



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	Filed February 23, 1983
	)	
vs.	)	
	)	
LEROY EUGENE RUPP,	)	<u>2-347</u>
	)	67774
Defendant-Appellant.	)	

Appeal from Benton District Court - Robert Osmundson, Judge.

Defendant appeals from his conviction of sexual abuse in the second degree in violation of Iowa Code § 709.3(1) (1981). **AFFIRMED.**

J. R. Norris of J. R. Norris & Associates, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

DONIELSON, J.

Defendant, Leroy Rupp, appeals from his conviction of sexual abuse in the second degree in violation of Iowa Code § 709.3(1) (1981). The defendant claims that the trial court erred (1) in denying defendant's motion to suppress evidence of statements he made to law enforcement officers; (2) in finding that there had been no suppression of exculpatory evidence; and (3) in finding that the evidence was sufficient to establish sexual abuse in the second degree. We affirm.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4. However, where there is an issue involving a violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I.

Defendant met the victim in April, 1981. The couple drank some beer and eventually went to defendant's apartment. The evidence is conflicting regarding the sequence of events once they reached defendant's apartment, but suggests that the couple were lying together in defendant's bed. Defendant later drove the victim home and it was during this time that the alleged incident of sexual abuse occurred.

The facts surrounding the incident are in dispute. The victim testified that defendant began making unwanted advances towards her in the car. She testified that she bit him and that he responded by hitting her in the jaw with his fist. He disrobed her while she resisted. She testified that after she struck the car horn with her foot the defendant hit her in the eye and in the stomach and asked her how she would like to be "dead in the ditch." The victim testified that she was very scared and apprehensive that the defendant did intend to kill her. Under cross-examination the victim admitted that she and the defendant had talked about a mutual acquaintance and that the defendant had warned her that she might end up dead if she associated with that person.

The defendant testified that the victim voluntarily had sexual intercourse with him. The defendant denied threatening to leave the victim dead in the ditch. He testified that he did hit her after she had hit him, and then told her that if she hit him again he would "break her damn neck."

At the close of all the evidence, the defendant moved to have the trial court withdraw the charge of sexual abuse in the second degree on the basis that the evidence was insufficient to support a guilty verdict on the charge. The trial court overruled the motion.

The jury subsequently returned a guilty verdict on the charge of sexual abuse in the second degree. Defendant then instituted this appeal.

II.

Defendant's first challenge concerns statements made by him to a sheriff's deputy and an investigative agent during their initial investigation of the crime. Prior to trial, defendant moved to suppress evidence gained as a result of the statements. The defendant asserted that such statements were obtained in violation of his right against self-incrimination under the fifth amendment to the United States Constitution and right to effective assistance of counsel under the sixth amendment. He contends that he was interrogated without having been informed of his constitutional protections in violation of the mandate of Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 706-07 (1966). The trial court ruled that the interview was not a custodial interrogation and that the statements had been voluntary and were therefore admissible.

The procedural safeguards articulated in Miranda do not attach in the absence of a "custodial interrogation." Id.; State v. Hansen, 286 N.W.2d 163, 168 (Iowa 1979); State v. Matlock, 289 N.W.2d 625, 627 (Iowa 1980). The Supreme Court noted that by "custodial interrogation" it meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise

deprived of action in any significant way." Miranda, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706 (footnoting that this was the intended meaning of Escobedo v. Illinois, 387 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), wherein the court "spoke of an investigation which had focused on an accused."). The facts of each case must be examined to determine whether the defendant was in "custody" when the statements were made. See Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). In determining whether a defendant was in custody, the critical issue is whether a reasonable person in the individual's position could believe that he was not free to leave and avoid questioning. See United States v. Hall, 421 F.2d 540 (2nd Cir. 1969) (defendant not "in custody" when questioned at his apartment); State v. Bakkerus, 297 N.W.2d 136 (Minn. 1980) (defendant did not reasonably believe his freedom of action was restricted when being questioned regarding a theft). More recently in United States v. Jonas, 639 F.2d 200, 203 (5th Cir. 1981), the court noted the following four-factor test for determining whether the interrogation was custodial: "(1) whether probable cause to arrest had arisen; (2) whether the officer intended to hold the defendant; (3) whether the defendant believed that his freedom was significantly restricted; and (4) whether the investigation focused on the defendant."

