FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed September 30, 1987
vs.	)	244
THEODORE EDWARD DOUPE,	)	7-234 / 86-1365
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Marshall County (No. CR 86A2200), Sandra J. Holien, Associate District Judge.

The defendant appeals from his conviction, following a jury trial, of indecent contact with a child in violation of Iowa Code §709.12 (1985). **AFFIRMED.**

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

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Judy K. Parks, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J. 245

The defendant appeals from his conviction, following a jury trial, of indecent contact with a child in violation of Iowa Code §709.12 (1985). He contends that the trial court erred in: (1) refusing to suppress an audio tape of his police interview where the State allegedly failed to demonstrate a valid waiver of his privilege against self-incrimination and right to counsel; (2) permitting several witnesses to testify as to what the alleged child-victim had told them over his hearsay objections; (3) overruling his motion for judgment of acquittal wherein the State allegedly failed to present sufficient evidence of the element of intent; and (4) considering his refusal to admit guilt to a presentence investigator in making its sentencing decision. We affirm.

I. Motion to Suppress

The defendant was accused of indecent contact with a child for allegedly touching the breast of K.J.H. on May 31, 1986. On July 9, 1986, he filed a motion to suppress an audio tape of his June 3 interview with the police, claiming that he had not made a knowing, intelligent, and voluntary waiver of his fifth and sixth amendment rights. Following a hearing, the trial court overruled defendant's motion, ruling that his statements were voluntarily given pursuant to a valid waiver of his rights. Defendant on appeal alleges error by the trial court in overruling defendant's motion to suppress. Defendant's primary argument is that since he was 75 years old at the time of interrogation, a fourth-grade drop-out, illiterate and conceptually mentally retarded, he did not understand what it meant to "waive" his "constitutional" rights.

Because the issue involved is constitutional, we review the record de novo, making an independent evaluation of the totality of the circumstances. State v. Nelson, 390 N.W.2d 589, 591 (Iowa 1986).

Our supreme court has recently summarized the law on this type of issue as follows:

> The burden of proof [is] on the State to prove by a preponderance of the evidence that [the defendant's] waiver of constitutional rights was knowingly, voluntarily and intelligently given. See State v. Reid, 394 N.W.2d 399, 402 (Iowa 1986). An express written waiver alone is not enough to establish waiver. Fryer v. State, 325 N.W.2d 400, 409 (Iowa 1982). The State also has the burden of establishing by a preponderance of the evidence that the defendant's inculpatory statement was made voluntarily. State v. Hodges, 326 N.W.2d 345, 347 (Iowa 1982). Thus, the voluntariness of both the waiver and the statement is at issue.
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> The test for voluntariness is whether the "totality of circumstances" demonstrates that the statement was the "product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired." Id. (quoting State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976)). Other factors to be considered include:
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> > The defendant's knowledge and waiver of his Miranda rights, the defendant's age, experience, prior record, level of education and intelligence, the length of time defendant is detained and interrogated, whether physical punishment was used, including the deprivation of food or sleep, defendant's ability to understand the questions, the defendant's physical and emotional condition and his reaction to the interrogation, whether any deceit or improper promises were used in gaining the admissions, and any mental weakness the defendant may possess. State v. Whitsel, 339 N.W.2d at 153.

State v. Vincik, 398 N.W.2d 788, 789-90 (Iowa 1987). Mental subnormality does not itself deprive a waiver or confession of voluntariness. State v. Davidson, 340 N.W.2d 770, 773 (Iowa 1983). Application of the above factors to the facts of the present case makes clear that the Miranda waiver was knowingly, voluntarily, and intelligently given and that the subsequent statements were voluntary.

On the morning of June 3, 1986, Officer Darryl Templeton was investigating the offense involved in the instant case. He arrived at defendant's home where only defendant's wife was present. Defendant's wife and the officer made an arrangement for defendant to be interviewed three hours later at the police station. The officer told defendant's wife that defendant may want to get an

attorney if he so desired, and that the attorney could contact him for further information. Defendant's wife could not find an attorney to accompany them to the police station, although she contacted three attorneys. One attorney did advise defendant "to be calm and sociable."

Officer Templeton conducted the 50-minute interview of defendant in a private office. He explained the interview to defendant and advised him of his rights prior to the interview. Officer Templeton then placed the Constitutional Rights and Acknowledgment form in front of defendant and asked the defendant to read along while he read the form to defendant. After each question the defendant responded he understood. The defendant initialed each right as it was read to him and signed the acknowledgment and waiver at the bottom of the form in the officer's presence. The officer asked defendant once more if he wanted to speak to him without an attorney. He also informed defendant that he had spoken with his attorney on the phone. At that time defendant did not state that he desired an attorney; he only related the advice he had received to be calm and sociable. Officer Templeton testified defendant could clearly and accurately relate details. The trial court noted, after listening to a tape recording of the interview, that defendant clearly stated he understood each right, he never informed the officer he couldn't read, he never asked to have his wife present and he never requested an attorney.

A psychologist testified he found defendant to have an I.Q. of 73, slightly above the mild retardation level. He also thought defendant would have trouble understanding the terms "waiver" and "constitutional." Defendant's history indicates he has had no problem with substance abuse; he has raised four children with his wife; he has maintained full-time employment throughout his life; and he has never had a conservator appointed for him.

