake are admissible as evidence in chief against the child in subsequent criminal proceedings provided that the statements were made with the advice of the child's counsel or after waiver of the child's right to counsel and provided that the court finds the child had voluntarily waived the right to remain silent.

See In re D.J.K., 397 N.W.2d 707, 709 (Iowa 1986); State v. Walker, 352 N.W.2d 239, 241 (Iowa 1984); see also In re J.A.N., 346 N.W.2d 495, 498-99 (Iowa 1984); State v. Aldape, 307 N.W.2d 32, 35 (Iowa 1981). "A statement obtained from a child without a valid waiver under section 232.11(2) is per se inadmissible." J.A.N., 346 N.W.2d at 498.

In Walker, the court made it clear that the parents have the right to consult with their detained child:

> Although the Juvenile Code only explicitly mentions a good faith effort to notify the parents, the statute implicitly requires that the officers wait a sufficient period of time after contact is made so the contacted parent may have a reasonable opportunity to come to the station and consult with the child before interrogation beings. (emphasis added).

Walker, 352 N.W.2d at 243.

A juvenile's confession may be suppressed because the interrogating officer did not notify the juvenile's "parent, guardian, or custodian of their right to visit and confer with him once he was in custody. . . ." D.J.K., 397 N.W.2d at 711.

The record is uncontroverted the State did not inform the defendant's parents of their right to visit and confer with their child prior to interrogation. This is a violation of Iowa Code section 232.11(2) (1987). Because the State failed to follow the proper procedure in obtaining a waiver of the juvenile's right to counsel, any incriminating statements made by him during the interrogation and after the waiver form was signed should have been suppressed pur-

suant to defendant's motion. Those statements should not have been considered during the course of the trial.

There being error, prejudice is presumed unless the contrary is affirmatively established. State v. Gansz, 376 N.W.2d 887, 891 (Iowa 1985).

Because the fundamental right to counsel is involved, the error can be harmless only if it is shown to be harmless beyond a reasonable doubt. State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979). The question is whether it appears beyond a reasonable doubt that the error did not affect the accused's right to a fair trial. Id.

The State has not shown the erroneous admission of defendant's confession would not affect the outcome.

We reverse and remand for new trial.

**REVERSED AND REMANDED.**

All judges concur except Habhab and Donielson, JJ., who dissent.

**HABHAB, J.** (dissenting)

I respectfully dissent. The defendant, who was seventeen years old at the time, was arrested on several charges stemming from assaults on three teenaged girls. After his arrest, the defendant's parents came to the police station and were seated with their son. In the presence of his parents and in the presence of each other, the defendant and his mother signed a form waiving the defendant's right to counsel. After obtaining the waiver of right to counsel, the defendant was interrogated by police, and during this interrogation incriminatory statements were made.

The juvenile court later waived its jurisdiction over the defendant, and he was prosecuted as an adult. After a jury trial, he was convicted of the crimes of willful injury and assault resulting in bodily injury. The defendant appeals on the ground that police failed to inform his parents of their right to confer with him prior to their signing the waiver of right to counsel. I would affirm the trial court. Because I find as a ground for affirming the trial court that the defendant, if there was error in failing to advise his parents of their right to confer with him, was not prejudiced, a detailed factual setting is necessary.

On July 25, 1986, at about 10:00 p.m., Karen Armel and Rachael Gothard were front-seat passengers in a vehicle driven by Lolita Jones. They were unable to locate the

home of a friend so they stopped and asked directions from the defendant and one Damon Willis.

The defendant and Damon Willis responded that they could not tell them where the house was but they would show them how to get there. Without permission, the defendant and his companion entered the car and sat in the back seat. The defendant and Damon Willis then gave directions to Lolita Jones. When they came to an alley, the defendant, who was sitting behind Lolita, held a knife to her throat and told her to turn off the lights and stop the car.

The girls started screaming. Rachael, who was sitting near the passenger door, ran from the car. She was chased by Damon Willis and when caught, he sexually abused her. The defendant, however, remained with the car and in a scuffle with Lolita Jones stabbed her in the back of the shoulder. Karen Armel was screaming behind the defendant and after telling her to "shut up" stabbed her in the hand. The defendant then fled on foot from the scene.

Lolita Jones and Karen Armel left in the car. They did not know of Rachael Gothard's whereabouts. The police were subsequently notified, and at about 1:00 a.m. the next morning, the defendant and Damon Willis were apprehended. At that time, the defendant had in his possession a knife.

The defendant and Damon Willis were taken to the Des Moines Police Station. Police Officer Barbara Dennis was

called to the police station to talk to the defendant. The defendant's parents were already in her office. The defendant was brought in at about 7:00 a.m. that morning.

