FILED
DEC 18 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RAYNARD EDMONDE POULAIN,)

Defendant-Appellant.)

Filed December 18, 1985

5-491
84-1217

Appeal from the Iowa District Court for Scott County - David J. Sohr, Judge, J. Hobard Darbyshire, Judge Overruling Motion to Suppress.

Defendant appeals from his conviction for second degree sexual abuse. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Pamela Greenman Dahl, Assistant Attorney General, and Virginia D. Barchman, Assistant County Attorney, for plaintiff-appellee.

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

SACKETT, J.

Defendant was convicted of second degree sexual abuse and has appealed contending: (1) the trial court erred by admitting evidence of an involuntary confession, (2) the trial court erred by admitting hearsay evidence, and (3) trial counsel was ineffective in failing to properly object to rebuttal testimony.

I. Taped Inculpatory Statements

In reviewing defendant's claim that his inculpatory statements were involuntary, we make an independent, de novo review of the totality of the relevant circumstances. State v. Rhiner, 352 N.W.2d 258, 262 (Iowa 1984).

At the hearing on the motion to suppress, defendant testified that he and his nephew were asked to go to the police department for some questioning. Defendant testified:

> . . . Officer Spahn had talked to me as soon as we stepped out of the police vehicle and told me that the statement I had gave him in the car was, his exact words, bullshit and that no judge would stand for it and that it would be best if I told the truth, that I'd probably be charged with sex abuse third and get probation off of it instead of being charged with rape.

Defendant testified that a Detective VanFossen told him he was ". . . there for an investigation and to make a statement into an alleged — he used the word rape of a nine-year-old girl." Defendant was given a Miranda warning and signed a waiver of rights form before giving the taped confession to Detective VanFossen. Defendant claims VanFossen started recording two minutes after defendant filled out the rights waiver.

> He proceeded to go through the operations of asking my name, my occupation, address, and age, and he asked me to give a detailed description of what happened between myself and Elizabeth . . . at Jefferson School.

Defendant testified he denied the allegations on tape and then VanFossen left the room.

> After he came back in the room, he told me he was — he had made two telephone calls, one to the hospital and one to a county attorney, and he proceeded to tell me that the hospital told him that Elizabeth . . . had not been entered by a penis, that it was fingers or a twig or something of that sort, and then he told me that he talked to the county attorney and that he was told that if I pleaded guilty, it would be to sex abuse third, which was a lot less time in prison than a rape charge would be.
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> *
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> He then erased the tape recorder of my previous statement back to where the time of the interview had started and the details of my name, age and occupation and so forth, and then started the tape again and asked me questions off of the report upon which I answered.

Defendant was arrested after the taped statement was made.

VanFossen testified at the motion to suppress hearing and denied defendant's version of the facts. He denied he made any promise of leniency or discussed with the defendant what the charge would be. VanFossen stated he did not talk to the hospital or the county attorney during defendant's questioning. He testified that his initial decision to charge defendant with sexual abuse in the third degree was not based on a "promise" to defendant.

Defendant admits he knew his rights and that his rights were given to him. However, he claims he made the inculpatory statements because he wanted to avoid a more serious charge. Defendant contends he would not have made the statement absent the promises of leniency to charge him with a lesser offense than rape. He argues the state failed to carry its burden of establishing the statement was voluntary.

In determining whether defendant voluntarily waived his rights, the following factors have been set out by the Iowa Supreme Court and are to be considered:

> In order to establish the voluntariness of a defendant's inculpatory statements, the State must demonstrate from the totality of circumstances that the statements

> were the product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired.
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> * * * * * * * * * * * * * * *
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> The defendant's knowledge and waiver of his Miranda rights, the defendant's age, experience, prior record, level of education and intelligence, the 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 questions, defendant's physical and emotional condition and his reaction to the interrogation, whether any deceit or improper promises were used in gaining the admissions, and any mental weakness the defendant may possess.

