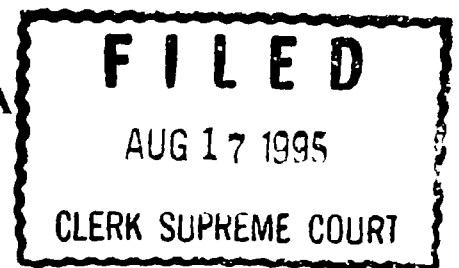


IN THE COURT OF APPEALS OF IOWA

No. 5-331 / 94-0856



STATE OF IOWA,

Appellee,

vs.

JOSEPH BROCKERT,

Appellant.

Appeal from the Iowa District Court for Muscatine County, Jack L. Burns,
Judge.

Defendant appeals his conviction for first-degree murder and first-degree robbery in violation of Iowa Code sections 707.1, 707.2, 711.1, and 711.2 (1993).

AFFIRMED.

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

Thomas J. Miller, Attorney General; Mary Tabor, Assistant Attorney General; James Kivi, Assistant Attorney General; and Richard R. Phillips, County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

DONIELSON, C.J.

The defendant, Joseph Brockert, appeals the judgment and sentence entered upon his convictions of first-degree murder and first-degree robbery. On appeal he argues: the trial court erred in overruling his motion to suppress; the State failed to prove him guilty beyond a reasonable doubt; and he was denied effective assistance of counsel. We affirm.

I. MOTION TO SUPPRESS

Prior to trial the defendant filed a motion to suppress the admission of any evidence pertaining to statements he made to law enforcement authorities on July 23, 1993. In the course of investigating the murder of Mr. Paul Lanfier, authorities asked the defendant to come to the sheriff's office to be interviewed. The defendant went to the sheriff's office and was informed of his *Miranda*¹ rights. The defendant executed a waiver form and agreed to talk to the investigating officers. The defendant subsequently made incriminating statements which were admitted against him at trial.

The defendant now claims admission of his incriminating statements was in violation of his rights under the fifth and fourteenth amendments to the United States Constitution. He asserts his statements were not voluntary given his lack of sleep, his

¹*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

prior use of drugs, the alleged false promises made by an interviewing officer, and the failure to comply with his alleged request to stop the interview.

When a defendant alleges error involving a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if an error occurred. *State v. Foell*, 512 N.W.2d 809, 811 (Iowa App. 1993). The fifth and fourteenth amendments protect a person's right against self-incrimination. *Id.* We apply a dual test in determining the admissibility of inculpatory statements by criminal defendants. "First, we ascertain whether or not *Miranda* warnings are required and, if so, whether they were properly given. Second, we determine whether the statement is voluntary and satisfies due process." *Id.* (quoting *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989)).

An express written waiver is usually strong proof of the validity of a defendant's waiver of his *Miranda* rights. *Fryer v. State*, 325 N.W.2d 400, 409 (Iowa 1982). However, it is not enough to establish waiver, we must find from the facts and circumstances that the waiver was voluntarily, knowingly and intelligently made. *Id.*

Statements are deemed voluntary if they 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. *Foell*, 512 N.W.2d at 812. Many factors bear on the issue of voluntariness including: the defendant's age, experience, prior record, level of education and intelligence; the

length of time the defendant is interrogated; whether physical punishment was used; the defendant's ability to understand the questions; the defendant's physical and emotional condition; whether any deceit or improper promises were used in gaining the admission; and any mental weaknesses the defendant may possess. *Id.* The State bears the burden of proving by a preponderance of the evidence that the defendant's statements were voluntary. *State v. Edman*, 452 N.W.2d 169, 170-71 (Iowa 1990).

Prior to being interviewed by law enforcement authorities, the defendant was given a "Statement of Rights and Acknowledgment and Waiver" form. The defendant had the opportunity to read along as Agent Kenneth Sandy read a copy of the form to the defendant. Agent Sandy specifically asked the defendant if he understood each of the rights explained to him, and, having those rights in mind, whether he wished to talk to the officers. The defendant responded "yes" to each question and signed the waiver form.

The explanation of the defendant's rights and his execution of the waiver form occurred around 1:43 p.m. The questioning of the defendant lasted until approximately 5:45 p.m. The defendant was not denied food or drink during the interview and was allowed to smoke. At least two breaks were taken during the interview.

The defendant claims he had ingested cocaine and had not slept during the two days preceding his interview at the sheriff's office. A urine drug test

administered after the defendant's interview revealed the presence of cocaine, cocaine metabolites and tetrahydrocannabinol, the active ingredient in marijuana. A friend of the defendant testified he and the defendant had used cocaine during the prior two nights and had not slept during those nights. However, there is evidence indicating the defendant slept during daytime hours as he appeared to have just awakened when law enforcement officers approached him on July 23 and asked him to come in for questioning.

Agent Sandy testified the defendant appeared to understand his rights when they were read to him. The agent had no trouble understanding the defendant and believed he responded appropriately to the questions asked of him.

Agent Sandy had been an Iowa Division of Criminal Investigation agent since 1976 and had previously dealt with people who were under the influence of drugs. Based on his observations of the defendant during his interview, it was Agent Sandy's opinion the defendant did not appear to be under the influence of any drugs. The correctional officer responsible for processing the defendant when he was jailed after the interview also had experience in dealing with people under the influence of drugs. She testified she had no trouble understanding the defendant when she processed his admission to the jail, and she felt his answers were appropriate to her questions. It was her opinion the defendant "didn't act as though he was on drugs."

