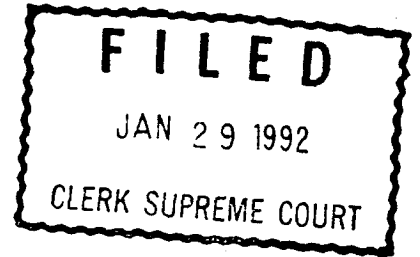


IN THE COURT OF APPEALS OF IOWA

No. 1-338 / 90-818



STATE OF IOWA,

Appellee,

vs.

ROBERT DEAN HEIDEN,

Appellant.

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Appeal from the Iowa District Court for Dallas County,
Peter A. Keller, Judge.

Heiden appeals from his conviction, following a jury trial, for first-degree murder. He contends the district court should have suppressed certain evidence. He also contends the district court should have granted him a mistrial. Finally, he contends the district court erred by submitting a felony murder theory to the jury, where the trial information failed to specify the underlying felony which gave rise to the theory. **AFFIRMED.**

William R. Byers, Adel, for appellant.

Bonnie J. Campbell, Attorney General; Sheryl A. Soich, Assistant Attorney General; David J. Welu, County Attorney; and F. Montgomery Brown, Assistant County Attorney, for appellee.

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

DONIELSON, P.J.

Martin Eldon Rex was fatally wounded, by gunshots to the head and back, while in the garage behind his home in Perry, Iowa. The shooting occurred at approximately 5:35 a.m. on November 13, 1989, and the body was discovered around 7:30 in the evening. Agents from the Iowa Division of Criminal Investigation were immediately sent to the scene.

After taking a number of statements from family, friends and neighbors, the agents learned that Mr. Rex was in the process of obtaining a divorce from his estranged wife, Lanna Rex. Custody of the parties' three children had apparently been a contested issue between the two. Although police attempted to contact and interview Lanna Rex, she refused to be questioned on the advice of her attorney.

During the investigation, the agents learned that Lanna Rex had dated the defendant, Robert Heiden. Heiden had reported that he had been involved in a one-car accident on a dirt road a few miles outside of Perry approximately one-half hour after Mr. Rex had been killed. On November 14, Heiden was interviewed by DCI agent Joe Diaz at Heiden's place of employment in Perry. The interview lasted for approximately two hours. During the interview, Heiden made no incriminating statements and denied any involvement in the shooting death of Mr. Rex.

On November 16, Heiden called the Perry Police Department and expressed concern for his safety, stating that he thought he had heard a prowler outside his residence the previous evening. Heiden was told to call back later that morning. When Heiden again called the police department, Special Agent David Fees of the DCI answered and suggested that Heiden come to the police department after work in order that his fears could be checked out. Agent Fees also suggested that Heiden could show the agents the route that he had driven prior to his car accident on the morning of the shooting.

Later that afternoon, Heiden arrived at the police department and was introduced to Special Agents John Quinn and Steve Bogel. The agents drove Heiden to his home and requested that Heiden take them on the route that he had traveled the morning of November 13. Heiden complied. When the three returned to the police department, Agent Quinn asked Heiden to accompany the agents to the DCI Headquarters in Des Moines to take a polygraph test.

At first, Heiden was reluctant, but Agent Quinn assured Heiden that the only purpose for such a test was to verify Heiden's statements regarding his whereabouts on the evening of November 12 and the route he had taken the morning of November 13. Heiden, then, agreed to go.

After stopping for food in Perry, they arrived at the Wallace Building in Des Moines at around 6:00 p.m. Heiden was told to wait in the reception area, and he was left

alone there for approximately fifteen to thirty minutes. Heiden was then introduced to Special Agent Dennis Wilbur, the polygraph examiner, who led Heiden into a small room which contained a desk with polygraph equipment on it and two chairs. Agent Wilbur conducted a pre-test interview in which he obtained certain information about Heiden's background, and Heiden executed an acknowledgment and waiver of Miranda rights form which stated, among other things, that he could terminate the test at any time. After the forms were completed, Agent Wilbur left the room to consult with Agents Quinn and Bogel who had taken up observation of the examination on closed-circuit television in the next room.

