IN THE COURT OF APPEALS OF IOWA

No. 0-495 / 09-1500
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH LEE MADSEN,
a/k/a KENNETH LEE DUNLAP,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Defendant appeals his convictions on two counts of second-degree sexual abuse and one count of lascivious acts with a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Ricki Osborn, County Attorney, and Susan Krisko, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., Mansfield, J., and Miller, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

I. Background Facts & Proceedings

During the summer of 2008, D.M.K., born in 1999, his brother, D.K., born in 1998, and their older sister, J.F., were on their front porch talking when the subject turned to sex. D.M.K. said something about D.K., when D.K. responded, "Why don't you tell about you and Kent?", referring to Kenneth Madsen. D.M.K. initially denied anything happened. When confronted a short time later by J.F., D.M.K. began to cry and told her about sexual contact by Madsen.

The next day, D.M.K. and J.F. told their mother. She contacted the Department of Human Services (DHS). On July 14, 2008, D.M.K. and D.K. were interviewed by Donita Fausch of the Regional Child Protection Center. D.M.K. indicated something had happened, but stated he could not tell. D.K. stated he had heard about sexual contact between Madsen and D.M.K.

Jodie Keller, a DHS child protective worker, telephoned Madsen and asked him to come to DHS offices for an interview. Detective Jody Chansler of the Fort Dodge Police Department was present for the interview, which was held on July 23, 2008. The interview lasted between forty-five minutes and one hour, and was not recorded. Madsen admitted that he had measured the erect penises of boys between the ages of eight and ten who had been at his apartment.[1] He had used a ruler he called a "peter meter." Madsen also stated

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[1] Besides D.M.K. and D.K., three other boys sometimes spent time at Madsen's apartment. Madsen took the boys "cop scanning," where they listened to a police scanner and then went to accident scenes. He took them bowling, and allowed them to use a video game system at his apartment.

that between five to ten times boys had masturbated at his apartment. Madsen left after the interview.

Detective Chansler telephoned Madsen and arranged a second interview at the police station on August 6, 2008. This interview was in large part audio recorded, but it was also recorded on a video system that included audio recording. The interview lasted about one to one and one-half hours. Madsen was informed at the beginning of the interview that the door was unlocked and he was free to leave at any time. Madsen stated he had engaged in poor judgment, but did not feel he had done anything all that wrong. Madsen stated that once he had been masturbating, and some boys came in and caught him in the act. Detective Chansler then told Madsen "in order for this case to get wrapped up, in order for you to go along with your life I have to know everything." He asserted there were additional things that had happened, about which Madsen had not told him, and "that's going to keep this investigation open until I get everything and I'm satisfied." Chansler asked, "you don't want this in the [local newspaper]," and asked, "you want it over with now, right?" After prompting, Madsen stated sometimes boys ran around his apartment naked, and that he had sometimes been naked while the boys were around. Madsen stated D.M.K. touched his penis, Madsen told D.M.K. to quit, but D.M.K. continued for about two minutes, and during this time Madsen had an erection, but did not ejaculate.[2] Madsen was free to leave at the end of the interview.

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[2] Madsen also related a disturbing incident in which he claimed D.M.K. and another boy wanted to have anal sex about one and one-half feet away from him on the bed. He

Madsen was charged with several counts of sexual abuse in the second degree and lascivious acts with four different boys. The district court granted Madsen's motion to sever the counts so each victim's case would be tried separately. This case involves only D.M.K. and charges against Madsen for three counts of second-degree sexual abuse and one count of lascivious acts with a child.[3]

Madsen filed a motion to suppress statements he made to Keller and Detective Chansler. The district court determined Madsen's statements during both interviews were voluntary and should not be suppressed. In reference to the first interview, the court noted, "While the fact that that interview was not recorded is bothersome to this court it is not of such an egregious or suspicious nature to require suppression of Defendant's statements." As to the second interview, the court found Madsen discussed the incidents in a matter-of-fact manner, and his statements were voluntary.