The mere fact one is under the influence of a drug at the time of making an inculpatory statement does not render the statement involuntary. *State v. Wilson*, 264 N.W.2d 614, 614 (Iowa 1978); *see also State v. King*, 492 N.W.2d 211, 215 (Iowa App. 1992) (mere fact that defendant was under the influence of alcohol did not render his *Miranda* waiver or inculpatory statements involuntary). The record does not support a finding that the defendant's drug use or lack of sleep precluded him from giving a voluntary waiver of his *Miranda* rights and a voluntary confession.

At one point during the course of the interview, the defendant stated he did not want to talk any further unless he spoke with his accomplice, Shane Fonner, first. Agent Sandy testified he told the defendant he would "try" to arrange a meeting between the defendant and Fonner. Agent Sandy left the room and checked with the county attorney and another DCI agent. He was informed the county attorney did not want to allow the defendant to talk to Fonner and he returned to the interview room and informed the defendant of this.² Agent Sandy proceeded to ask the defendant further questions and the defendant answered them.

In his brief the defendant appears to argue his request to speak to Fonner constitutes an invocation of his right to remain silent and any further interrogation of him should have ceased. A suspect's right to cut off questioning must be scrupulously honored. *State v. Kasel*, 488 N.W.2d 706, 709 (Iowa 1992). *Miranda*

²Appendix, p. 61.

dictates that once a defendant has invoked his right to remain silent, any subsequent statements, even if voluntary, must be suppressed. *See Kasel*, 488 N.W.2d at 709.

This is not a case in which the defendant clearly and unambiguously invoked his right to remain silent. *See e.g., Kasel*, 488 N.W.2d at 708-09 (defendant had invoked her right to remain silent when she "stormed out" of interrogation room and was forcibly returned by officer). Instead, the defendant merely asked to see his accomplice and declined to answer further questions until the officers acted on his request. When the defendant was informed his request was denied, he continued to answer questions. Under these circumstances, his actions and expressions did not constitute a sufficient indication of a desire to exercise his right to remain silent. *Cf. State v. Whitsel*, 339 N.W.2d 149, 152 (Iowa 1983) (general reluctance to answer question is a natural reticent posture taken by one being questioned and is not an invocation of one's *Miranda* rights).

The defendant also argues his statements were rendered involuntary by the alleged "false promises" of Agent Sandy. The defendant contends he was under the impression he would be allowed to speak to Fonner and Agent Sandy did not inform him the county attorney had refused to allow such a meeting. As noted above, a review of the record reveals Agent Sandy did inform the defendant he would not be allowed to speak to Fonner, and it was afterward that the defendant made incriminating statements.

Deception by State agents in the context of an interrogation cannot be condoned. *State v. Jacoby*, 260 N.W.2d 828, 832 (Iowa 1977). However, the record does not support the defendant's assertion that Agent Sandy's conduct amounted to deception. Agent Sandy had indicated he would "try" to arrange a meeting between the defendant and Fonner and he did so. The defendant's claim of false promises is meritless.

Our review of the record reveals the defendant was properly informed of his *Miranda* rights and was able to make a knowing, intelligent and voluntary waiver of them. None of the circumstances cited by the defendant, whether considered separately or together, render his statements involuntary. The trial court did not err in denying the defendant's motion to suppress.

II. SUFFICIENCY OF THE EVIDENCE

The defendant argues the State failed to prove him guilty beyond a reasonable doubt of first degree murder and first-degree robbery. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact that the

defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

In his statements to law enforcement officers on July 23, 1993, the defendant admitted he intended to rob the victim and hit him with a tree limb. The defendant's statements were corroborated by the detailed testimony of his accomplice, Fonner. A defendant's admissions may be considered corroboration for the testimony of an accomplice. *See State v. Jochims*, 241 N.W.2d 25, 27 (Iowa 1976); *State v. Jones*, 511 N.W.2d 400, 405 (Iowa App. 1993).

There was evidence indicating the defendant was aware the victim carried a great deal of money and the defendant arranged to take the victim to a remote location for the purpose of robbing him. Immediately after the murder the defendant was in possession of a large amount of money. The defendant told witness Beth Small he had come into possession of the money by beating up someone. The defendant took efforts after the murder to see that his and Fonner's shoes could not be traced to the murder scene.

The defendant argues a review of the evidence leads to the "inescapable conclusion" Fonner administered the fatal blows to the victim. He relies on such factors as the presence of the victim's blood on Fonner's shoes and Fonner's accurate

recollection of the color of the sign they placed over the victim's head. The evidence implicating Fonner, and the inferences which can be drawn therefrom, do not undercut the overwhelming evidence of the defendant's guilt. There was sufficient evidence to support the defendant's conviction on the murder and robbery charges submitted to the jury.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant raises two claims of alleged ineffective assistance of counsel. The first pertains to whether his trial counsel timely filed a motion to suppress. The State concedes trial counsel timely filed the defendant's motion to suppress, and we have affirmed the denial of that motion in section I of this opinion.

The defendant also argues his trial counsel was ineffective in failing to object to a potentially tainted jury pool. During voir dire the parties became aware law enforcement officers had provided information to the State regarding prospective jurors. At least one of the prospective jurors was aware of the State's efforts to obtain information about her.

The defendant contends it is unclear from the present record whether persons serving on the jury panel knew of the investigation or whether defense counsel was forced to exercise strikes on this basis. He contends this claim of ineffective assistance should be preserved for postconviction proceedings so an adequate record

may be made. We agree. Without expressing any comment on the possible merit of this claim, we note evidence outside of the record, such as defense counsel's strategy, is relevant to any determination of whether trial counsel should have objected to a potentially tainted jury pool.

AFFIRMED.