Agent Wilbur then prepared the list of relevant questions which would be the subject of Heiden's polygraph examination. Agent Quinn testified he told Special Agent Wilbur that the reason for the polygraph examination was to determine the veracity of Heiden's alibi. However, Wilbur testified that Agent Quinn had made no reference to an alibi; but rather, Quinn had told him the purpose of the test was to determine Heiden's involvement in the shooting death of Mr. Rex.

Special Agent Wilbur reentered the room and went over the relevant questions with Heiden. In administering the polygraph test, Agent Wilbur read the questions to Heiden and asked Heiden to answer only to himself. Agent Wilbur then performed a "stimulation test" in which he asked

Heiden to pick a number, and after a series of questions Wilbur correctly told Heiden the number that he had picked. Wilbur then asked Heiden to verbally respond to the relevant questions. After the third question, however, Agent Wilbur discontinued the test. He immediately told Heiden that he had not been telling the truth and that he had been deceptive.

Agent Wilbur then left the room at approximately 8:25 p.m. Two minutes later, Agent Quinn entered the room to talk to Heiden. Twenty minutes later, Agent Wilbur joined them. Heiden had made no incriminating statements, but at approximately 9:00, Heiden began to cry. A few minutes later, Heiden told Agents Quinn and Wilbur that he wanted to go home, and he asked to leave.

Despite Heiden's request, Agents Wilbur and Quinn continued to question him stating that they needed to know what happened on the morning of the shooting. They stated that they knew Heiden had been involved.

At approximately 9:18 p.m., Heiden stated that he wanted to go home and that he would get back with them. He also stated that he needed to talk to someone. At approximately 9:20 p.m., Heiden asked not to be further pressured, and he also stated that he was not going to say anything more.

Nevertheless, Agent Quinn continued to question Heiden. Quinn asked Heiden about the location of the gun, stating that he did not want any children to find it and

hurt themselves with it. At that time, Heiden incriminated himself by saying that the gun was in a location where it would not be used to hurt anyone. He also stated that no one else was involved in the shooting and that he had not meant to hurt Mr. Rex but had wished only to talk to him. At 9:26 p.m., the interview ended, and at 9:40 p.m., the three departed in Agent Quinn's vehicle for the drive back to Perry. On the way to Perry, Agent Bogel continued to question Heiden about the shooting, but Heiden fell asleep about halfway home.

Heiden returned home around 10:20 p.m., and he claims to have laid awake all night thinking about what he had told the agents in Des Moines. He testified that he dwelled upon what would happen to him as a result of his statements implicating him in the shooting death of Martin Rex. The next morning, Heiden was picked up at his home and given a ride to work by a co-worker, David Pillow.

From work, he called his mother, Patricia Heiden, to whom he made incriminating statements. After talking with his mother, Heiden was taken to the Perry Recreation Center by another co-worker, Larry Parker. During the ride, Heiden made incriminating statements to Parker. When he arrived at the recreation center, Heiden called Lanna Rex. She noticed his voice sounded unusual, and after the conversation, she called her attorney. Her attorney contacted the DCI, and agents made arrangements to place a tape recording device on Lanna Rex's phone.

Meanwhile, Heiden had returned to his home with his mother and two brothers. He again made statements to his mother and brothers regarding his involvement in the shooting death of Mr. Rex. They, then, left his home and went to a restaurant in Perry. From the restaurant, Heiden again phoned Lanna Rex. During their conversation, Heiden made certain inculpatory admissions. The conversation was recorded.

The family then drove to a number of hospitals in Des Moines so that Heiden could get what he termed "help". They were eventually referred to Polk County Victim Services. Once there, Heiden told the receptionist, Kathy Wenger, and a counselor, Rich Joens, that he had shot someone. Joens referred Heiden to John Wellman at the Offender Advocate's Office in Des Moines.

While Heiden was in Wellman's office, Wellman received a phone call from David Welu, the Dallas County Attorney, who informed Wellman that an arrest warrant had been issued for Heiden. Heiden turned himself in to the Dallas County Sheriff's Office in Adel.

Heiden was charged with the first-degree murder of Martin Rex under alternative theories of premeditation and felony murder. On January 31, 1990, Heiden filed an evidentiary suppression motion. He sought to suppress all incriminating statements which he made to law enforcement officials on the evening of November 16, 1989, on the grounds that the statements were the product of coercive

police conduct rendering them involuntary. Heiden also sought to suppress all incriminating statements made to Larry Parker, Patricia Heiden, Chad Heiden, Wade Heiden, Lanna Rex, Special Agent John Quinn, Kathy Wenger, and Rich Joens on November 17, 1989. He argued those incriminating statements were as much the product of the illegal police coercion as the statements made the evening before. Finally, Heiden sought to suppress the gun which had been retrieved by law enforcement officials guided by the map given to Special Agent Quinn by Heiden.

