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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed November 30, 1983

vs.)

STEVEN OLSON,) 3-261 / 68540

Defendant-Appellant.)

Appeal from Polk District Court - Joel Novak, Judge.

Defendant appeals his conviction of two counts of second degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3 (1981), and one count of lascivious acts with a child in violation of Iowa Code section 709.8 (1981). AFFIRMED.

David W. Sheetz, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and John Messina, Assistant Attorney General, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendant appeals his conviction of two counts of second degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3 (1981), and one count of lascivious acts with a child in violation of Iowa Code section 709.8 (1981). Defendant claims he was denied effective assistance of counsel, that there was insufficient evidence to support his convictions, that his confession was involuntary and should have been suppressed, and that the trial court abused its discretion by overruling defendant's motion for a continuance of the suppression hearing. We affirm.

Defendant received a call from Steve Sorenson, the chief of the Bondurant Police Department, asking that the defendant go to the police station to talk to the Chief. A few minutes after arriving, Sorenson informed defendant that he had a warrant for defendant's arrest on charges of sexual abuse, asked him if he would like a lawyer, and proceeded to tape record an interrogation of the defendant. There is no dispute that defendant declined the assistance of an attorney, or that Sorenson read the so-called "Miranda" rights to defendant. There is no evidentiary support to suggest that Sorenson proceeded with the interrogation without the spoken agreement of defendant. A tape recording was made of the interrogation, and in that discussion inculpatory statements were made by the defendant.

Defendant filed a motion to suppress all evidence regarding statements, admissions or confessions made in the interview with Chief Sorenson, alleging inter alia that such statements were not voluntarily made. Hearing was held on the motion to suppress on March 12, 1982. Defendant orally requested at the hearing that the record remain open to allow the defendant to undergo psychological evaluation and submit additional evidence. Defendant also filed a motion to continue the trial to a date after March 17, 1982, the date upon which trial was scheduled. Both the motion for continuance and the motion to suppress were overruled, and the matter proceeded to trial without a jury on March 17, 1982.

I. Defendant claims ineffective assistance of counsel. Defendant's claim of ineffective assistance of counsel is based upon three grounds: (1) counsel's failure to present psychiatric evidence at the suppression hearing; (2) counsel's failure to challenge the competency of the three minor children and to question them more effectively; and (3) counsel's overall lack of preparation for trial.

Ineffective assistance of counsel would be a violation of a basic constitutional safeguard. When we are faced with such an issue, we make our own evaluation of the claim upon a consideration of the totality of the circumstances. State v. Lemburg, 257 N.W.2d 39, 46 (Iowa 1977). In reviewing an attorney's performance, the defendant has the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. There is a presumption that counsel is competent. Defendant must show that counsel failed to perform an essential duty and that prejudice resulted. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). The question is whether the attorney's challenged performance was within the range of normal competency. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980).

Defendant initially claims his counsel was ineffective in failing to present psychiatric evidence at the suppression hearing to determine the admissibility of the confessions or admissions made by defendant in his interrogation by Chief Sorenson. It is suggested in defendant's brief that such testimony as was later introduced at trial should have been used in the suppression hearing. Defendant does not, however, claim that the evidence of defendant's learning disability, his low IQ, or the implications of the testimony concerning his subnormal mental capacities, as that evidence exists in the record, would be sufficient to cause a court to rule that such statements, admissions, or confessions were not voluntarily given or made. We are asked, in another part of defendant's brief, to rule that the trial court should have suppressed any statements, admissions, or confessions given or made in the interrogation of defendant by Chief Sorenson. Although we deal with

that issue more extensively below, for purposes of determining the issue at hand we hold that upon the record made at the suppression hearing, even assuming the inclusion of the trial testimony concerning defendant's subnormal mental capacities, the trial court did not err in failing to suppress that evidence.

The question which remains for determination here is: did counsel for defendant fail to offer evidence which would demonstrate that defendant's statements were not voluntarily made. We can only speculate upon what additional evidence defendant believes should have been elicited from the various witnesses he refers to. There is insufficient evidence in the record for us to rule upon the claim of ineffective assistance of counsel in connection with this claim. Such issue may be pursued by postconviction proceedings. See State v. White, 337 N.W.2d 517, 519-20 (Iowa 1983).

Likewise, we defer ruling upon the claim of ineffective assistance of counsel with respect to defendant's claim concerning the challenge to the competency of the three minor children, and with respect to the claim of overall lack of preparation for trial. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

II. Defendant claims there was insufficient evidence to support his convictions. On a claim of insufficiency of the evidence, the court views the whole record in the light most favorable to the State, accepts all legitimate inferences tending to support the conviction, and upholds the trial court's decision when there is substantial evidence to support it. State v. Newman, 326 N.W.2d 788, 790-91 (Iowa 1982). We must determine whether, viewed in its entirety, there was such evidence as would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981), cert. denied, ___ U.S. ___, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982).