State v. Rhiner, 352 N.W.2d 258, 262 (Iowa 1984).

A. Officer Spahn

First, we will review whether Officer Spahn's alleged comments to the defendant caused defendant to waive his rights involuntarily and make the inculpatory statements.

Officer Spahn transported the defendant to the police department; he was not the interviewing officer. Defendant had not been subjected to any intense questioning by Officer Spahn or any other officer at the time Spahn's alleged statement was made. There was a lapse of time between Spahn's alleged statement and the taped statement. These facts are distinguishable from situations where statements were made shortly after an officer made implied threats or gave promises of leniency. See State v. Rhiner, 352 N.W.2d 258, 263 (Iowa 1984)(coercive statement made midway through intense questioning); State v. Hrbek, 336 N.W.2d 431, 434 (Iowa 1983)(promise of leniency made in midst of questioning); State v. Hodges, 326 N.W.2d 345, 349 (Iowa 1982)(promises of leniency made after two hours of intense custodial interrogation); State v. Ware, 205 N.W.2d 700, 701 (Iowa 1973)(promise of leniency made after custodial interrogation).

We must also examine what words the officer allegedly used and what impact these words had on the defendant. Defendant testified Spahn stated ". . . that it would be best if I told the truth, that I'd probably be charged with sex abuse third and get probation off of it instead of being charged with rape."

> An officer can ordinarily tell a suspect that it is better to tell the truth. 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.

State v. Rhiner, 352 N.W.2d 258, 263 (Iowa 1984). The term "probably be charged" does not rise to the level of a promise, and defendant even admitted at the suppression hearing that he did not think it was a promise.

> Q. Did Officer Spahn make you any promises or did he just give you advice like this? A. Advice.

Additionally, the timing of defendant's allegation raises an inference of fabrication. Defendant first mentions Spahn made the statement at the hearing for the motion to suppress.[1] Defendant was asked whether he thought there was a difference between rape and sexual abuse in the third degree before VanFossen made his alleged promise. Defendant claimed he believed there was a difference because of what Officer Spahn had stated to him. Remarkably, Spahn's statement is very similar to VanFossen's statement.

In light of the totality of the circumstances, we find defendant's inculpatory statements were not improperly induced by Officer Spahn's alleged remarks.

B. Detective VanFossen

We next turn to defendant's claim that Detective VanFossen's statements induced him to make the involuntary, inculpatory statements.

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[1] Defendant's petition for a motion to suppress had only named VanFossen.

VanFossen was the interviewing officer. Defendant stated that only he and VanFossen were in the interviewing room. Defendant arrived at the police station shortly before 8 p.m. The taped confession was made from approximately 8:10 p.m. to 8:20 p.m. VanFossen's alleged promise of leniency was given shortly before the taped inculpatory confession. Defendant was eighteen-years-old when the taped statement was made and had twelve years of education. There is no evidence in the record that he had any prior contact with law enforcement officials.

We have listened to the taped statement as part of our de novo review. VanFossen identifies defendant and states his date of birth, address, and occupation. VanFossen then fully advises defendant of his Miranda rights, reads the rights waiver form to defendant, and has defendant initial and sign the form. Defendant verbally acknowledges that he understands his rights. The defendant is then asked by VanFossen why he was around Jefferson School that evening and who he was with. The rest of the tape consists of defendant's inculpatory statement.

In listening to the tape, we do not find that the tape recorder was shut off and turned back on at anytime during VanFossen's interview with defendant. Additionally, the sequence of events is not as defendant alleges. Defendant claims: (1) he filled out a rights waiver form, (2) VanFossen started the tape, (3) VanFossen asked identification questions, (4) defendant gave noninculpatory statement, (5) tape erased back to identification questions, (6) defendant gave inculpatory statement. The sequence of events on the tape is: (1) VanFossen starts the tape, (2) VanFossen reads defendant's date of birth, address, and occupation (he does not ask questions), (3) defendant fills out waiver form, (4) defendant gives inculpatory statement.