Officer Dennis read the defendant his Miranda rights. The defendant's parents were present. Officer Dennis then gave the defendant and his parents a document titled "Juvenile Waiver and Parental Consent."

The waiver and consent form was read by the defendant and parents, and Officer Dennis in turn read the form to them. I would adopt the following findings by the trial court in its suppression order of December 11, 1986:

> The evidence at the suppression hearing showed that on July 26, 1986, at approximately 6:58 a.m. Officer Barb Dennis read a "Juvenile Waiver and Parental Consent" form to defendant Edward Nelson and both of his parents. Officer Dennis then had defendant Nelson and his parents each read the form. Defendant Nelson indicated to Officer Dennis that he had completed the ninth grade, indicated he understood his Miranda rights, and knowingly and voluntarily would waive said rights and talk with Officer Dennis. Defendant Nelson signed the form at 6:58 a.m., and his mother, after reading the rights and indicating she understood them, signed the form and allowed her son to talk with Officer Dennis. Shortly thereafter defendant Damon Willis [sic] made incriminating statements linking him to the stabbings. See State's Exhibits D and B.

On appeal, the defendant contends his waiver of his right to counsel was invalid because his parents were not informed of their right to confer with him prior to the execution of such waiver in violation of Iowa Code section 232.11(2) (1987). He therefore argues that the incriminat-

ing statements he made following the waiver of counsel should have been suppressed.

Iowa Code section 232.11(1)(a) (1987) provides as follows:

> A child shall have the right to be represented by counsel at the following stages of the proceedings within the jurisdiction of the juvenile court under Division II:
>
> a. From the time the child is taken into custody for an alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony under the Iowa Criminal Code, and during any questioning thereafter by a peace officer or probation officer.

Iowa Code section 232.11(2) (1987) provides in relevant part that:

> The child's right to be represented by counsel under subsection 1, paragraph "a" shall not be waived by a child less than sixteen years of age without the written consent of the child's parent, guardian, or custodian. The waiver by a child who is at least sixteen years of age is valid only if a good faith effort has been made to notify the child's parent, guardian, or custodian that the child has been taken into custody and of the alleged delinquent act for which the child has been taken into custody, the location of the child, and the right of the parent, to visit and confer with the child.

Iowa Code section 232.45(9) (1987) completes the statutory scheme by providing a per se exclusionary rule for evidence obtained in violation of section 232.11(1)-(2):

> If the court waives jurisdiction, statements made by the child after being taken into custody and prior to intake are admissible as evidence in chief against the child in subsequent criminal proceedings provided that the statements were made with the advice of the child's counsel or after waiver of the child's right to counsel and provided that the court finds the child had voluntarily waived the right to remain silent.

See In re D.J.K., 397 N.W.2d 707, 709 (Iowa 1986); State v. Walker, 352 N.W.2d 239, 241 (Iowa 1984); see also In re J.A.N., 346 N.W.2d 495, 498-99 (Iowa 1984); State v. Aldape, 307 N.W.2d 32, 35 (Iowa 1981). "A statement obtained from a child without a valid waiver under section 232.11(2) is per se inadmissible." J.A.N., 346 N.W.2d at 498.

As stated, the only complaint the defendant makes on appeal is that his parents were not told that they could confer with him. In this respect, the defendant relies rather heavily on Walker for reversal. Walker, 352 N.W.2d 237 (1984). Walker, like the case before us, involved a seventeen-year-old boy. Id. That case hinged on whether the police officers had made a good faith effort to notify the defendant's parents as required under section 232.11(2). Id. The Walker court held that the police officers did not. Id. In reaching that conclusion, the court stated:

> The statute (232.11(2)) listed very specifically the four items of information which the officer must make a good faith effort to convey to the contacted parent. In enacting the statute, our legislature apparently believed that each part of the four-part message would tend to impress upon a parent the importance of going to the side of the child and giving the child parental advice.

Id. at 242.

But in Walker, the parents were not present, either at the time the seventeen-year-old defendant waived in writing

his right to counsel or at the time the defendant was interrogated by police. Id. The defendant's parents in this case were present, were aware of the defendant's circumstances, and participated in the waiver process. The defendant's mother was sitting there with her son. In addition, she was present during the interrogation.

