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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 20, 1984
vs.	)	
CHARLES DENNIS GAFFNEY,	)	4-349 83-649
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Buchanan County - Thomas H. Nelson, Judge.

Defendant appeals from his conviction for sexual abuse in the third degree in violation of Iowa Code section 709.4(1). AFFIRMED.

Charles Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

Defendant appeals from his conviction for sexual abuse in the third degree in violation of Iowa Code section 709.4(1). He asserts that certain statements made to police officers should have been excluded from his trial because he did not knowingly and voluntarily waive his Miranda rights and he did not voluntarily make inculpatory statements.

Since defendant raises issues involving the violation of basic constitutional rights, this court makes an independent evaluation of the totality of the circumstances. State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976). This is the equivalent of a de novo review. Id.

I. Statements to Deputy Erbes. At approximately 2:00 a.m. on May 31, 1981, defendant was awakened at his home by law enforcement officers. Deputy Erbes advised defendant that Deputy Dryer wanted to speak with him at the law enforcement center about an incident that had happened earlier that evening. After permitting him to dress, Deputy Erbes placed defendant in the rear of his squad car and read him his Miranda rights. When asked if he understood the warnings defendant grunted "ah huh" and nodded his head in the affirmative. Deputy Erbes then asked if defendant, understanding those rights, was still willing to talk about the earlier incident. Defendant again nodded in the affirmative. Deputy Erbes estimated that approximately five minutes elapsed between the time defendant was awakened and the time he was read his rights. Deputy Erbes testified that defendant did not appear tired, nervous, or under the influence of alcohol or drugs at the time he was read his rights. After driving about two miles toward the law enforcement center, Deputy Erbes stated to defendant that he was willing to listen if defendant wished to tell his side of the story. Defendant proceeded to tell the story in narrative form, interrupted by three or four questions by Deputy Erbes. These inculpatory statements were admitted at defendant's sexual abuse trial. At the law enforcement center defendant was handed a waiver of rights form which he read and signed.

The State must prove by a preponderance of the evidence that defendant knowingly, voluntarily, and intelligently waived his constitutional rights. State v. Whitsel, 339 N.W.2d 149, 152 (Iowa 1983). We find that the State has met that burden in this case.

Defendant responded that he understood his rights with a grunt and a nod. Although one of these expressions alone might be ambiguous, the two together are usually interpreted correctly. Furthermore, when asked by Deputy Dryer at the law enforcement center whether he had been read his rights by Deputy Erbes and whether he had understood those rights defendant replied affirmatively to both questions.

The case of Tague v. Louisiana, 444 U.S. 469, 100 S. Ct. 652, 62 L. Ed. 2d 622 (1980), relied upon by defendant is distinguishable. In Tague the United States Supreme Court reversed an armed robbery conviction because there was no evidence that the petitioner knowingly and intelligently waived his rights before making an inculpatory statement. The following facts were important in that case:

> At the suppression hearing in the trial court, the arresting officer testified that he read petitioner his Miranda rights from a card, that he could not presently remember what those rights were, that he could not recall whether he asked petitioner whether he understood the rights as read to him, and that he "couldn't say yes or no" whether he rendered any tests to determine whether petitioner was literate or otherwise capable of understanding his rights.

Id. at 469, 100 S. Ct. at 652, 62 L. Ed. 2d at 624. In the present case defendant was asked whether he understood his rights and indicated on two separate occasions that he understood them when they were read to him by Deputy Erbes. Furthermore, defendant had graduated from high school and ran his own construction business. There was no indication that he was incapable of understanding his rights. There was also no evidence that he was nervous, upset, or under the influence of any intoxicants. Although defendant was awakened from

sleep, Deputy Erbes testified that by the time defendant dressed and was read his rights he no longer appeared to be tired.

We hold, therefore, that defendant made a legally effective waiver of his rights. Since there is no allegation that the statements made to Deputy Erbes were made involuntarily, these statements were properly admitted at trial.

In so holding we reject defendant's contention that Deputy Erbes should have reminded him of those rights when he began to talk. Defendant's voluntary statement was made shortly after he was read his rights. No reminder was necessary. See State v. Jump, 269 N.W.2d 417, 423-24 (Iowa 1978). We also reject his contention that he did not know the statements made to Deputy Erbes could be used against him since Erbes was merely transporting him to the law center to speak with Deputy Dryer.