Detective VanFossen all along has denied defendant's version of the facts. We find that defendant's version of the facts are not substantiated by the record.

Therefore, we find, as did the trial court, that defendant's taped inculpatory statements were voluntarily and freely given. The trial court did not err in overruling the motion to suppress.

II. Excited Utterances

The nine-year-old victim did not testify at trial. Under the excited utterance exception, the trial court admitted over a hearsay objection testimony concerning four statements made by the victim incriminating the defendant. Two were made to her parents on the afternoon in question. Two were made to police officers at the hospital where the victim was taken for examination shortly after the alleged abuse. Defendant claims the trial court erred in admitting these hearsay statements.

Our review is on assigned error. Iowa R. App. P. 4. The trial court has discretion when ruling on a hearsay objection. Rhiner v. City of Clive, 373 N.W.2d 466, 476 (Iowa 1985).

Iowa Rule of Evidence 803(2) provides for the excited utterance exception to the hearsay rule:

> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

To qualify under the excited utterance exception, the statement must be made under the excitement of the incident rather than on reflection or deliberation. Rhiner v. City of Clive, 373 N.W.2d at 476.

The victim's mother testified that she was looking for her daughter at about 4:00 or 4:30 p.m. when she observed her walking down the street with the defendant and some other people. The victim saw her mother and ran to

her. The mother testified her daughter was crying and said to her, "Ray raped me" or "Mommy, he raped me." They went home and the victim's mother called the police. These statements were clearly relating to the startling event that put the victim in her agitated state. We find that the trial court was within the permissible scope of its discretion in ruling the statements fell within the excited utterance exception.

The victim's father testified that while his wife was calling the police, the victim came over to him and told him, "Daddy, he tried to put it in the back." He testified that his daughter had calmed down somewhat and had stopped crying, but her statement was made to him about five minutes after she had arrived home. In view of the victim's stressed condition, the short time lapse, and the fact this was a spontaneous statement and not in response to a question, we find that the victim's statement to her father also fell within the excited utterance exception. The trial court did not abuse its discretion in admitting this statement.

The police arrived at about 5:30 p.m., and Officer Willems talked with the victim. He testified that her face was streaked with dirt and what looked like tears. The officer testified when he asked her, "What happened?" or "What could I do for you," she started crying. However, there is some dispute in the record as to whether or not the victim was crying at the time the officer began asking questions, and whether the victim or her sister spoke up first and named "Ray." Over defendant's hearsay objection, Officer Willems testified the victim told him that Ray had captured her while they were playing army, Ray held her by the arms, and "He started digging in my bootie." The victim then continued to cry and would not say anything else. The fact that the victim's statements were made in response to the officer's questions is a factor which tends to negate spontaneity but is not conclusive. State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa

1981). Narration of particular facts weighs in the balance against impulsiveness. State v. Stevens, 289 N.W.2d 593, 597 (Iowa 1980).

Admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the record shows the challenged evidence did not impact on the jury's finding of guilt. State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984). The contrary is established when the record shows that the challenged evidence did not impact on the jury's finding of guilt. The defendant had already been identified by the victim's statements to her mother, and the sexual abuse act and events leading up to the act are in the record by way of defendant's taped statement. Without determining whether the statement to Officer Willems was an excited utterance, we determine it was cumulative to the record and find that its admission was harmless error.

Officer Tanner testified that at approximately 6:00 p.m. she met the victim at the hospital. The officer stated when she talked to the victim she was wringing her hands, her face was dirty and flushed, and it was obvious that she had been crying. Over defense objection, Tanner testified the victim told her "Ray had hurt her" and he had touched her where she went number one and number two. We also find this inadmissible hearsay testimony to be harmless error due to its cumulative nature in light of the total record. See State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984).