The suppression motion was overruled, and Heiden employed the defense of diminished responsibility. Accordingly, at trial he offered his doctors' testimony which incorporated his own account of the shooting. Heiden's account was that he had gone to Martin Rex's house to talk to him, but he had seen his father's face transposed on Martin Rex's face. This phenomenon, it was contended, led Heiden to shoot the decedent.

A jury found Heiden guilty of first-degree murder. He has appealed from the resulting conviction. Heiden contends the district court should have suppressed certain evidence. He argues that incriminating statements he made to a DCI polygraph examiner were involuntary. Therefore, he argues, the subsequent incriminating statements he made to several other people should have been suppressed because they were "tainted fruits" of the initial involuntary statements to the DCI agents. In addition, he argues that

the murder weapon should have been suppressed because its discovery was also a "tainted fruit" of the initial involuntary statement to the polygraph examiner.

Next, Heiden contends the district court should have granted his motion for a mistrial. He argues he was prejudiced by the cumulative effect of (1) a co-worker's testimony that Heiden had complained of a raw deal on an earlier rape charge, and (2) testimony that he was "just off probation" at the time of the present offense. The State responds that any prejudice resulting from the testimony was cured by a cautionary instruction.

Finally, Heiden contends the district court erred by instructing the jury on a felony murder theory. Heiden argues the felony murder theory should not have been submitted because the trial information did not specify the underlying felony (first-degree burglary) upon which the felony murder theory was based.

I. Involuntary Confession. We first address Heiden's contention that his inculpatory statements were made involuntarily.¹ When the defendant alleges error involving

1. The Iowa Supreme Court has noted the difference between the voluntariness of a waiver of Miranda rights and the voluntariness of a confession. See State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976) (the question of whether the statements received were made after an effective waiver of Miranda rights and the question of whether the statements were made voluntarily are separate issues).

On appeal, the defendant contends only that his statements were not voluntary. He does not argue that his prophylactic Miranda safeguards were violated, although it is quite clear the DCI agents continued to question him after he had asserted his right to remain silent and possibly his right to counsel. See e.g. Minnick v.

a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). Our standard of review is de novo. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

To be admissible as evidence, incriminating statements made by a defendant must have been made voluntarily. Id. at 127. The State bears the burden of establishing, by a preponderance of the evidence, that the statements were made voluntarily. Id.

A statement is made voluntarily if it is "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." State v. Snethen, 245 N.W.2d 308, 315 (Iowa 1976). In State v. Davis, 446 N.W.2d 785 (Iowa 1989), the Iowa

Mississippi, U.S., 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990); Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)(once the putative defendant has asserted his or her right to counsel the authorities may not reinterrogate until he or she has been provided with counsel, despite a prior waiver of his or her Miranda rights); Michigan v. Mosely, 423 U.S. 96, 104 S. Ct. 321, 326, 46 L. Ed. 2d 313, 321 (1975)(the putative defendant's right to cut off questioning must be scrupulously honored); Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966)(despite an initial waiver of rights, if a putative defendant invokes his or her right to remain silent the interrogation must cease).

We consider any argument the defendant may have had on this issue to be waived. Iowa R. App. P. 14(a)(3).

Supreme Court stated "[a]n incriminating statement is not involuntary in the constitutional sense unless it can be established that it was extorted from the defendant by means of coercive activity. Id. at 789 (citing United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987)). Furthermore, to be admissible, a confession must not have been extracted by threats or violence, nor obtained by any direct or implied promises, however slight, nor by exertion of any improper influence. State v. Hrbek, 336 N.W.2d 431 (Iowa 1983).

In State v. Davis, the supreme court stated:

No one factor is determinative of the voluntariness of an admission. Hodges, 326 N.W.2d at 348. Many factors bear on the issue of voluntariness. These include 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; defendant's ability to understand the questions; 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. (citations omitted). In the event the questioning was custodial, defendant's knowledge and waiver of his Miranda rights and the length of his detention would also be considered. Id.

