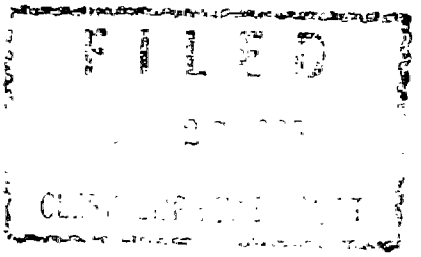
IN THE COURT OF APPEALS OF IOWA



No. 5-203 / 94-0161

STATE OF IOWA,

Appellee,

vs.

GARY L. COTTON,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Cotton appeals his conviction for second-degree sexual abuse. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

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

HAYDEN, P.J.

On the evening of July 12, 1993, six-year-old B.G. told her mother, Susan, she had sexual contact with her neighbor, Gary Cotton. Cotton had earlier taken B.G. and another child swimming. Susan notified the police. The police went to Cotton's trailer home. Cotton and his father were home. Officer Engel informed Cotton of the statements B.G. had made and stated he wanted to talk with him. Cotton agreed to accompany the officer to the police station.

At the station Engel read Cotton his *Miranda* rights and asked him if he understood them. Cotton responded he did. In addition, Engel told Cotton he did not have to talk to him. Cotton stated he wished to talk and signed the waiver. Cotton then provided an account of what occurred that day while Officer Engel typed it. Officer Engel then gave the document to him to read aloud. Cotton appeared to have problems reading, so Engel read it to him in the presence of Officer Stevenson. Later Engel informed Cotton he did not believe he had told the whole truth.

When asked if he would submit to a polygraph test, Cotton stated he would. Engel asked Cotton if he had made a mistake. Cotton responded he had, stating he should not have spanked B.G. for grabbing the steering wheel while he was driving. Engel and Cotton talked some more, and at one point, Cotton stated he had made a mistake but was embarrassed to talk about it. Cotton told Engel he had not recounted the whole story the first time and provided another account of his contact with B.G.

He admitted sexual contact with B.G. He gave a graphic version of how it happened. Engel completed the statement and reread it to Cotton. Cotton signed the second statement. Cotton was eventually charged with second-degree sexual abuse.

At trial to the court, Cotton testified he had taken B.G. and another child swimming. He claimed as he was driving back, he remembered he had forgotten B.G.'s shorts. He returned to the pool, and then went to his employer to ask the secretary where he was to report for work. He alleged he then took B.G. to McDonald's for food, made a telephone call, and headed back to his trailer park. Cotton maintained B.G. grabbed the steering wheel and almost caused an accident. At that point, Cotton testified, he pulled down B.G.'s pants and spanked her. Cotton denied Officer Engel told him about the accusations at the trailer and felt like he had been forced to accompany him to the police station.

B.G. testified at trial Cotton drove them to a "flooded place." She stated Cotton removed her bikini bottom. B.G. alleged Cotton took off his jeans, pulled down his shorts, and then got on top of her. She stated she began crying because it hurt.

Susan G. testified she began worrying when B.G. had not come back from the pool after it had closed. She asked J.L., another child who had been with Cotton and B.G. at the pool, where B.G. was. Susan stated J.L. told her they had gone back to the pool to retrieve B.G.'s shorts. Around 7:20 p.m. Cotton returned with B.G. Susan stated B.G. was uncharacteristically quiet and appeared frightened. She additionally

testified B.G went inside the house, changed her clothing, got one of her stuffed animals, and refused to come outside. Susan became alarmed when she noticed the look on B.G.'s face when she saw Cotton and asked B.G if Cotton had touched her anywhere. She testified Cotton had touched her privates She examined B.G. and discovered her genital area was swollen, red, and secreting a whitish fluid. She stated she then took B.G. to the hospital.

During the trial Dr Robert Pucelik, a psychiatrist, testified Cotton had an organic brain disorder on Axis I. He stated Cotton had an impairment of the brain function which results in difficulty in controlling behavior and impairs judgment. He believed Cotton was of borderline intellectual functioning. Another psychologist testified Cotton was mildly retarded.

On December 29, 1993, the trial court entered an order finding Cotton guilty as charged. On January 7, 1994, Cotton filed motions in arrest of judgment and for a new trial which the trial court overruled. On January 21, 1994, Cotton was sentenced to serve a twenty-five-year term of imprisonment. He appeals. We affirm.

Cotton argues (1) the statements he made to the police were involuntary because he did not understand his *Miranda* rights or the documents he signed at the police station and (2) there was insufficient evidence to support his conviction for second-degree sexual abuse.

