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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)
Plaintiff-Appellee,) Filed March 23, 1982
vs.)
JOHN J. WAITE, JR.,) 2-26 / 66648
Defendant-Appellant.)

Appeal from Linn District Court - Larry J. Conmey, Judge.

The defendant appeals his conviction of lascivious acts with a child in violation of section 709.8, The Code 1981, and assault in violation of section 708.1, The Code 1981, asserting: (1) that his confession to the police was inadmissible as the product of an earlier involuntary confession; (2) that the record failed to establish he knowingly and voluntarily waived his Miranda rights; and (3) that trial court erred in denying his motion for a mistrial following a detective's reference at the trial to his prior incarceration. REVERSED AND REMANDED FOR A NEW TRIAL.

T. Todd Becker of Tom Riley Law Firm, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Valencia Voyd, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

The defendant appeals his conviction of lascivious acts with a child in violation of section 709.8, The Code 1981, and assault in violation of section 708.1, The Code 1981. The defendant asserts: (1) that his confession to the police was inadmissible as the product of an earlier involuntary confession; (2) that the record failed to establish he knowingly and voluntarily waived his Miranda rights; and (3) that trial court erred in denying his motion for a mistrial following a detective's reference at the trial to his prior incarceration. We reverse and remand for a new trial.

Defendant filed a motion to suppress incriminating statements he made during interrogation by the police on the basis that they were involuntary as the product of coercion and that he did not knowingly, intelligently and voluntarily waive his Miranda rights. During the suppression hearing, evidence was presented indicating that Mark Finn learned from Cheryl Drake, his estranged wife, that she suspected defendant had injured their child. Between 3:00 and 3:30 p.m. on August 26, 1980, Finn found defendant at a grocery store, pushed defendant outside and asked what the defendant did to Finn's child. After defendant denied hurting the child, Finn proceeded to strike the defendant five or six times on the head. Defendant then confessed to having fondled another child who he was babysitting. Finn had defendant repeat his confession to Finn's girlfriend and told him that if the defendant did not get convicted "one of these days someone is going to kill you." Finn and his girlfriend subsequently took defendant to the police station, arriving about one hour after the altercation with Finn. Finn told defendant to tell the police what he had told Finn. Finn left the immediate area after defendant was taken to another room for interrogation.

Defendant was initially questioned by detectives Holecek and Glenn. Holecek testified that Glenn read a waiver form to defendant and that defendant signed the form after being asked to sign it if he understood his rights. Glenn

testified that he could not recall reading the form to the defendant, but thought that he did because that is standard procedure. The detectives testified that the defendant appeared to be quiet and nervous. Another officer who later participated in the interrogation, detective Chiafos, testified that he gave Miranda warnings and asked defendant if he, defendant, understood the difference between right and wrong because "[h]e [defendant] didn't appear that he—He was so nervous I wanted to make sure, very sure that he understood precisely what was going on." Defendant testified that he could not remember his rights being read to him. The officers apparently knew that someone had hit the defendant and that he had a below average intelligence. The record also reflects that the officers knew defendant had been under the care of a psychiatrist. Defendant subsequently made incriminating statements to the police approximately two hours after Finn had assaulted the defendant.

Trial court overruled defendant's motion to suppress finding that the confession to the police was admissible because the defendant had "waived his rights and voluntarily and intelligently made inculpatory statements."

During defendant's trial, a police officer indicated that defendant had stated that he was afraid of going back to jail. Defendant moved for a mistrial or to strike the word "back" because it raised an issue of defendant's prior conviction. Trial court sustained defendant's objection to the testimony and the motion to strike but refused to grant a mistrial. Defendant refused trial court's offer to admonish the jury.

I. Scope of Review. Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. However, when a constitutional issue is presented, the evidence relevant to that issue is reviewed de novo. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Voluntariness of Confession. Defendant asserts that his confession to the police was inadmissible because it was the product of his earlier, involuntary

confessions made to Mark Finn and his girlfriend, Rosalynn Hall. We agree.

To render a confession admissible, the State must prove that defendant enjoyed the requisite "mental freedom" to confess or deny his involvement in the crime. Lyons v. Oklahoma, 322 U.S. 596, 602, 64 S. Ct. 1208, 1212, 88 L. Ed. 2d 1481, 1485 (1944). When, as here, an earlier confession is undisputedly involuntary, this requisite mental freedom is present if there has been a "break in the stream of events [rendering the first confession involuntary] sufficient to insulate the final events from the effect of all that went before." Darwin v. Connecticut, 391 U.S. 346, 349, 88 S. Ct. 1488, 1490, 20 L. Ed. 2d 630, 634 (1968); Beecher v. Alabama, 389 U.S. 35, 88 S. Ct. 189, 19 L. Ed. 2d 35 (1967); Clewis v. Texas, 386 U.S. 707, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967). We conclude that the record does not support a finding of a sufficient break.

