IN THE COURT OF APPEALS OF IOWA

No. 3-581 / 92-1463

FILED
JAN 25 1994
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROGER SCOTT AUGSBURGER,

Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John C. Miller, Judge.

Defendant appeals from the judgment and sentence imposed following his conviction of arson in the second degree, in violation of Iowa Code sections 712.1 and 712.3 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and Patrick C. Jackson, County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant Roger Scott Augsburger appeals his conviction of arson in the second degree, in violation of Iowa Code sections 712.1 and 712.3 (1991). Defendant contends the trial court erred in not sustaining his motion to suppress statements he claimed were involuntarily given and in denying his motion for acquittal. We affirm.

On February 26, 1992, fire gutted a building leased to defendant. As a part of the investigation by the Burlington Police Department, defendant was approached on March 11, 1992, by Grimshaw of the Burlington Police Department and asked if he would come in for questioning. Defendant went to the department at 10:00 a.m. the next day, March 12, 1992.

Defendant met with Wunnenberg, an officer who had been with the department for more than seventeen years and was in charge of the investigation unit.

Defendant was taken to an interview room, told the fire was still under investigation and polygraph examinations were being given. Defendant was asked if he would take such an examination and answer questions about the fire. Defendant said he would and a test was administered at the Burlington station by a federal agent, Thomas Lane, who was with the Bureau of Alcohol, Tobacco and Firearms. Defendant was introduced to Lane about half an hour after he arrived at the station. Lane spent about one hour getting the defendant's consent, obtaining background

information and explaining the procedure for the polygraph examination. Defendant was questioned for about a half-hour while connected to the polygraph machine. The examination concluded at 12:30. Defendant stayed in the station. After a break, defendant was told he had failed the examination because he had been involved in setting the fire. Shortly after one o'clock, Wunnenberg and Lane began questioning defendant. Sometimes one man questioned defendant and sometimes both. The questioners testified defendant was given two breaks and told he was free to leave.

The trial court found Lane aggressive in questioning defendant, telling defendant he did not believe him and defendant was involved with the fire. The trial court also found defendant was hostile and confrontational toward Lane in answering questions. After about three hours, defendant made inculpatory statements incriminating himself. Defendant asked questions about local or federal involvement in any prosecution.

Defendant claims he was promised if he cooperated a state, rather than a federal, charge would be filed. The officers saw fit to videotape defendant's confession but the extensive conversation leading up to the confessions were not videotaped. We, therefore, must rely on the officers' testimony of what transpired and their notes in assessing this issue.

This issue is whether defendant's confession should not have been admitted because it was involuntary. We review do novo considering all the circumstances surrounding the confession. See State v. Hodges, 326 N.W.2d 345, 347 (Iowa 1982). The burden to show by a preponderance of evidence that the confession was voluntarily given is on the State. See State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975).

In order to establish defendant voluntarily made statements incriminating himself, the state must show from all the circumstances that the statement was given freely by defendant at a time when his ability to make a determination of whether to give the statement was not impaired. See Hodges, 326 N.W.2d at 347; Cullison, 227 N.W.2d at 127.

In deciding whether the confession was voluntarily given, we look to coercion by the questioning authorities; the background and abilities of the accused; how the interrogation progressed and when the statements were given; and evidence of the accused's condition at that time.

Defendant's primary contention is a promise to bring a state, not a federal, proceeding was used to secure his confession. Improper promises are one fact that bears on the issue of whether defendant's statements are voluntary. Hodges, 326 N.W.2d at 348; State v. Munro, 295 N.W.2d 437, 443 (Iowa 1980). A statement that results from a promise of help or leniency by a person in authority is not

considered voluntary and is not admissible. Hodges, 326 N.W.2d at 348; State v. Hilpipre, 242 N.W.2d 306, 310-11 (Iowa 1976); State v. Franks, 239 N.W.2d 588, 592 (Iowa 1976).

An officer can ordinarily tell a suspect it is better to tell the truth. Hodges, 326 N.W.2d at 349. The line between admissibility and exclusion is generally crossed if the officer also tells the suspect what advantage is to be gained or is likely to be gained from making the confession. See id. Ordinarily, the officer's statements then become promises or assurances rendering the suspect's statement involuntary. Id.; State v. Mullin, 249 Iowa 10, 16-17, 85 N.W.2d 598, 601-02 (1957).

The pivotal issue appears to be what, if any, promises were made to defendant. Defendant contends his statements were the result of a promise of a state, rather than a federal, prosecution. Defendant was told there was enough evidence to take the case to a federal grand jury. Also an excerpt from Wunnenberg's written report reads as follows, "[T]om Lane advised Roger that this case did not have to be taken federally, that it could be prosecuted on a state level, and that it would possibly be in his best interest to work with the local authorities regarding this."

The trial court found Lane told defendant any decision concerning prosecution in federal court would depend on whether another agent made a report and Lane had no control over the other agent.

We recognize the notes of Wunnenberg could be construed as conveying that Lane offered a promise in exchange for the defendant's confession.

The question is were Wunnenberg and Lane credible when they testified at the suppression hearing. We give credence to the trial court's assessment of credibility. See In re Estate of Heller, 401 N.W.2d 602, 608 (Iowa App. 1986). We affirm on this issue.

Defendant's last contention is there was not substantial evidence to prove beyond a reasonable doubt he started the fire. Defendant's argument centers on criticism of the opinions of Stan Nelson of the State Fire Marshal's office. A number of Nelson's conclusions were challenged by John Dinneen, a retired arson investigator engaged in consulting work, who testified as a part of defendant's case. Both Nelson and Dinneen were qualified as experts on the issue of the cause of the fire. The question of the weight to be given to their respective testimony was for the jury. See State v. Lindsey, 302 N.W.2d 98, 103 (Iowa 1981). We have found defendant's incriminating statements were admissible. There was substantial evidence for a jury to find beyond a reasonable doubt defendant was responsible for the fire. We affirm on this issue.

AFFIRMED.