The defendant does not raise a constitutional claim; the appeal rests on the claim that the defendant's waiver of counsel was imperfect under Iowa Code section 232.11(2). In this respect, section 232.11(2) distinguishes between juveniles who are less than sixteen years of age and, as true of defendant here, those who are sixteen or older. Walker, 352 N.W.2d at 242. For children less than sixteen, that statute provides that no waiver of counsel is valid unless accompanied by the written consent of the parent. Id.; In Interest of D.J.K., 397 N.W.2d 707 (Iowa 1986) (Court held that it was proper to suppress a confession of a sixteen-year-old defendant when a good faith effort was not made to notify the defendant's parents that the defendant was in police custody. The defendant's parents were not present at the time.)

> For the child who is at least sixteen years of age, the statute replaces written parental consent with the requirement that good faith efforts be made to notify the parent, guardian, or custodian and to provide the notified person with four explicit facts about the juvenile's circumstances: (1) that the child has been taken into custody and (2) of the alleged delinquent act for which the child has been taken into custody, (3) the location of the child, and (4) the right of

> the parent, guardian or custodian to visit and confer with the child.

Walker, 352 N.W.2d at 242.

It is clear and without dispute that the defendant freely and intelligently and with full knowledge of the consequences of his act, voluntarily signed a waiver of rights form and his mother consented in writing to his giving up his right to be represented by counsel during questioning. Under the circumstances here, had the defendant been less than sixteen years of age, his waiver of counsel right would have been proper. I see no reason why the waiver should not be determined proper for a seventeen-year-old. Nor do I see how the defendant was prejudiced when the parents freely and voluntarily signed the consent form.

I concur with the trial court that the good faith effort required by section 232.11(2) was complied with. The parents were notified and in fact were present at all pertinent times leading up to and during the signing of the waiver. Although the officer did not tell the defendant's mother that she could confer and visit with her son, they were seated in the same room and the opportunity was available for her to do so. I believe, under the facts of this case, that the legislative purpose of "impressing upon a parent the importance of going to the side of a child and giving the child parental advice," Walker, 352 N.W.2d at 242, has been more than complied with.

For us to hold otherwise means that under the factual setting of this case, a greater or higher degree of right is required for a seventeen-year-old than for a sixteen-year-old. I cannot believe this to be the legislative intent. In either event, I conclude that under the circumstances here the intelligent and informed signing of the waiver of the right to counsel by the parents and the child obviated the need, in the absence of a showing of prejudice, to inform the parents that they could visit and confer with their seventeen-year-old son. There has been no showing by either the parent or the defendant of prejudice.

I do not believe that the exclusionary rule should be extended so as to preclude from evidence his incriminatory statements. To exclude those statements under the circumstances here is too great a departure from the truth-finding process of judicial proceedings.

Therefore, I conclude the trial court did not err in overruling the defendant's motion to suppress. However, it is also clear to me that any possible error in the admission of this disputed evidence would be harmless. The standard we use to make determinations of this type has been well stated. "[W]e must assess whether the other evidence is so overwhelming as to prove the error was harmless beyond a reasonable doubt and the state must show it did not contribute to the correction." Chapman v. California,

386 U.S. 18, 23-24, 87 S. Ct. 824, 827-28, 17 L. Ed. 2d 705, 710-11 (1967); State v. Sowder, 394 N.W.2d 368, 372 (Iowa 1986); State v. Craney, 347 N.W.2d 668, 673-76 (Iowa 1984); State v. Ware, 205 N.W.2d 700, 704-05 (Iowa 1973). The harmless error rule applies to erroneous admissions of a juvenile's confession. In re Thompson, 241 N.W.2d 2, 8 (Iowa 1976).

The defendant was identified by two of the three victims of the crimes committed against them by the defendant and the codefendant. One of the minor female victims identified the defendant as one of the two male juveniles who attacked them one night, but was unable to testify as to which defendant committed which crimes. One of her companions testified that it was the defendant who first stabbed one of the other girls and then stabbed the witness through the hand. The witness had, the morning after the crimes, selected from a police photograph array pictures of defendant and the codefendant as the two persons involved in the crimes. There was also evidence that when police officers attempted to apprehend the defendant and the codefendant, the defendant fled but was soon caught and arrested. A police search of the defendant uncovered a knife in his pocket.

Error which is harmless does not dictate reversal because the primary purpose of criminal trials is to determine the factual question of a defendant's guilt or inno-

cence, and society is ill-served by reversals of criminal convictions where the outcome will remain the same. Delaware v. VanArsdell, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674, 684-85 (1986). Based on the records of fact, I find the other evidence is so overwhelming so as to prove the error was harmless beyond a reasonable doubt. I find sufficient evidence to prove defendant's guilt beyond a reasonable doubt. For all the reasons above, I dissent to the majority opinion. I would affirm the trial court and the defendant's conviction.

Donielson, J., joins this dissent.