The evidence supporting defendant's convictions consisted of the tape recorded statements containing admissions and confessions made by defendant in the presence of and testified to by Chief Sorenson, the written confession,

unsigned, prepared by defendant, and the corroborating testimony of the three minor victims. Such evidence, if properly admissible, was substantial evidence upon which a rational trier of fact could find beyond a reasonable doubt that defendant was guilty of the charges of which he was convicted. We, therefore, must determine whether that evidence was properly admitted.

A. Defendant challenges the admissibility of the statements, admissions, or confessions arising out of the interrogation by Chief Sorenson. As previously stated, we do not find that the trial court was in error in admitting that testimony. Defendant claims that his waiver of his constitutional rights was not voluntary, and that therefore the statements, admissions, and confessions contained on the tape recording and the written statement violate his right against self-incrimination.

Since a claim that a statement by defendant was not voluntarily made raises a constitutional issue, we must make an independent evaluation of the totality of the evidence from which the assertion of unconstitutionality arises. The evidence relative to that issue is reviewed **de novo.** State v. Boren, 224 N.W.2d 14, 15 (Iowa 1974), cert. denied, 422 U.S. 1008, 95 S. Ct. 2630, 45 L. Ed. 2d 671 (1975). We must review the evidence to determine whether the State established by a preponderance of the evidence that defendant's statements to Chief Sorenson were freely and voluntarily made.

Defendant relies upon his claim of subnormal intelligence to claim that he did not understand the rights that were read to him, and that his waiver of them was not knowing, voluntary, or intelligent. Mental subnormality does not in itself prevent statements from being voluntary unless it is sufficient to deprive the person involved of capacity to understand their meaning and effect. State v. Gilmore, 259 N.W.2d 846, 849 (Iowa 1977); State v. Conner, 241 N.W.2d 447, 453-454 (Iowa 1976); State v. Fetters, 202 N.W.2d 84, 89-90 (Iowa 1972). The court in State v. Fetters, 202 N.W.2d at 89, stated that "[s]ubnormality is a factor to be

considered in determining the issue of voluntariness, and where accompanied by other factors indicative of an absence of voluntariness, will require that the confession be excluded." The court, after acknowledging that facts indicated Fetters had low intelligence, noted that "Fetters had a driver's license, operated an automobile, and had been employed at a wage of $2.50 per hour. Moreover, he lived with his wife and child and apparently was able to provide for them and himself." The court concluded that he had a low intelligence, but sufficient intelligence to "understand events as they take place."

As in the Fetters case, the court in the case at bar was justified in finding that the defendant's mental subnormality was not sufficient to deprive him of the capacity to understand the meaning and effect of what was said to him or statements he made. Steven Olson was a twenty-nine-year-old full-time employed male. He completed the twelfth grade, although it is undisputed he had a learning disability, and has difficulty in reading, writing, and applying words. He has maintained regular and steady employment in a job that apparently requires him to follow written orders.

The defendant also asserts that the inculpatory statements were not voluntary because the Bondurant Police Department, in conjunction with officers from the Polk County Sheriff's Department, prevented defendant's wife from assisting him in determining whether to seek the advice of counsel. Defendant argues that he was effectively deprived of the right to secure the services of a lawyer prior to giving his statement as a result of the alleged police misconduct. Defendant alleges that while Chief Sorenson was questioning him at the police station, members of the Polk County Sheriff's Department prevented his wife from going to the police station to assist him. Defendant's argument appears to rest upon the theory that because of his lower IQ and learning disabilities, he was unable to voluntarily give any statement to the police much the same as a juvenile may be unable to give a voluntary statement without the permission of a parent or

guardian. See Iowa Code § 232.11(2) (1983); Iowa Code § 232.45(9) (1983). We decline to establish a special requirement for determining voluntariness where it is alleged that the defendant lacks sufficient mental capacity to voluntarily give a statement to police. It is clear that the level of a defendant's intelligence is already considered as one of the factors in determining whether an inculpatory statement is voluntary. See State v. Whitsel, ____ N.W.2d ____, ____ (Iowa 1983); State v. Fetters, 202 N.W.2d at 89.

The record does not bear out the defendant's claim that his wife was prevented from going to the police station or from calling him. Moreover, as noted above, the record does not demonstrate that the defendant was unable to understand the events that took place. While the fact that a criminal defendant of subnormal intelligence is denied access to a person whom they normally rely upon for guidance in making decisions is a factor in determining whether, on the total record, a statement is voluntary, the facts in this case do not establish such a deprivation.