I. Voluntariness of Statement.

Defendant complains the trial court erred in overruling his motion to suppress his incriminating statement. He claims his statement was involuntarily given. Our review of this issue is de novo based on the totality of the circumstances involved in the interrogation of defendant. *State v. Rhomberg*, 516 N.W.2d 803, 807 (Iowa 1994).

When a confession is challenged as being involuntary, the State is charged with proving voluntariness by a preponderance of the evidence. *State v. Reid*, 394 N.W.2d 399, 402 (Iowa 1986) (citations omitted). The test for voluntariness is "whether the defendant's will was overborne by the police officers" considering "the totality of the circumstances." *Id.* (citations omitted). Factors relevant to a determination of voluntariness include:

> "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, the 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. Vincik, 398 N.W.2d 788, 790 (Iowa 1987) (quoting *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983)).

A review of these factors, as they apply to defendant here, demonstrates defendant's statement was voluntarily given. Defendant, at age thirty-three, is not of tender years. He is a high school graduate and prior to incarceration was employed

at Cedar Valley as a concrete worker. He has previous employment experience as a dishwasher and a janitor. Officer Engel advised defendant of his rights. Defendant appeared to listen and stated he understood and wanted to talk. He executed a *Miranda* waiver form. The questioning was done by one officer, Officer Engel, and was conducted in an interview room. The interview lasted approximately three and one-half hours, and defendant was given breaks including an opportunity to use the bathroom. He was also given a glass of water as he requested.

Although defendant had no prior criminal record, Officer Engel explained the nature of the complaint and testified defendant appeared to grasp the seriousness of the situation. Defendant appeared alert and not overly nervous at the time. Defendant at no point requested an attorney.

There was evidence defendant has a lower than normal level of intelligence. Estimates of his IQ range from 67 to 80. Mental subnormality on the part of one confessing a crime does not of itself deprive the confession of voluntariness or bar its admission in evidence provided the subnormality has not deprived the person in question of the capacity to understand the meaning and effect of the confession. *Rhomberg*, 516 N.W.2d at 806-07 (defendant was a fifteen-year-old with IQ of 80); *Reid*, 394 N.W.2d at 401-04 (IQ between 74 and 77); *State v. Fetters*, 202 N.W.2d 84, 88-90 (Iowa 1972) (IQ of 67); *State v. Holderness*, 191 N.W.2d 642, 644-47 (Iowa 1971) (defendant could neither read nor write and had IQ of 77). In the present

case, both Officer Marshall and Officer Engel testified defendant was able to understand and answer the questions that were asked of him.

Even accepting defendant's low IQ, it does not appear from the totality of the circumstances that his will was overborne by the police officer who questioned him. He remained calm and comprehended the nature and extent of his constitutional rights, making a considered and voluntary choice to waive them. The motion to exclude defendant's statement was properly overruled.

II. Sufficiency of the Evidence.

The standard of review for challenges to the denial of a motion for judgment of acquittal is well-settled. We view the evidence in the light most favorable to the State. *State v. Rojas-Cardona*, 503 N.W.2d 591, 594 (Iowa 1993). We uphold a trial court's refusal to grant a motion for judgment of acquittal if there is substantial record evidence to support the charge. *Id.* Evidence is substantial if it could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* (citing *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981)).

After being returned by defendant, the victim appeared distraught to her mother. The victim told her mother defendant put his "private" in her vagina. The mother of the victim testified she then examined B.G. and observed white secretions on her labia. The vaginal area also appeared red.

B.G. was examined at the hospital and a sexual assault examination was performed by a doctor. Laboratory analysis revealed spermatozoa on B.G.'s labia smear. Seminal fluid was also found on B.G.'s swimsuit bottom. The seminal fluid stain was determined to be from a seminal fluid donor who is a Group O secretor. Defendant is included in the approximately thirty-six percent of Caucasian males who are possible seminal donors. Additionally, a pubic hair similar to that of defendant was recovered from the seat cover in defendant's car.

The factfinder in this case was required to find beyond a reasonable doubt defendant committed a sex act on B.G. on or about the 12th day of July, 1993, and that B.G. was under the age of twelve. *See* Iowa Code § 709.1 and 709.3(2) (1993). We determine there was substantial evidence presented to prove defendant guilty beyond a reasonable doubt of the crime of sexual abuse in the second degree.

We affirm the conviction.

AFFIRMED.

Cady, J., concurs; Sackett, J., concurs specially.

SACKETT, J. (concurring specially)

I concur specially. I agree with the majority, except I consider a three and one-half hour interview a lengthy interview.