446 N.W.2d at 789.

After considering these factors in light of the totality of the circumstances, we conclude the State has failed to prove by a preponderance of the evidence that Heiden's inculpatory statements to the agents on the evening of November 16 were made voluntarily. We believe that the cumulative effect of several factors surrounding

Heiden's interrogation served to overbear his will and caused him to make admissions involuntarily.

We find that Heiden began to cry during the post-test interrogation, and before making any incriminating statements, he asked to leave, he asked to be allowed to consult with someone, and he asked that the questioning be curtailed. We find that Heiden's intelligence quotient is below normal, being approximately eighty-four. We find Heiden was kept at the DCI headquarters, away from home and without friends or family to provide support, for a protracted period of time. We also consider and weigh the effect that the polygraph test had on Heiden. See Cullison, 227 N.W.2d at 129. From the record, it appears that the polygraph was used in this case as no more than a tactic to gain leverage on Heiden. The record does not contain sufficient analysis of the results of the polygraph test to allow us to make an evaluation of whether Agent Wilbur was deceptive in his explanation to Heiden of the test results. Finally, we find the agents intentionally deceived Heiden regarding the content of the polygraph questioning. Heiden was coaxed to accompany the agents to Des Moines by Agent Quinn's representations that the polygraph test would focus only on Heiden's alibi and the route he had taken prior to his accident on the morning of the shooting. The scope of the actual questioning was, indeed, much broader.

In summary, we cannot say that the statements made by Heiden on the evening of November 16, 1989, were the product of a free and unconstrained choice, made by Heiden when his will was not overborne. The incriminating statements made to the DCI agents by Heiden on November 16, 1989, were made involuntarily.

However, the statements made by Heiden on November 16, 1989, were not introduced into evidence by the State at trial. Rather, the State used statements made by Heiden to various individuals the day after the interrogation. It is the trial court's ruling on the admissibility of the subsequent admissions that Heiden challenges.

II. Subsequent Admissions. We next address Heiden's argument that the inculpatory statements he made to Larry Parker, Patricia Heiden, Chad Heiden, Wade Heiden, Lanna Rex, Special Agent John Quinn, Kathy Wenger, and Rich Joens on November 17, 1989, were so inextricably linked to the statements he had made the night before as to make them inadmissible as well.

We have found that the inculpatory statements made by Heiden on November 16 were coerced in violation of Heiden's fifth and fourteenth amendment right against compelled self-incrimination. In Wong Sun v. United States, the Supreme Court held that the fruits of a constitutional violation must be suppressed. 371 U.S. 471, 485-86, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441, 453 (1963). In United States v. Bayer, 331 U.S. 532, 540, 67 S. Ct. 1394, 1398,

91 L. Ed. 1654, 1660 (1947), the Court stated:

Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

Id. Therefore, we recognize that the circumstances surrounding a prior involuntary confession may carry over to taint a subsequent confession and thereby render the subsequent confession inadmissible. United States v. Toral, 536 F.2d 893, 896 (9th Cir. 1976). Indeed, under certain circumstances, a prior involuntary confession, standing alone, may be enough to render a subsequent confession involuntary. Id. at 897.

However, other factors must be examined as well. There is no inflexible rule used. Id. at 896. "Even though a prior involuntary confession irretrievably 'lets the cat out of the bag,' a subsequent confession may still be made voluntarily under the proper circumstances." Id.

In Oregon v. Elstad, the Supreme Court stated that "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators" all bear on whether the coercion marking the first statement has carried over to the subsequent statement. 470 U.S. 298, 310, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222, 233 (1985)(citing Westover v. United States, decided together with Miranda v. Arizona, 384 U.S. at 494,

86 S. Ct. at 1638, 16 L. Ed. 2d at 734-35). "In order for this causal chain to be severed, the second confession must be sufficiently an act of free will to purge the primary taint." United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982)(citing Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)). Therefore, our inquiry is for voluntariness. We examine whether the circumstances surrounding Heiden's subsequent admissions demonstrate that those statements were sufficiently acts of free will to purge the taint of the prior involuntary statements.