III. Ineffective Assistance of Counsel

Defendant claims that his trial counsel was ineffective in failing to properly object to rebuttal testimony. We make an independent, de novo review of the totality of the circumstances. Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980).

The nine-year-old victim had been ruled incompetent to testify. During trial, defense counsel read the victim's pretrial deposition into evidence. While

being deposed, the victim had covered her face with her hands and denied virtually everything having to do with the sexual assault.

In rebuttal, the state presented Joannie Dittmer, a counselor with Quad Cities Rape/Sexual Assault Center. Dittmer testified as to the various symptoms believed to be associated with rape trauma syndrome. She testified that the victim appeared to be scared and frightened at the deposition. Defense counsel objected to the state of mind evidence and the objection was sustained. Dittmer went on to testify that the victim held her hands over her eyes during the deposition and that Dittmer expected that sort of behavior.

Defense counsel objected to Dittmer's testimony on the basis that she was not qualified to testify and that it was improper rebuttal, which were both overruled. On appeal, the defendant contends the proper objection should have been lack of relevance and improper subject for expert testimony. Defendant argues the admitted rape trauma syndrome testimony was irrelevant as well as being a matter of unproven scientific reliability. Defendant contends that trial counsel's objection was insufficient and that this extremely prejudicial evidence was admitted into evidence due to the insufficient objection.

To establish the claim of ineffective assistance of counsel, defendant must establish that his counsel's performance did not fall within the range of normal competency by showing: (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Kyle v. State, 364 N.W.2d 558, 562 (Iowa 1985)(citing Strickland v. Washington, 466 U.S. 668, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). We recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reason-

able professional judgment. Id. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. Sims v. State, 295 N.W.2d at 423.

Defendant fails to demonstrate how these additional objections would have provided more effective assistance and affected the trial outcome.

The general rule in Iowa is one of liberality in the admission of opinion evidence. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). The decision as to admissibility of such testimony rests in the trial court's discretion. Id. We will reverse only on a clear showing of abuse of discretion. Id.

We fail to see how the outcome would have been different if trial counsel had objected to the testimony as "irrelevant and not a proper subject for expert testimony," rather than the objections he did in fact make. Other jurisdictions have admitted expert testimony regarding rape trauma syndrome and have stated this testimony is particularly helpful when the victim is a child.

> In the case of a sexually abused child consent is irrelevant and jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain or ambivalent accuser and who may even recant. Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particularly of children as young as this complainant. State v. Middleton, supra; State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1981). See also State v. Loss, 295 Minn. 271, 280, 204 N.W.2d 404 (1973)(battered child syndrome); Ibn-Tamas v. United States, 407 A.2d 626 (D.C.Cir.1979)(battered wife syndrome).

State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984)(emphasis added).

> If a complaining witness in a burglary trial, after making the initial report, denied several times before testifying at trial that the crime had happened, the jury would have good reason to doubt seriously her credibility at any time. However, in this instance we are concerned

> with a child who states she has been the victim of sexual abuse by a member of her family. The experts testified that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility. [emphasis added].

State v. Middleton, 294 Or. 427, 435-36, 657 P.2d 1215, 1219-20 (1983).

We agree with defendant that expert testimony as to rape trauma syndrome should not be admissible to prove that a rape in fact occurred. See People v. Bledsoe, 36 Cal.3d 236, 681 P.2d 291, 203 Cal.Rptr. 450 (1984). However, in this case the expert testimony was offered as rebuttal to the victim's deposition in which she denied all matters having to do with the alleged sexual abuse.

The decision on admissibility is left to the discretion of the trial court under the circumstances of the particular case to be guided by whether the expert's opinion will be helpful to the jury in performing its function. State v. Halstead, 362 N.W.2d at 506. We do not find that any different objections offered by trial counsel would have affected the outcome of the trial court's ruling on admissibility or on the outcome of defendant's case. We reject defendant's claim of ineffective assistance of counsel and affirm the trial court.

AFFIRMED.