Defendant's confession to the police came less than 2 hours after he had been brought to the police station by a person who not only had recently assaulted him, but also had told defendant that "if you don't get convicted or something, one of these days you're going to do that and somebody's going to kill you." Further, defendant was taken to the interrogation room before his attacker left the premises. In fact, the record reasonably supports the conclusion that defendant believed his attacker was still at the police station during this interrogation. From these circumstances, we cannot conclude that defendant freely chose to talk.

III. Waiver of Miranda Rights. Defendant also alleges trial court erred in refusing to suppress his confession due to violation of his Miranda rights. Again, we agree. Law enforcement officers can question a suspect only after the suspect has knowingly, intelligently, and voluntarily waived those rights set forth in Miranda v. Arizona, 384 U.S. 436, 468, 86 S. Ct. 1602, 1624-25, 16 L. Ed. 2d 694, 720 (1966). The State must prove such a waiver by a preponderance of the evidence. State v. Fisher, 279 N.W.2d 265, 267 (Iowa 1979).

While the record shows that the police officers informed defendant of his rights, it also establishes the following facts. Defendant signed the waiver form, at 4:27 p.m., after glancing at it for only a "brief few seconds." Defendant seemed nervous and afraid. The detectives knew Mark Finn had beaten defendant shortly before defendant arrived at the police station and that Finn was apparently still on the premises. Detective Holecek knew he was questioning a person with below average intelligence. (Defendant attended school through the seventh grade but could not read a document presented to him at the hearing.) The detectives also knew, prior to defendant's confession to them, that he had been under the care of a psychiatrist.

In light of the above facts, we conclude that the State failed to prove by a preponderance of the evidence that defendant knowingly, intelligently and voluntarily waived his rights under Miranda.

IV. Mistrial. Defendant's final allegation of error is that the trial court erred by denying a mistrial following Detective Chiafos' reference during trial to other crimes committed by the defendant. We do not believe this constitutes reversible error.

The allegedly prejudicial testimony is as follows:

> Q. Did the Defendant express to you—again on that date, August 26th—fears of any person whether named or un-named?
>
> A. No.
>
> Q. You stated that he was nervous. Did he also appear frightened?
>
> A. Yes, he did.
>
> Q. Did he explain to you why he was afraid?
>
> A. Yes, he did.
>
> Q. And how did he explain it?
>
> A. He stated that he was afraid of going back to jail.

The trial court sustained the defendant's motion to strike a portion of the defendant's testimony, but overruled defendant's motion for a mistrial. The trial court then offered to admonish the jury, but defendant declined this offer.

The trial court has considerable discretion in deciding whether to grant a mistrial. State v. Mattingly, 220 N.W.2d 865, 870 (Iowa 1974). Initially, we do not believe the detective's statement that defendant was afraid of going "back to jail" was highly prejudicial. This statement on its own does not necessarily suggest a prior felony conviction as would a statement such as being afraid of going back to Anamosa or back to prison. The fact that defendant spent time in "jail" would not in all cases mean there was a prior felony conviction. Many non-felons have spent time in jail, and common knowledge would suggest few would want to go back to jail. Thus, we conclude the statement "back to jail" in itself is not sufficiently prejudicial to require a mistrial.

Further, in light of the trial court's offer to admonish the jury and the general nature of the detective's statement, we find the trial court did not abuse its discretion by refusing to grant a mistrial.

In summary, we conclude that trial court erred in refusing to suppress defendant's confession and, therefore, reverse and remand this case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent.

I believe the totality of circumstances shows a break in the stream of events, sufficient to insulate the final events from the effect of all that went before, occurred when the defendant was delivered into the custody of the police. In my view, the fact that the involuntary confession could have been the product of an assault by the victim's father rather than the product of intimidation or abuse by the police makes this case distinguishable from the cases cited by the majority.

All crimes undoubtably create stressful situations. The defendant committed a horrendous crime with a small child and was assaulted by the child's father. Even if both the defendant and his assailant were subject to some degree of stress, this does not mean the police should not be allowed to promptly investigate the charges made against the defendant. Nor does this mean that the defendant, who was under police protection, cannot voluntarily waive his Miranda rights after being properly appraised of his rights by the police.

I see no evidence on the record that indicates the defendant was so upset upon his arrival at the police station that he could not voluntarily and intelligently waive his rights. This finding is bolstered by the fact that the defendant did not actually confess until nearly two hours after his arrival at the police station. If the defendant was as nervous and upset as the majority would like to believe, then he would have confessed immediately upon his arrival at the police station, not nearly two hours later and some three hours after being attacked by the victim's father.

In summary, this case does not involve any misconduct on the part of law enforcement officials. When defendant was delivered to the police he was immediately separated from his assailant and taken to a separate room for questioning.

The police acted correctly and promptly. I would not, therefore, punish society and the police for the emotional response of the victim's father which produced the defendant's first, and in my view only, involuntary confession. I would find that the defendant, after being properly informed of his Miranda rights, voluntarily decided to relinquish those rights and voluntarily confessed to the crime he had committed. I would affirm the trial court.