While on his way to lift weights, Heiden told his co-worker, Larry Parker, "You know the guy that got shot in town this week? . . . I'm the one that did it." Rich Joens, a counselor-advocate for Polk County Victim Services, was at his office when Heiden appeared and told him he wanted to turn himself in and find out "why he did what he did." Kathy Wenger, Joens' secretary, also saw Heiden at the Victim Services office. She heard him say that he killed someone and wanted to know why. Mrs. Heiden, the defendant's mother, received a telephone call from Heiden in which he admitted killing Martin Rex. Heiden told his brothers that "[t]wo people [were in the garage], one watching, one pulling the trigger." Heiden called Lanna Rex twice and told her that he was going to turn himself in to the police in connection with her husband's death.

These statements were made to friends, family, co-workers, and counselors, not to law enforcement agents. The statements were also, for the most part, unsolicited. Furthermore, the statements were made in settings quite different from the DCI headquarters. A substantial amount of time, more than eight hours, had passed between the two sets of statements. Some were even made over the telephone. Finally, the subsequent statements were more detailed than the original ones. We do not believe these inculpatory statements made by Heiden on November 17, 1989, are the tainted fruits of the original involuntary admissions.

Heiden also made additional incriminating statements regarding his involvement in the shooting and the location of the hidden weapon to DCI Agent Quinn on November 17. In fact, he drew Agent Quinn a map. However, these statements were clearly voluntary as well. These statements were more specific than his prior statements, they were made at Heiden's place of employment, and Heiden was not reminded by Agent Quinn of his prior statements. We do not believe these statements are tainted by the initial admissions either.

We find that Heiden's subsequent statements made on November 17 to various individuals were voluntary. They were the products of a free will and were untainted by the original involuntary statements. As such, the trial court properly found them to be admissible.

III. Motion For Mistrial. Heiden next argues the trial court erred in overruling his mistrial motion made after the State had introduced evidence of his prior criminal record. We are not persuaded.

State's witness, Larry Parker, one of Heiden's co-workers, testified on direct examination that Heiden said he had "always kind of gotten a raw deal" and "referred to an incident where he was accused of raping somebody." Additionally, State's witness, Dr. Taylor testified that Heiden had said he hid the murder weapon because he was "just off probation." At the request of defendant's counsel, the trial court, immediately after the testimony was given, admonished the jury to disregard each of these remarks. Outside the presence of the jury, Heiden moved for a mistrial based on these remarks having been heard by the jury, and the trial court overruled Heiden's motion.

The trial court is vested with considerable discretion in ruling on a request for a mistrial. State v. Burrell, 255 N.W.2d 119, 122 (Iowa 1977). We review for an abuse of that discretion. Id. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 132 Vt. 603, 606, 326 A.2d 138, 140 (1974)).

The trial court is in a better position to observe the matter complained of and its effect on the jury. State v. Callender, 444 N.W.2d 768, 770 (Iowa App. 1989). The trial court will be found to have abused its discretion only when the defendant shows prejudice which prevented him from having a fair trial. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977). Generally, an admonition to the jury to disregard inadmissible testimony is sufficient to cure any prejudice, and the trial court made such an admonition in this case. See State v. Hamilton, 335 N.W.2d 154, 160 (Iowa 1983). We are unable to find an abuse of the trial court's discretion in overruling Heiden's mistrial motion.

IV. Jury Instructions. Heiden's final argument on appeal asserts the trial court erred in instructing the jury on the crime of felony-murder. In essence, Heiden contends the State should have specified the particular felony alleged to support the felony-murder charge (burglary) in the trial information. Heiden asserts the State's failure to specify the particular felony violated his right to due process guaranteed by the fifth and fourteenth amendments to the United States Constitution. We disagree.

When the defendant alleges error involving a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart, 234 N.W.2d at 658. Our

standard of review is de novo. Cullison, 227 N.W.2d at 126-27.

In State v. Beyer, 258 N.W.2d 353 (Iowa 1977), the Iowa Supreme Court held that a murder indictment need only specify "A.B. murdered C.D." Id. at 357. We find the trial information in the case at bar was sufficiently specific.

V. Conclusion. We find Heiden's original incriminating statements, made on November 16 to DCI agents, were involuntary. However, his subsequent incriminating statements, made on November 17 to a variety of individuals, were not tainted by the original involuntary statements. Accordingly, Heiden's subsequent statements were properly admitted as evidence at trial. The trial court did not abuse its discretion in overruling Heiden's motion for mistrial based on testimony implying Heiden had been involved in past crimes. Finally, we find the jury was properly instructed on the crime of felony-murder.

The costs of this appeal are taxed to the defendant.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.