Applying the law as outlined in Vincik to the facts set forth herein, we find that defendant voluntarily, knowingly and intelligently waived his rights, based on the totality of the circumstances. Defendant's constitutional rights were specifically enumerated and defined for him; defendant never indicated he did not understand them; there was no coercion from Officer Templeton. Therefore, we find the district court did not err in overruling defendant's motion to suppress.

II. Hearsay Objections

At his trial, the defendant lodged hearsay objections to testimony by K.J.H's father, and Mr. and Mrs. Steel, the parents of a friend of K.J.H. to whom K.J.H went for help, as to what K.J.H told them on the night of the incident. The trial court overruled these objections on excited utterance grounds. Defendant argues the trial court erred in overruling his hearsay objections because K.J.H.'s statements were not excited utterances.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

Victims' complaints of sexual abuse are admissible when offered to corroborate their testimony: "The hearsay rule is not involved." State v. Grady, 183 N.W.2d 707, 713 (Iowa 1971). The purpose of this type of evidence is not to prove the truth of the matter asserted but only that a complaint was made by the prosecutrix. Id.

Iowa Rule of Evidence 803(2) allows a witness to testify about a declarant's statements if they related "to a startling event or condition" and occurred "while the declarant was under stress of excitement caused by the event or the condition." State v. Mateer, 383 N.W.2d 533, 534 (Iowa 1986). Victims' complaints of indecent contact, even though they are considered nonhearsay, also may be excited utterances. Cf. State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981)

(complaints of sexual abuse). The excited utterance exception to the hearsay rule can support admission of the hearsay statement by a child of tender years in a sexual assault case only if the foundation criteria are met; that is, if the child was upset rather than calm when the statements were made. State v. Brown, 341 N.W.2d 10, 13 (Iowa 1983). The fact K.J.H.'s statements were made in response to questions is a factor which tends to negate spontaneity but is not conclusive. Ogilvie, 310 N.W.2d at 196.

Defendant argues that the hearsay objections should have been sustained because of the extensive questioning by both sets of parents which elicited K.J.H.'s responses and the fact the statements were made after a lapse in time.

The time lapse here was no greater than previous cases where the court has upheld the admission of excited utterances. State v. Galvan, 297 N.W.2d 344, 347 (Iowa 1980) (two days); State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980) (about an hour). We note that K.J.H. immediately went to the home of Mr. and Mrs. Steel. Mrs. Steel testified K.J.H. was "crying hysterically and clutching." K.J.H.'s father testified that K.J.H. was upset and nervous, and he could tell she'd been crying. He observed K.J.H. within 45 minutes after the incident. K.J.H.'s mother testified K.J.H. was crying real hard.

Applying the foregoing principles of law to the circumstances of this case, including K.J.H.'s tender age of 10 years, the short time frame involved, and the extensive evidence concerning K.J.H.'s upset demeanor, we believe that the statements made by K.J.H. to the Steels and to her parents were properly admitted.

III. Motion for Judgment of Acquittal

At the end of the State's case and his own, the defendant moved for judgment of acquittal, contending that the State failed to present sufficient evidence that he harbored the requisite intent for the offense charged. The trial court

overruled defendant's motions and submitted the case to the jury. Defendant contends the trial court erred in overruling defendant's motions for judgment of acquittal.

As the State so eloquently stated in its brief, "The defendant argues the evidence clearly showed that the fire in his septuagenarian furnace had been extinguished for several years." Defendant argues he did not have the requisite intent to commit the offense; i.e., to arouse or satisfy the sexual desires of either of them, based on his lack of libido for 10 years.

In reviewing cases where a defendant claims there is insufficient evidence to support a conviction for a criminal offense, we view the evidence in a light most favorable to the State. State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984). All inferences that are fairly and reasonably deduced from the evidence are accepted. Id. All the evidence is considered, not just that evidence supporting the verdict. Id. The verdict will be upheld if supported by substantial evidence. Id. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. Id.

Defendant testified that there had been a previous time he had been interested in touching K.J.H.'s breasts. K.J.H. also testified defendant said to her before he squeezed her breast, "If there is anything you want me to do, I'll do it." We believe this evidence is sufficient to demonstrate defendant's intent.

Examining the evidence in a light most favorable to the State, we find there was substantial evidence for a rational jury to conclude defendant was guilty of the crime charged.

IV. Sentencing

The jury found the defendant guilty as charged. The trial court gave the defendant a 180-day suspended sentence and placed him on probation for two

years. The defendant argues that the trial court, in denying defendant's request for a deferred judgment, improperly considered the defendant's refusal to admit his guilt.

The defendant correctly points out that the sentence imposed by the trial judge must be because it is appropriate to that particular case and not because of some emotional reaction or preconceived determination based solely on the nature of the offense. State v. Peckenschneider, 236 N.W.2d 344, 350 (Iowa 1975) (McCormick, J., dissenting). Appellate review of sentences imposed by trial courts is limited to the question of whether the trial court abused its discretion. State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

Upon review of the sentencing record in this case, we find that the trial court did not abuse its discretion in sentencing the defendant. The court relied on a variety of factors: defendant's age, his familial responsibilities, his health, his failure to admit guilt, and the impact of the offense on K.J.H. No single factor was determinative.

Accordingly, we affirm the district court in all respects.

AFFIRMED.