IN THE COURT OF APPEALS OF IOWA

No. 9-318 / 98-512
Filed November 23, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERNEST D. TABOR,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Muscatine County, J. Hobart Darbyshire, Judge.

The defendant appeals his conviction and sentence for second-degree sexual abuse. **REVERSED AND REMANDED.**

Jeffrey M. Johnson, Muscatine, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Richard R. Phillips, County Attorney, and Dana Christiansen, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

HUTTINK, J.

I. Background Facts and Proceedings.

Ernest Tabor was initially implicated in the sexual abuse of his ten-year-old stepdaughter, A.A., when she sent a note to a school teacher describing sexual experiences with Tabor. A.A. subsequently repeated these allegations to a physician during a medical examination arranged by investigators. When confronted with the child's allegations, Tabor made several inculpatory statements to a police officer and gave the officer a written confession detailing a two-year history of sex acts with A.A.

Tabor moved to suppress his statements to investigators claiming they "were involuntarily made having been induced by promise of leniency made by the interrogating officer." After a hearing, the district court found police had made no inappropriate promises of leniency and denied Tabor's motion to suppress. Tabor's inculpatory statements and written confession were subsequently admitted at trial as part of the State's case in chief.

At trial a physician testified over Tabor's hearsay objection concerning his conversation with A.A. and accusatory statements she made during a medical examination arranged by investigators. The physician's report detailing A.A.'s statements was also admitted over Tabor's hearsay objections.

A.A. was also called as a witness by the State in its case in chief, despite her pretrial recantation. In her testimony A.A. recanted her allegations of sexual abuse but admitted that she had written the accusatory note to her teacher. She also

identified the note prior to its offer by the State. A.A.'s testimony and the note were admitted over Tabor's hearsay objection. Tabor also unsuccessfully sought exclusion of A.A.'s testimony in a motion in limine citing the State's knowledge of A.A.'s pretrial recantation and intention to impeach A.A. with prior statements accusing Tabor of sexual abuse.

The investigating officer testified concerning the details of Tabor's interview and resulting confession. The officer also testified, over Tabor's hearsay objection, that A.A.'s statements to him were consistent with the note she sent to her teacher.

The jury found Tabor guilty of sexual abuse in the second degree. The district court sentenced Tabor to a term of incarceration not to exceed twenty-five years.

On appeal Tabor renews his challenge to the admission of his confession. Tabor also cites admission of hearsay testimony by A.A.'s examining physician, the investigating officer, A.A., and A.A.'s improper impeachment as reversible error. Tabor further argues the State failed to present sufficient evidence corroborating his confession and his conviction lacks sufficient evidentiary support.

II. Tabor's Confession.

Because Tabor's challenge to the admissibility of his confession implicates his constitutional right to due process, our review is de novo. *State v. Davis*, 446 N.W.2d 785, 787 (Iowa 1989). We consider the record made at the hearing on the motion to suppress and evidence presented at trial. *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997).

To be admissible, a confession must be "'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" *Brady v. United States,* 397 U.S. 742, 753, 90 S. Ct. 1463, 1471-72, 25 L. Ed. 2d 747, 759 (1970). Statements are involuntary when induced by promises of leniency. *State v. Hodges*, 326 N.W.2d 345, 348-49 (Iowa 1982); *State v. Ware*, 205 N.W.2d 700, 703 (Iowa 1973). Use of confessions which are obtained through promises or assurances that the accused would receive better treatment, less severe punishment, or more mercy by confessing guilt has consistently been forbidden. However, an investigating officer's offer to recommend psychiatric help or inform the prosecutor of defendant's cooperation are not tantamount to promises of leniency. *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983); *State v. Miller*, 316 N.W.2d 23, 28 (Minn. 1982) (fact that officer mentioned he would try to get psychiatric help for defendant if he was guilty did not render subsequent confes. ion involuntary). An officer can also tell a suspect that it is better to tell the truth. *Hodges*, 326 N.W.2d at 349. "The line between admissibility and exclusion seems to be crossed, however, if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. Ordinarily the officer's statements then become promises or assurances, rendering the suspect's statements involuntary." *Id.*

The suppression record indicates Tabor was questioned by Detective James Fulcher shortly after authorities were notified of A.A.'s allegations. Fulcher's

testimonial version of Tabor's interrogation and confession includes the following questions and answers:

> Q. Did you discuss with Mr. Tabor the importance of telling the truth? A. Yes, I did.
>
> Q. How did you go about that discussion? A. Well, I told him that if he was to tell me that what his daughter said was a lie, then that would be defeating the purpose in trying to keep the family together.
>
> Q. When did you--did you further discuss this keeping the family together? A. Would you repeat that please.
>
> Q. Did you discuss that any further about keeping the family together? A. Yes, I--well, I told him that the goal was to keep the family together and that the first step in that process would be to tell the truth, because if he was going to call--if he was going to deny what [A.A.] had said, he would in fact be calling her a liar, and that would just slow the process down.
>
> Q. This process you talk about, was there anything else involved in that that you discussed with him? A. I told him that if he wanted to cooperate and to teil me what happened, that he would be taken to the Sheriff's office and issued a citation and released and not have to go to jail that night.
>
> Q. Was that your first discussion with him about any kind of charge leveled against him? A. Yes.
>
> Q. He hadn't--had not been placed under arrest that I've heard you describe. A. No, the word arrest was never used.
>
> Q. Were the--were terms used ever about punishment or sentence? A. No, he didn't ask and I didn't volunteer that.

On cross-examination by Tabor's attorney Fulcher acknowledged prior deposition testimony in which he stated: "I had mentioned to him that if he would like to clear the matter up tonight and give me a statement, that he would be issued a charge and a citation and not be incarcerated."

Tabor's testimonial version of his conversation with Fulcher included the following questions and answers:

> Q. Okay. So would you tell the Court what you remember Detective Fulcher telling you? A. He said that he told me that [A.A.] told five people and they all believe her, and that I better confess or else he'd arrest me and put me in jail that night. If I did confess, get it done and over with and work on being a family again, and since I've never been in trouble with the law before it was going to go on my behalf.
>
> Q. So at that point did you give him a confession? A. I kept telling him nothing happened and then he started telling me bits and pieced of what [A.A.] said, and he was writing down on a yellow notebook like what you guys got there. He told me to write it down in my own words.
>
> Q. So why did you--why did you tell him that something had happened or that these sex acts had occurred? A. It was my understanding that, you know, just get it done and over with as quick as possible, my understanding was. I don't know.
>
> Q. Well, Detective Fulcher, when he testified this morning, said some things about not going to jail. What did he--did he say anything specifically to you about that? A. No, he just said that if I didn't confess he'd arrest me and put me in jail.

In its ruling on Tabor's motion to suppress, the district court said:

> He [Tabor] was not threatened in any fashion by the officer [Fulcher], nor did he give any indication that he did not understand what was going on. It was not improper to suggest that a suspect tell the truth. The detective did not suggest to Defendant he would not be prosecuted, nor is the defendant credil le in his statement that he was threatened with jail if he did not confess. His statements were knowingly and voluntarily made and the court finds Defendant's motion should be denied.

Although Fulcher's assurances that Tabor would not go to jail that night if he confessed did not implicate Tabor's exposure to prosecution or severity of punishment, they were nevertheless an offer to spare Tabor some measure of penal consequence in exchange for his confession. Moreover, the clear and unmistakable implication of Tabor's failure to confess was arrest and immediate incarceration even though no express threats were made. We hold Fulcher's assurances to Tabor that he

would not go to jail if he confessed were tantamount to promises of leniency or threat of penalty. Tabor's confession should have been suppressed.

The admission of Tabor's confession, like other constitutional errors, does not require reversal if the error was harmless. *State v. Hensley*, 534 N.W.2d 379, 382 (Iowa 1995). The State has the burden to prove beyond a reasonable doubt that this error did not contribute to the verdict obtained. *Id.* at 383. Despite a vigorous contest over the underlying issue of promised leniency, the State makes no argument and cites no authority claiming any error in the admission of Tabor's statement was harmless. The State's failure to do so constitutes a waiver of this issue on appeal. *In re J.J.A.*, 580 N.W.2d 731, 740 (Iowa 1998); Iowa R. App. P. 14(a)(3).

III. Evidentiary Issues.

Although the foregoing is dispositive, we briefly address those evidentiary issues which may recur at a new trial.

As noted earlier A.A.'s incriminating note to her teacher was admitted over Tabor's hearsay objection. Detective Fulcher's testimony concerning the content of the note was also admitted over the same objection. Because both recounted A.A.'s initial complaints of sexual abuse, the note and Fulcher's testimony were inadmissible hearsay. Iowa R. Evid. 801(c); *see also State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992). Whether the note may be used to impeach A.A.'s testimony depends on the future context of her testimony, and we accordingly make no dispositive ruling on its future use for impeachment purposes. Lastly, we hold the examining physician's

testimony concerning A.A.'s statements made in the course of a medical examination were admissible under Iowa Rule of Evidence 803(4) (statements made for purposes of medical diagnosis and treatment). *See also Tracy*, 482 N.W.2d at 681.

We have carefully considered all of the issues and arguments raised in this appeal and find they are either without merit or controlled by the foregoing. The judgment of the district court is reversed, and this case is remanded for new trial.

REVERSED AND REMANDED.