The case proceeded to a jury trial. D.M.K. testified that when he was over at Madsen's apartment Madsen would not wear clothes. He related incidents when Madsen would pull down D.M.K.'s pants and measure his penis with a ruler. D.M.K. stated he saw Madsen masturbate, and at times Madsen would place D.M.K.'s hand on his penis while he masturbated. D.M.K. also stated Madsen would touch D.M.K.'s penis, and this "happened pretty often." D.M.K. testified Madsen put his mouth on D.M.K.'s penis. D.K., D.M.K.'s brother, stated

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stated they were unsure how to go about it, so he provided them with some lubricant and helped position them.

[3] After the jury verdict in this case, the charges involving two of the four boys were dismissed.

Madsen measured both his penis and that of D.M.K. with the ruler. D.K. testified he saw Madsen "jacking off" D.M.K. with his hand on D.M.K.'s penis.

Madsen testified he made admissions to Detective Chansler because it was easier to go along with him. He stated he told Detective Chansler what he wanted to hear because he was threatened with public humiliation, and possibly the loss of his job, if he did not cooperate. Madsen denied having any sexual contact with D.M.K.

The jury found Madsen guilty of two counts of second-degree sexual abuse and one count of lascivious acts with a child. The district court denied Madsen's motion in arrest of judgment and motion for new trial. Madsen was sentenced to a term of imprisonment not to exceed twenty-five years on each sexual abuse charge, and ten years on the lascivious acts charge, all to be served consecutively. Madsen appeals his convictions.

II. Recording of Interview

Madsen claims that information obtained as a result of the first interview should be inadmissible because it was not electronically recorded. In *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006), the Iowa Supreme Court stated, "We believe electronic recording, particularly videotaping, of custodial interrogation should be encouraged, and we take this opportunity to do so." Madsen cites to a statement by the Iowa Attorney General that "the *Hajtic* decision should be interpreted as essentially requiring this practice." *See* Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. Crim. Law & Criminology

215, 222 (2009) (quoting Thomas J. Miller, *Cautions Regarding Custodial Issues*, 39 Iowa Police J. 15, 15 (2007)).

The parties agree our review on this issue is de novo. We review the record and make our own evaluation of the circumstances. *See State v. Walls*, 761 N.W.2d 683, 685 (Iowa 2009). However, even if our review were for the correction of errors at law, our conclusion would be the same.

The *Hajtic* decision, 724 N.W.2d at 456, specifically refers to *custodial* interrogation. It is clear that Madsen was not in custody at the time of the first interrogation. Keller, an employee of DHS telephoned Madsen and left a voice message. Madsen returned her call and they set up an appointment at DHS offices in Fort Dodge. The interview was described as "pleasant," and lasted about one hour. Madsen was free to leave, and left at the end of the interview. Madsen was not deprived of his freedom in any significant way. *See State v. Ortiz*, 766 N.W.2d 244, 251 (Iowa 2009). While it would have been better if the interview had been recorded, we conclude that information obtained as a result of the interview was not inadmissible due to the lack of electronic recording.

III. Voluntariness of Statements

A. Madsen claims statements made during the first interview were not voluntary and were obtained in violation of his Fifth Amendment right against self-incrimination.

As noted above, this interview was not recorded. In other circumstances, where there is no dispute as to the words used or their obvious meaning, we review on an evidentiary, not a constitutional basis. *State v. McCoy*, 692 N.W.2d

6, 28 (Iowa 2005). In the present case, however, the record concerning the first interview is not sufficiently clear to review the issue on an evidentiary basis as a matter of law. *See State v. Mullin*, 249 Iowa 10, 15, 85 N.W.2d 589, 601 (1957) (noting issue should be determined as a matter of law "where there is no dispute as to the words used or their obvious meaning and the circumstances surrounding the expressions"). We therefore make a de novo review of the totality of the circumstances. *State v. Countryman*, 572 N.W.2d 553, 558 (Iowa 1997).

The State must prove by a preponderance of the evidence that a defendant's waiver of constitutional rights was knowing, intelligent, and voluntary. *Id.* at 557. A defendant's waiver must not be the result of intimidation, coercion, or deception. *Id.* Looking at the totality of the circumstances, we consider whether "the statements were the products of an essentially free and unconstrained choice, made by the subject at a time when that person's will was not overborne or the capacity for self-determination critically impaired." *State v. Bowers*, 656 N.W.2d 349, 353 (Iowa 2002).