In Hansen, the Iowa Supreme Court found that the initial questioning of the defendant was not "custodial" within the meaning of Miranda since, though she was a suspect, the officers had not ruled out the possibility that someone else could have committed the crime and because there was "no indication in the record that the defendant was taken into custody or otherwise deprived of her freedom of action during questioning." Hansen, 286 N.W.2d at 168. With regard to the subsequent questioning, however, the court found the meeting with defendant had a coercive atmosphere and was "custodial." The defendant knew that she was suspected of the crime of arson and knew that the purpose of the meeting was to

discuss alternatives to the filing of charges. She was specifically told by an officer that if she was not cooperative, he would file the charges against her. The court held that "this threat was indicative of the fact that defendant had suffered a substantial deprivation of her freedom of action resulting in the questioning being custodial interrogation." Id.

The instant case is distinguishable. Here, defendant was questioned by police in a private office at his place of employment. The officers testified that they did not consider the defendant to be a suspect and that the questioning was in the investigatory stage of the case. They had certain information, including knowledge of the suspect's name and where he worked, on the basis of which the officers could have suspected the defendant as the perpetrator of the crime. When the officers introduced themselves to the defendant they advised him that he was not in custody and that they were not going to take him into custody as a result of their interrogation. The defendant testified that he answered the officers' questions voluntarily and no promises or threats were made.

Under these circumstances, we must agree with the trial court that there was no "custodial interrogation" of the defendant and thus, his statements were not subject to suppression under Miranda. As the Hansen court noted, the fact that defendant was a suspect is not determinative; it is merely one factor to be considered in deciding whether he was in custody or had been "deprived of his freedom of action in any significant way." Hansen, 286 N.W.2d at 168. We thus affirm the trial court on this issue.

III.

Defendant contends that the trial court erred in finding that there had been no suppression of exculpatory evidence. Prior to trial, defendant made a general request for, among other things, "any other exculpatory evidence of which you have knowledge which has not been previously disclosed." Detective Potter was

called as a State rebuttal witness to testify as to statements made to him by LeAnn Huse, a witness for defendant, who had been present at the defendant's home the night before the alleged incident of sexual abuse. LeAnn Huse had testified for the defendant concerning her observations of the victim and the defendant and their activities before the alleged sexual abuse had occurred. Potter testified for the State that during an earlier interview with Huse she allegedly told the officer that she believed that the victim and defendant had sexual intercourse on other occasions prior to the night that they were together at defendant's house. On examination, she denied making such statements. Defendant himself testified that he had not met the victim before the night in question. Defendant now asserts that the State's failure to disclose Huse's statements made to Potter denied him of his constitutional right to a fair trial. We disagree.

The Iowa Supreme Court recently set forth the legal standards governing this issue as follows:

Issues of suppression of exculpatory evidence are governed by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). In Brady, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218.

* * *

The standard of materiality where a general request for exculpatory evidence has been made is:

if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional

evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. at 112-13, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355.

State v. Beeman, 315 N.W.2d 770, 777-78 (Iowa 1982) (emphasis added).

Moreover, when the evidence in question is presented to the jury it is disclosed. State v. Love, 302 N.W.2d 115, 123 (Iowa 1981) (citing State v. Epperson, 264 N.W.2d 753, 756 (Iowa 1978), cert. denied, 439 U.S. 913, 99 S. Ct. 285, 58 L. Ed. 2d 260 (1978)). In State v. Love, the court noted that "with the trial disclosure the question remains whether there has been an infringement of due process in failing to produce the evidence at an earlier time." State v. Love, 302 N.W.2d at 123.

We fail to find that the statements made to Potter were material to the guilt of the defendant. The statements were only introduced to challenge Huse's credibility. The defendant himself testified to the contrary; that he had not met the victim before the night in question. We do not believe that pretrial disclosure to him of Potter's rebuttal testimony would create a reasonable doubt. There was no infringement of defendant's right to a fair trial.

IV.

Defendant's final contention is that there is insufficient evidence from which a rational jury could find beyond a reasonable doubt that the defendant committed an act of sexual abuse upon the victim. The review governing this type of challenge was recently articulated in State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981), as follows:

In reviewing a motion for a directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. All of the evidence must be considered, State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980), and all legitimate inferences that may

be deducted therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d at 339.

Additionally, we note that credibility of witnesses is a matter for the fact-finder. State v. Robinson, 288 N.W.2d at 341. The facts of the instant case are in dispute. The defendant claims that he had consensual intercourse with the victim. The victim contends that the defendant hit her and threatened to kill her if she continued to fight off his sexual advances. Viewing the record in the light most favorable to the State, we believe there is sufficient evidence to support the finding that defendant committed a sex act against the will of the victim, and in doing so, "used or threatened to use force creating a substantial risk of death or serious injury" to the victim in violation of Iowa Code § 709.3(1).

Having found no reversible error, we affirm the conviction.

AFFIRMED.