The record shows that defendant was read his Miranda rights, and the trial court was justified in finding that he understood those rights. There is no evidence that he was coerced into waiving his rights, and the record shows he stated his willingness to talk to Chief Sorenson and declined the presence of an attorney. On the total record, we agree with the trial court that defendant's waiver of his rights and the statements, admissions, and confessions made and given were made and given voluntarily. The court did not err in refusing to suppress the statements.

B. Defendant asserts that the testimony of the the three minor victims should not have been received for the reason that due to their ages, five, five, and four, and because of their failure to appreciate the obligation of an oath, they were not competent to testify.

Iowa Code section 622.1 (1981), provides that "[e] very human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, except as otherwise declared." The newly adopted Iowa Rule of Evidence 601, states the proposition as follows: "Every person of sufficient capacity to understand the obligation of an oath or affirmation is competent to be a witness except as otherwise provided in these rules." For an understanding of the obligation of the oath, Iowa Rule of Evidence 603 states: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

Competency of a witness to testify under Iowa Code section 622.1 (1981), or his capacity of communication has two aspects: (1) the mental capacity to understand the nature of the questions put and to form and communicate intelligent answers thereto and (2) the moral responsibility to speak the truth, which is the essence of the nature and obligation of an oath. State v. Harvey, 242 N.W.2d 330, 336 (Iowa 1976).

> When a child under 14 years of age is called as a witness, the preliminary inquiry should be directed solely to ascertaining whether sufficient capacity is possessed to understand the obligation of an oath . . . . The decision as to capacity is primarily for the judge. . . .

State v. King, 117 Iowa 484, 486-87, 91 N.W. 768, 769 (1902). In that case, Chief Justice Ladd considered the competency of a twelve-year-old alleged victim, and held that the understanding of the obligation of the oath was not considered or touched upon by the trial court, and, there being no presumption of competency, it should have been investigated by the court. Until such investigation, the witness was not competent under the statute. Id. at 489, 91 N.W. at 770.

> The decision as to capacity is primarily for the judge, though the evidence adduced may be considered by the jury, in connection with the age of the witness, his understanding and sense of moral accountability in passing upon the value of the testimony subsequently given on the

> merits. The court sees the witness, notices his manner, observes the apparent degree of intelligence and maturity of mind; and, as these matters cannot be photographed in the record, its decision will not be disturbed unless clearly erroneous.

Id. at 487-488, 91 N.W. at 769.

The State claims that the issue of the minor victims' competency was not raised in the trial court, and therefore it is not preserved on appeal. State v. Mark, 286 N.W.2d 396, 408 (Iowa 1979). While the record is sparse on this issue, there was considerable discussion concerning the issue prior to the commencement of trial. Trial judge, sua sponte undertook to satisfy himself of their competency prior to permitting each one to testify.

While there was little discussion of an oath as such, it is clear that the trial court satisfied itself that the children all understood they were required to tell the truth, and that they promised to do so. As stated in Harvey, that is "the essence of the nature and obligation of an oath." State v. Harvey, 242 N.W.2d at 336.

The determination of the competency of these witnesses was in the court's discretion. We find that his allowance of such testimony was not an abuse of that discretion, and accordingly, is approved. The age, immaturity, and other factors brought out by cross-examination presented a matter of weight and credibility for the jury to decide. We also find that the testimony of the minor victims is sufficient to provide corroboration for the admissions or confessions made by the defendant.

On the whole record, therefore, we find that the convictions of defendant are supported by substantial evidence.

III. The motion for continuance. At the suppression hearing on March 12, 1982, defense counsel made an oral application to the district court to keep the record open in order to allow the defendant to have a psychological evaluation to determine whether the defendant gave a voluntary statement. The trial informa-

tion was filed on December 9, 1981, and the motion to suppress was filed on February 24, 1982. Defense counsel alleged that it was only the night before the hearing that he learned of the necessity for the psychological evaluation.

Iowa Rule of Civil Procedure 183(a) applies in this situation. State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978).

> Under this rule, the granting or refusal of a motion for continuance rests largely in the sound discretion of the trial court and such discretion is very broad. This Court will interfere with the action of the trial court in passing on a motion for continuance only where there has been a clear abuse of judicial discretion and injustice thereby done to the defendant.

Id. (citations omitted). Defendant had been evaluated by psychologists between the time of indictment and the suppression hearing. The record shows trial counsel had ample time to secure a psychological evaluation of the defendant and obtain expert testimony prior to the suppression hearing. See State v. Youngbear, 229 N.W.2d 728, 734-35 (Iowa), cert. denied, 423 U.S. 1018, 96 S. Ct. 455, 46 L. Ed. 2d 390 (1975). The trial court did not abuse its discretion in denying the continuance.

We find that the convictions should be affirmed. This ruling is without prejudice to the defendant's ability to bring an action for postconviction relief with respect to those issues reserved herein.

AFFIRMED.