At the suppression hearing, Madsen testified that at the first interview Detective Chansler threatened to keep him there all day if Madsen did not tell him what he wanted to hear. Madsen stated he needed to be at work by 2:00 p.m. and he felt threatened that he would lose his job. He decided "I was going to tell him anything that would get him to let me leave."

Keller denied any threats were made to Madsen during the interview at DHS offices. She testified Detective Chansler was very professional with

Madsen, and pleasant. She stated Madsen "seemed to actually like law enforcement and talking to them." Detective Chansler also denied threatening to keep Madsen at the interview. Madsen stated he needed to leave by a certain time to go to work, and he left well before that time. The interview started at about 11:00 a.m. and ended by noon. Madsen drove his own car to the interview, and left of his own volition.

Madsen was thirty-five years old. He has a high school education and some college. He is a sign language interpreter. Madsen had sixteen weeks of study at the Fort Lauderdale Police Academy and graduated from that program. Madsen admitted he learned at the academy that a person had a right to leave if they were not in custody.

Considering the totality of the circumstances, we conclude the State adequately showed Madsen's admissions during the first interview were voluntary. Madsen voluntarily attended the interview. It was held at DHS offices, and lasted between forty-five minutes and one hour. The evidence does not support Madsen's claim he was told he would not be able to leave if he did not give satisfactory answers. Madsen was able to leave in plenty of time to go to work. We determine the district court properly denied Madsen's motion to suppress his statements made during the first interview.

B. Madsen claims his statements during the second interview violated his constitutional rights and were involuntary because Detective Chansler gave him promises of leniency and threatened him with exposure in the local newspaper. He alleges Detective Chansler told him that if he confessed

everything would return to normal. He also alleges the detective told him that if he did not confess, information about the investigation would get into the local newspaper, the *Messenger.* Madsen asserts that based on Detective Chansler's statements, he made highly incriminating statements.

The transcript of the audio recording shows Detective Chansler asked the following questions and made the following statements, and Madsen responded as shown:

> Q. Okay. You want this to go away right? A. Well yeah.
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> Q. Because you have a good job, you have a life, and you—A. I made a poor choice.
>
> Q. And you want this to be done with—this— . . . . A. I thought it was over. It thought the decision was made . . . . I'm waiting for the other shoe to basically drop right now.
>
> Q. Well here is what I need from you okay and I've explained to you once when we spoke before—you've got—in order for this case to get wrapped up, in order for you to go along with your life I have to know everything. A. Yeah.
>
> Q. And there is more information that I know that happened that you haven't told me about so that's going to keep the investigation open until I get everything and I'm satisfied with. I mean you don't want this in the *Messenger* do you? A. No.
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> Q. You don't want your family—your job to open the *Messenger* and see your photograph and see my name saying that you're under investigation for this, this, this—you want it over with now, right? A. Yes. I'm trying.
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> Q. Well you've got to be—you've got to come clean on everything. A. That's what I'm doing.
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> . . .
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> Q. . . . [A]nd before you answer that think about what I just said about this investigation getting wrapped up and getting over with so you can move on with your life. . . . I'm not arresting you today . . . . Okay there is so much evidence—so much—I got all kinds of videos, statements, evidence—and my last piece is you telling us the truth or this investigation is not going to be open and I'm just going to keep going and keep going so—I need you to make it over with. I can't make it over with you unless [you] help out. A. Well I can't tell you anymore . . . .
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> . . .

> Q. Come on—you've got to be honest with me because right now you're not telling me everything. I know that. Okay. And you know that—I think you're just scared that everybody is going to hear about it. Kent I want to help you. I can't help you. I can't make this go away, okay, until you tell me everything. Until I get that this case is going to be going on. I'm going to have to talk to the *Messenger*, they're going to want to know what's going on. Right now it hasn't got to that point. Right now I can wrap this case up, do my report, and I'm none [sic] with it. Okay. But I'm not there yet because you're not telling me everything. So you need to think real hard what you want out of this case. It's already happened, it's already being dealt with, there is no going back to this not happening. Now you have to move ahead and get on with your life. Right? A. Oh yeah.

