

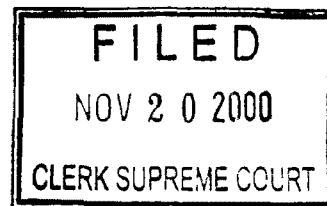
IN THE COURT OF APPEALS OF IOWA

No. 0-462 / 99-1096
Filed November 20, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN EDWARD STILTNER,
Defendant-Appellant.



Appeal from the Iowa District Court for Davis County, E. Richard Meadows, Judge.

John Stiltner appeals his conviction and sentence for sexual abuse in the second degree. **AFFIRMED.**

Kenneth A. Duker and Thomas M. Walter of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Rick Lynch, County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Miller, JJ.

STREIT, P.J.

John Stiltner was convicted and sentenced for second-degree sexual abuse after he molested his daughter. He challenges the district court's denial of his motion to suppress statements he made to the county sheriff. He also challenges the court's evidentiary rulings concerning statements he made to the sheriff and his jailmate and statements his daughter made regarding her prior sexual experiences. We affirm.

I. Background Facts and Proceedings.

In 1998 Stiltner's daughter accused him of committing various sex acts against her. According to the child, these acts included Stiltner touching her vagina with his hand and placing his penis in her mouth. The acts occurred between January 1, 1993, and December 31, 1997, while the child was five to ten years of age.

After learning of the child's allegations, the county sheriff unsuccessfully attempted to contact Stiltner by telephone. When Stiltner returned the sheriff's call a few days later, the sheriff told Stiltner he needed to talk to him about the allegations and if Stiltner did not come to see him that day, he would file charges against him and arrest him. Stiltner came to the sheriff's office roughly two hours later. After hearing a *Miranda* warning, Stiltner told the sheriff his daughter had put his penis into her mouth on four or five occasions while he was napping or sitting at his computer. He stated he stopped her immediately. The sheriff arrested Stiltner for sexual abuse, and Stiltner wrote out a statement that paralleled his prior oral statement.

Stiltner pled not guilty to the sexual abuse charge. Before trial, the district court denied Stiltner's motion to suppress statements he had made to the sheriff. The court also denied Stiltner's motion to exclude these statements—and statements he had made to a fellow inmate at the county jail—on various evidentiary grounds. The court granted the State's request to exclude statements the child had made regarding the sexual experiences she had allegedly had with other children.

Stiltner was convicted of second-degree sexual abuse. He appeals, claiming the court should have suppressed his statements to the sheriff or, alternatively, excluded these statements pursuant to the Iowa Rules of Evidence. He also claims the court should have excluded his statements to his jailmate but should not have excluded statements his daughter made about her sexual experiences with other people.

II. Motion to Suppress.

Stiltner claims the district court should have suppressed his oral and written statements to the sheriff under *Miranda*. We review such constitutional challenges de novo. *State v. Astello*, 602 N.W.2d 190, 195 (Iowa App. 1999).

Stiltner argues he did not waive his *Miranda* rights. Law enforcement officers must only give a person *Miranda* warnings when both custody and interrogation exist. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). Even if custody and interrogation exist, a person may waive his or her *Miranda* rights. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 421 (1986). A waiver of *Miranda* rights is valid if, under the totality of the circumstances, it is made “voluntarily, knowingly, and intelligently.” *Id.* (citations

omitted). A waiver is made voluntarily if it is “the product of free and deliberate choice rather than intimidation, coercion, or deception.”¹ *Id.* A waiver is made with the requisite level of comprehension if it is “made with a full awareness of both of the nature of the right being abandoned and the consequences of the decision to abandon it.” *Id.* A written waiver is strong evidence of the validity of a waiver. *State v. Pierson*, 554 N.W.2d 555, 560 (Iowa 1996). A waiver can also be inferred from a person’s words and actions. *State v. Davis*, 304 N.W.2d 432, 435 (Iowa 1981).

Stiltner waived his *Miranda* rights before he made any incriminating statements to the sheriff.² The sheriff read the rights to Stiltner from a form and Stiltner signed the form. When asked if he understood those rights and if he wished to talk to the sheriff, he answered “yes” and “as much as I can.” Stiltner’s latter reply does not undercut the validity of his waiver given he freely discussed his daughter’s allegations with the sheriff after making this comment. The waiver was valid under the totality of the circumstances. *See Burbine*, 475 U.S. at 421, 106 S. Ct. at 1141, 89 L. Ed. 2d at 421.