II. Statements to Deputy Dryer. After defendant signed the written waiver form given him by Deputy Erbes, he was taken into Deputy Dryer's office. Defendant indicated that he had been read his rights by Deputy Erbes and that he had understood them. However, since defendant seemed distracted Deputy Dryer read defendant his Miranda rights again and defendant again stated he understood them and was willing to talk. Defendant also executed another written waiver. When defendant asked if signing the waiver was tantamount to an admission of guilt, Dryer answered that it was not, but did not remind him that his statements could be used against him. Dryer also stated that if defendant did not sign the waiver the interview would be discontinued and Dryer would find some other way to get the information he needed. Defendant maintains he interpreted this statement to mean he would be put in a jail cell if he did not talk. At one point defendant asked what would happen to him based on the victim's complaint and Dryer responded that he did not know without hearing defendant's side of the story. After defendant had given his account of the incident, he was told that he would be charged with sexual abuse. Defendant asked about the penalties. Dryer

testified he told defendant "there might be some possibility of a bargain in return for a plea in court or other available options to incarceration." Defendant contends Dryer told him, "usually you get a deferred sentence and pay a fine."

Defendant does not challenge the validity of the waiver of rights made in Deputy Dryer's office, but rather maintains that despite the waiver he was induced to make inculpatory statements by the misleading remarks of Deputy Dryer. See State v. Whitsel, 339 N.W.2d at 152 (issues of whether Miranda rights were effectively waived and whether statements were made voluntarily are separate).

A determination of voluntariness is based on an examination of the totality of the circumstances surrounding the defendant's decision to make the statement. The following factors have been identified by the supreme court as relevant to that determination: defendant's knowledge and waiver of his Miranda rights; defendant's age, experience, prior record, level of education and intelligence; 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 question; defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admission; and any mental weakness the defendant may possess. State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982).

In Hodges the supreme court held that a suspect's confession was inadmissible where the police officer questioning him stated that if the suspect gave his side of the story there was a much better chance of him receiving a lesser charge than first-degree murder. State v. Hodges, 326 N.W.2d at 349. The court stated that an officer can ordinarily tell a suspect that it is better to tell the truth. However, when the officer tells the suspect what advantage is likely to be gained from making a confession, the officer's statements become promises or assurances rendering the suspect's statements involuntary. Id. See also State v.

Kase, 344 N.W.2d 223, 225-26 (Iowa 1984) (inculpatory statements were made involuntarily where law enforcement officer told defendant no charges would be brought against her if she told what she knew, but if she did not talk she would be charged with murder). However, in State v. Whitsel, 339 N.W.2d at 153-54, the supreme court held that detectives' offer to tell the county attorney of defendant's cooperation and to recommend to county attorney that defendant receive psychiatric help was not tantamount to a promise of leniency. The evidence showed the detectives had explained to defendant that they could give no guarantees, but they would relate to the county attorney their recommendations. Id. at 153.

In the present case Deputy Dryer told defendant that his signing the waiver of rights was not an admission of guilt. This was correct information. We do not agree with defendant's claim that Dryer was required to remind him that anything he said would be used against him. Defendant had just read the waiver form which makes that point clear. Dryer also stated that if defendant did not wish to talk to him the interview would stop and Dryer would find another way to get the information he needed. We are not persuaded that defendant's interpretation of this remark to mean that he would be incarcerated if he did not talk is a reasonable one. Defendant testified at the supression hearing that no one at the law enforcement center told him anything bad would happen to him if he did not cooperate with them.

When defendant asked what was going to happen to him Dryer responded that he did not know without hearing defendant's side of the story. Although this remark could be viewed as designed to persuade defendant to talk, we find that it does not cross the line of permissibility. Dryer did not indicate that defendant would be in less trouble if he talked than he would be if he remained silent.

We are more concerned about the discussion of the possibility of plea negotiations and of a deferred sentence. However, the record shows that these

subjects were not brought up until after defendant had made the inculpatory statements. Therefore, his decision to make those statements could not have been influenced by anything Deputy Dryer said regarding plea bargaining or deferred sentences.

We find that there was no deceit or promise of leniency used to persuade defendant to confess to sexual abuse. After examining the other factors relevant to a determination of voluntariness, we see no indication that defendant's statements were made involuntarily. We note that defendant testified at the suppression hearing, "the story I gave was voluntary, yes." Consequently, defendant's conviction is affirmed.

AFFIRMED.