After this lengthy exchange Madsen made several incriminating statements.[4]

The foregoing exchanges appear in a transcript, included in the appendix on appeal, of the audio recording of most of the August 6 interview. However, the record also includes the video recording that itself includes audio recording. The video recording shows that the interview in fact included almost one and one-half minutes of conversation occurring before Detective Chansler started the separate audio recording,[5] and included almost two minutes of conversation that occurred after the audio recording device was turned off. During that two minutes Madsen asked the following questions and Detective Chansler gave the following answers:

> Q. So where do we go from here? A. At this point in time, Kent, all I'm doing is, is, is compiling a report. Okay? The county

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[4] Madsen stated sometimes boys ran around his apartment naked, and that he had sometimes been naked while the boys were around. Madsen stated D.M.K. touched his penis, Madsen told D.M.K. to quit, but D.M.K. continued manipulating his penis for about two minutes. Furthermore, he stated that when D.M.K. and another boy attempted to have anal sex he gave them some lubricant, told them how to do it, and helped with his hands to get them into position.

[5] Nothing relevant to the issues presented on appeal appears during this one and one-half minutes.

> attorneys look it over and they will deem whether or not they want to do anything with it. Okay? That's it.
>
> Q. So they still could issue a warrant at this point? A. They could, yes. That is possible.
>
> Q. Wonderful. A. But, I'm not saying that is going to happen and I'm not saying it isn't going to happen. I don't know. They have to look over all the evidence, all the paperwork. It's not going to happen anytime soon. I'll let you know if it does. But they have to review it. Okay? Anything else that you want to discuss . . .?

Where there is no dispute as to the words used, or their obvious meaning, then as a matter of law a court must determine "whether there appeared some assurance that the accused might gain in some manner *relating to his punishment* by issuing the solicited statement relative to his guilt." *Mullin*, 249 Iowa at 15, 85 N.W.2d at 601 (emphasis added). Where it is clear what was said to a defendant, we review on an evidentiary, rather than a constitutional basis. *McCoy*, 692 N.W.2d at 28. "A coerced confession should not be admitted in evidence because of its inherent lack of reliability." *State v. Quintero*, 480 N.W.2d 50, 52 (Iowa 1992). Because this issue is not decided on a constitutional basis our review is not based on the totality of the circumstances, but is for the correction of errors at law. *See McCoy*, 692 N.W.2d at 28.

If a defendant's statement "results from a promise of help or leniency by a person in authority it is not considered voluntary and is not admissible." *State v. Hodges*, 326 N.W.2d 345, 348 (Iowa 1982). Our supreme court has stated:

> An officer can ordinarily tell a suspect 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, rending the suspect's statements involuntary.

Id. at 349. When officers explain just how it will be better or wiser for a defendant to speak, the statements "may suddenly become more than an admonishment and assume the character of an assurance or promise of special treatment which may well destroy the voluntary nature of the confession in the eyes of the law." *Mullin*, 249 Iowa at 16, 85 N.W.2d at 601-02.

Detective Chansler made statements and asked questions some of which when viewed individually or in some combinations might arguably be considered to be promises of leniency. However, the exchanges between Chansler and Madsen that we have quoted, when taken as a whole, demonstrate that Chansler intended, and Madsen understood, that Chansler was referring to his investigation and was indicating only that when he became satisfied Madsen had disclosed everything relevant to the investigation that had transpired, then the investigation would be concluded. Chansler's statements and questions gave no assurance that by cooperating with the investigation Madsen might gain in some manner relating to possible charges or punishment. We find no error in the district court's determination that Madsen's statements in the second interview were voluntarily made and therefore should not be suppressed.

IV. Ineffective Assistance

Madsen asserts that if we find he has not adequately preserved error on the issue of promissory leniency, then this is due to ineffective assistance of counsel. The motion to suppress and defendant's brief in support of the motion clearly raise the issue of whether defendant's statements were the result of any direct or implied promise. We have addressed this issue on the merits, and

conclude we do not need to further address it under a theory of ineffective assistance of counsel.

We affirm Madsen's convictions.

AFFIRMED.