Stiltner also argues he invoked his right to have an attorney present while the sheriff questioned him about his daughter’s allegations. If a person invokes this right, law enforcement officials cannot interrogate that person until an attorney is present even if he or she previously waived the right. *Edwards v.*

¹ Whether a person voluntarily made incriminating statements is a separate issue. *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989). Stiltner has not pursued this issue on direct appeal.

² The State argues Stiltner’s oral statements were made before he was in custody. Because Stiltner waived his *Miranda* rights before making these statements, we do not address when he was subjected to custodial interrogation.

Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981). The invocation must be made by an unequivocal request for counsel. *Davis v. U.S.*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362, 371 (1994).

Stiltner did not unequivocally request counsel. When the sheriff and Stiltner initially spoke about the allegations over the telephone, Stiltner stated he had an attorney and the sheriff would have to make arrangements with the attorney to come to the sheriff's office. This conversation, however, occurred at least two hours before Stiltner's *Miranda* rights were triggered by custodial interrogation. See *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3, 111 S. Ct. 2204, 2211 n.3, 115 L. Ed. 2d 158, 171 n.3 (1991) ("We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'"). Nothing Stiltner said after he arrived at the sheriff's office—including his "as much as I can" comment—constituted an unequivocal request to have an attorney present while the sheriff questioned him. Stiltner's statements suggest he was not overly concerned about not having an attorney present. When Stiltner arrived at the sheriff's office without his attorney, the sheriff asked where his attorney was and whether he wanted to call another attorney—Stiltner replied his attorney was unavailable and he did not want to contact anyone else. Stiltner did not invoke his right to have an attorney present.

The sheriff did not violate Stiltner's *Miranda* rights. We affirm the district court's denial of Stiltner's motion to suppress.

III. Exclusion of Statements.

We review the district court's rulings on the admissibility of evidence for an abuse of the court's discretion. *State v. Sallis*, 574, N.W.2d 15, 16 (Iowa 1998).

A. Stiltner's Statements.

Stiltner also claims the district court should have excluded, pursuant to Iowa Rules of Evidence 402 (irrelevant), 404 (bad acts), and 802 (hearsay), his statements to the sheriff regarding his daughter's alleged attempts to initiate sexual contact with him.³ He makes the same claim regarding similar statements he made to an inmate with whom he was incarcerated while awaiting trial.⁴ Both the sheriff and the inmate testified about Stiltner's oral statements; Stiltner's written statement to the sheriff was also introduced into evidence.

Stiltner argues his statements to the sheriff and his jailmate are irrelevant and thus inadmissible pursuant to rule 402.⁵ In his opinion, his daughter's allegations do not coincide with his statements because, while he was charged with sexually abusing her, the statements involve *her* alleged attempts to put his penis into her mouth. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. Stiltner's statements fall within this definition. The primary issue in Stiltner's case was, of course, whether Stiltner actually sexually abused

³ Stiltner also asserts the statements are inadmissible pursuant to Iowa Rules of Evidence 403 and 608. Because he has not made any arguments in support of his assertions, we do not address whether the district court should have excluded his statements pursuant to these rules. See Iowa R. App. P. 14(a)(3).

⁴ Stiltner's jailmate testified as follows:

Well, what [Stiltner] said was that he shouldn't have told [the sheriff] about how he was playing the computer and his daughter started messing with his penis. And I asked him—how could you not—you, know, didn't he know that his daughter was sucking his penis, and he said no, that I must not have played no computer games then.

⁵ Rule 402 states "[e]vidence which is not relevant is not admissible."

his daughter. His own statements show he had sexual contact with her and thus had the opportunity to abuse her. The statements constituted relevant evidence.

Stiltner also argues his statements are inadmissible hearsay pursuant to rule 802.⁶ Admissions by a party-opponent, however, are not hearsay. Iowa R. Evid. 801(d). Anything said by a party-opponent may be used against the party as an admission, provided it exhibits inconsistency with the facts the party has asserted through pleadings and testimony. *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 566 (Iowa 1970) (citations omitted). The statements to the sheriff and jailmate are comparable to Stiltner's own testimony at trial. However, Stiltner had not yet testified when the State introduced his oral and written statements into evidence. As was discussed above, the statements demonstrated Stiltner had the opportunity to sexually abuse his daughter. When offered into evidence, the statements were inconsistent with Stiltner's plea of not guilty. See *State v. Ritchison*, 223 N.W.2d 207, 212 (Iowa 1974). Stiltner's statements were admissible as admissions by a party-opponent.

Finally, Stiltner argues his statements are inadmissible pursuant to rule 404(b). The statements fall within the exception to the rule. The rule reads as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

⁶ Rule 802 states "[h]earsay is not admissible except as provided by the Constitution of the State of Iowa, by statute, by these rules, or by other rules of the Iowa Supreme Court."

purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

Iowa R. Evid. 404(b).

We employ a tiered analysis to determine whether evidence of a person's prior bad acts fall within the rule 404(b)'s "other purposes" exception. *State v. Uthe*, 542 N.W.2d 810, 814 (Iowa 1996). The first tier requires the evidence be relevant for a purpose other than to show the general propensity of the defendant to commit crime. *Id.* Stiltner's statements show he had the opportunity to sexually abuse his daughter and thus are clearly relevant to a legitimate issue in this case. Because the evidence at issue clears the relevancy hurdle, we turn to the second tier of analysis: whether the probative value of the evidence "is substantially outweighed by the danger of prejudice." *Id.*; Iowa R. Evid. 403. Stiltner's statements are highly probative. His statements confirm he had sexual contact with his daughter and thus partially corroborate her accusations. On the other hand, the statements do not pose a danger of unfair prejudice. The statements are disturbing, but no more so than the sexual abuse charges brought against Stiltner. If anything, the statements tend to shift one's attention from Stiltner to his daughter. The statements survive the balancing test required under our second tier of analysis. Stiltner's statements to the sheriff and his jailmate were admissible pursuant to rule 404(b)'s "other purposes" exception.

Stiltner seems to suggest his statements are inadmissible pursuant to rule 404(b) because they do not involve "crimes, wrongs, or acts" he committed. Apparently, Stiltner believes his statements implicate his daughter's alleged bad acts rather than his because the statements suggest she initiated all of the

sexual contact between them. We are skeptical of Stiltner's suggestion his daughter was able to place his penis into her mouth without any culpability on his part. But, if Stiltner did not commit any bad acts on the occasions his daughter allegedly attempted to initiate sexual contact with him, then rule 404(b) would not apply to his statements regarding that sexual contact. Even if rule 404(b) did not apply, however, the statements were still admissible given they constituted relevant, nonhearsay evidence not subject to exclusion pursuant to any other rules of evidence.

The district court did not abuse its discretion. We affirm its refusal to exclude Stiltner's statements regarding his daughter's alleged attempts to initiate sexual contact with him.

B. The Victim's Statements.

Stiltner claims the district court should not have excluded his daughter's statements regarding her alleged sexual experiences with other children. The child told individuals investigating her sexual abuse allegations she had been "humped" by some boys and she had participated in a game involving sexual touching. The court ruled in favor of the State's motion in limine that argued such evidence was irrelevant and Stiltner had not complied with Iowa Rule of Evidence 412's procedural requirements. When Stiltner sought to introduce his daughter's statements into evidence at trial, the court upheld its ruling and also found the evidence was inadmissible pursuant to rule 403.⁷

⁷ Rule 403 states relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

Stiltner claims that, to the extent his daughter's statements are true, his constitutional rights of confrontation and due process required her statements to be admitted. Specifically, he claims his rights required he be allowed to refute the inference his daughter only knew about certain sexual activity because he sexually abused her. Rule 412, which generally prohibits the admissibility of a sexual abuse victim's past sexual behavior, does allow such evidence to be admitted when it is "constitutionally required to be admitted." Iowa R. Evid. 412(b)(1). "The constitutional provisions most often implicated in [sexual abuse cases] are the sixth amendment right of confrontation and the fourteenth amendment due process right to a fair trial." *State v. Clarke*, 343, N.W.2d 158, 161 (Iowa 1984).

Even though Stiltner's constitutional rights may have been implicated in this case, he was not automatically entitled to introduce his daughter's statements. A defendant accused of sexual abuse who intends to offer evidence of his alleged victim's past sexual behavior must comply with the applicable procedural requirements of rule 412(c) before introducing the evidence. *Id.* The defendant's failure to do so can result in the exclusion of the evidence. *Cf. U.S. v. Eagle Thunder*, 893 F.2d 950, 954 (8th Cir. 1990) (noting the defendant failed to comply with Federal Rule of Evidence 412's procedural requirements and "for this reason alone the district court could have denied his offer of proof"); 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure*

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

§ 5390, at 615 (1980). Stiltner did not comply with any of rule 412's procedural requirements.⁸

Stiltner argues, however, the State opened the door to evidence of his daughter's statements when it purportedly suggested her knowledge of certain sexual activity came solely from the sexual abuse to which he subjected her. Courts are generally reluctant to find the prosecution has opened the door to evidence of a sexual abuse victim's past sexual behavior. 3 Clifford S. Fishman, *Jones on Evidence* § 19:58, at 837 n.26 (7th ed. 1998). Here, the sheriff testified during his direct examination by the State he told Stiltner "there had to be some explanation [she had] knowledge of such sexual acts." When the sheriff made this statement, however, he was merely being asked what happened when Stiltner came to his office. The State's line of questioning does not suggest the State was attempting to elicit this particular response from the sheriff, and the State did not follow-up on the sheriff's statement. Moreover, during the sheriff's cross-examination, Stiltner was allowed to present the portions of his written statement in which he stated his daughter had told him a boy had "done things to her of a sexual nature."⁹ Stiltner thus had a limited opportunity to rebut whatever

⁸ The applicable procedural requirements included making a written motion to offer the child's statements accompanied by a written offer of proof. See Iowa R. Evid. 412(c)(1)-(2). Stiltner should have made the motion no later than fifteen days before trial unless the motion involved new evidence or a newly arisen issue. See Iowa R. Evid. 412(c)(1).

⁹ The State offered Stiltner's written statement into evidence during the sheriff's direct examination. While the statement did contain references to the child's alleged sexual experiences with a person other than Stiltner, the State's introduction of the statement did not open the door to additional evidence of her sexual experiences with other children. Cf. *U.S. v. Duran*, 886 F.2d 167, 169 (8th Cir. 1989) ("[T]he remedy of the defense is to object when the victim [makes a statement about her past sexual behavior]; [he] may not use the prosecution's violation of Rule 412 as an excuse for further inquiry into the victim's past sexual behavior.") (citations omitted).

inference the sheriff's statement created. The sheriff's statement did not warrant excusing Stiltner's noncompliance with rule 412's procedural requirements.

Even if we found rule 412's procedural requirements did not apply in this case, evidence of the child's statements would be inadmissible. As stated previously, Stiltner claims his daughter's statements were constitutionally required to be admitted. "The Constitution, however, ordinarily requires only the introduction of otherwise relevant and admissible evidence." *Clarke*, 343 N.W.2d at 161 (citations omitted). Stiltner argues he should have been allowed to introduce evidence of his daughter's statements to rebut the inference his sexual abuse was her sole source of knowledge regarding certain sexual activity. If offered for this reason, the child's out-of-court statements regarding her sexual experiences with other children are inadmissible hearsay pursuant to rules 801 and 802.¹⁰ They are also "marginally relevant and . . . more prejudicial than probative." *State v. Jones*, 490 N.W.2d 787, 791 (Iowa 1992) (affirming the district court's exclusion of evidence of a sexual abuse victim's prior sexual history when the defendant argued the evidence should have been admitted to show an alternative source of the thirteen-year-old victim's ability to describe the sex act defendant perpetrated on her). The district court did not abuse its discretion when it excluded evidence of the daughter's statements.

Alternatively, Stiltner claims his daughter's statements are false and thus he should have been allowed to impeach her credibility with them. He argues

¹⁰ Rule 801(c) defines "hearsay" as "a statement, other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

rule 412 does not govern the admission of a sexual abuse victim's prior false reports of sexual abuse. Courts have reached varied conclusions regarding the applicability of rule 412 to such false reports. 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 412.03[4][b] (Joseph M. McLaughlin ed., 2d ed. 2000). We do not resolve this issue. We, like the district court, are not convinced the child's statements are actually false. Moreover, Stiltner could not have introduced evidence of her statements for impeachment purposes even if her statements were false: Iowa Rule of Evidence 608(b) states "[s]pecific instances of conduct of a witness, for the purpose of attacking or supporting [her] credibility, . . . may not be proved by extrinsic evidence."¹¹ The district court did not abuse its discretion.

We affirm the district court.

AFFIRMED.

¹¹ Rule 608(b) does allow, in the discretion of the court, specific instances of the conduct of a witness to be inquired into on cross-examination of the witness. Stiltner, however, argues we should "reverse and remand for a new trial and allow [him] to offer [his daughter's] false statements of prior sexual activity in order to impeach the witnesses [sic] credibility."