IN THE COURT OF APPEALS OF IOWA

No. 1-144 / 10-0085
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GABRIEL LUIS VASQUEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek (motion in limine), C.H. Pelton (motion to suppress), and Mark J. Smith (trial and sentencing), Judges.

Defendant appeals his convictions on two counts of second-degree sexual abuse and one count of third-degree sexual abuse. **AFFIRMED.**

J.E. Tobey, Davenport, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.

I. Background Facts & Proceedings.

On April 13, 2009, the Bettendorf Police Department received information that C.V., who was then a high school student, alleged she had been sexually abused by her adoptive father, Gabriel Vasquez, when she was between the ages of ten and thirteen. C.V. told officers that she often slept in her parents' bed when she was younger and her mother often worked late, so that she and Vasquez would be alone. She stated Vasquez touched her breasts and vagina with his hands and his lips. She stated he rubbed his penis against her vagina without actual penetration.

Officers went to Vasquez's place of employment and asked him to accompany them to the police station. Vasquez drove himself to the police station. A door was unlocked to permit him into the back part of the station, and he was shown to an interview room. Officer Jeffrey Buckles interviewed Vaquez for about one hour and forty-five minutes. Officer Buckles told Vasquez he was not under arrest, and several times he told Vasquez he was free to leave. During the course of the interview, Vasquez made inculpatory statements admitting he had engaged in sexual acts with C.V. After the interview, Vasquez drove himself back to work.

Vasquez was charged with two counts of sexual abuse in the second degree, in violation of Iowa Code section 709.3(2) (2009), and one count of sexual abuse in the third degree, in violation of section 709.4(2)(b). The minutes of testimony contained information that C.V. had attempted suicide on two occasions by taking pills she found in the home.

Vasquez filed a motion to suppress, claiming he was in custody during the interrogation and a *Miranda* warning should have been given. His motion was based on the Fourth, Fifth, and Sixth Amendments of the United States Constitution, Iowa statutory law, and the Iowa Constitution. After a suppression hearing the district court concluded:

> The Court finds from the totality of the circumstances that the defendant was somewhat intimidated by the assertiveness of the detective but that a reasonable person in defendant's position would understand that he was not coerced or misled or deprived of freedom in any significant way. Thus, the State has proven that his statement was voluntary.
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> The Court concludes that defendant was never in custodial interrogation when he gave the inculpatory statements. Therefore, defendant's police interview was not violative of his Fifth Amendment right against self-incrimination, nor is it a violation of due process.

Vasquez also filed a motion for additional documentation seeking access to C.V.'s psychiatric records. He believed the records contained exculpatory material concerning C.V.'s stated reasons for her suicide attempts.[1] At a hearing on the motion, the State asserted it did not plan to introduce any evidence concerning the suicide attempts. There was an in-camera inspection of C.V.'s medical records. The district court concluded, "the Court is unable to locate anything in the medical records that would be relevant to the trial of this case."

The case proceeded to a jury trial. C.V. testified as outlined above. No evidence was presented concerning her suicide attempts. Vasquez testified and denied engaging in the acts attributed to him by C.V. He gave the theory that

[1] After the second suicide attempt, C.V. began to receive counseling. Vasquez believed C.V. did not tell her psychologist she had been sexually abused and instead gave different reasons for her suicide attempts. He believed C.V. would testify at trial that she attempted suicide because of the sexual abuse, and he claimed the psychiatric records should be available to him to impeach her testimony.

C.V.'s biological father recently reentered her life, causing her some confusion about her relationship with him, and she then made these accusations.

The jury returned a verdict finding Vasquez guilty of the charges against him. He was sentenced to a term of imprisonment not to exceed twenty-five years on each of the counts of second-degree sexual abuse, to be served consecutively, and a term not to exceed ten years on the charge of third-degree sexual abuse, to be served concurrently with the first two counts. Vasquez appeals his convictions.

II. Motion to Suppress.

A. Our review of constitutional claims is de novo. *State v. Peterson*, 663 N.W.2d 417, 423 (Iowa 2003). Under the Fifth Amendment, when a person is questioned by officers while in custody, the person must be warned "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966). This requirement is made applicable to the states through the Fourteenth Amendment. *State v. Simmons*, 714 N.W.2d 264, 274 (Iowa 2006). If there has been a violation of this rule, no evidence obtained as a result of the interrogation may be used against the person. *State v. Trigon, Inc.*, 657 N.W.2d 441, 444 (Iowa 2003).

Miranda warnings do not need to be given unless there is both custody and interrogation. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). A person is in custody if the person has been formally arrested or the person's freedom of movement is restricted to a degree normally associated with a formal

arrest. *State v. Bogan*, 774 N.W.2d 676, 680 (Iowa 2009). We apply an objective test to determine how a reasonable person in the suspect's position would have understood the situation. *Simmons*, 714 N.W.2d at 274. We consider the following factors[2] in determining whether a person is in custody: (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the person is confronted with evidence of his guilt; and (4) whether the person is free to leave the place of questioning. *State v. Ortiz*, 766 N.W.2d 244, 252 (Iowa 2009) (citing *State v. Miranda*, 672 N.W.2d 753, 759 (Iowa 2003)).

Concerning the first factor, two plain-clothed police officers asked Vasquez to come with them to the police station, stating they would give him a ride or he could drive his own vehicle. Officer Buckles testified that he told Vasquez he was not under arrest and that a report had been filed that he needed to talk to him about. Vasquez elected to drive his own vehicle, and the officers followed him.[3]

On the second factor, officer Buckles testified the purpose of the interview was "[t]o gain greater knowledge, information about the case to allow Mr.

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[2] We reject Vasquez's request to add a fifth, "good faith," element based on *Missouri v. Seibert*, 542 U.S. 600, 622, 124 S. Ct. 2601, 2616, 159 L. Ed. 2d 643, 661 (2004) (Kennedy, J., concurring) (finding a "two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning"). The case of *Seibert* did not involve an issue of whether the defendant was in custody at the time she was questioned, but whether her statements should be suppressed based on custodial interrogation prior to a Miranda warning. *Seibert*, 542 U.S. at 604, 124 S. Ct. at 2605, 159 L. Ed. 2d at 650.

[3] Vasquez testified at the suppression hearing that he called his wife as he was driving and his telephone beeped to alert him he had another incoming call. He stated he believed the officers were calling him in an attempt to interrupt his call, but he continued to talk to his wife. Vasquez also testified that he saw a marked police car as he drove to the police station, and he believed officers were keeping him on the route to the station. There is absolutely no evidence to support either of Vasquez's suppositions.

Vasquez the opportunity to give his side of the story or explain." The interview took place at the Bettendorf Police Station in an interview room. Vasquez was let through one locked door into the back part of the police station.[4] Vasquez entered the room first and so was able to choose where he wanted to sit. The interview took about one and three-fourths hours and was videotaped.

Moving to the third factor, during the interview officer Buckles mentioned C.V.'s two suicide attempts and asked if Vasquez had any knowledge of inappropriate contact by adults with C.V. As the interview progressed Officer Buckles confronted Vasquez with the allegations made by C.V.

Finally, Vasquez was told several times during the interview that he was not under arrest at that time and he would be free to leave at the end of the interview. In fact, Vasquez left after the interview and drove himself back to his place of employment.

After considering these four factors, we concur in the district court's conclusion that a reasonable person in Vasquez's position would not believe he was in custody. Vasquez was informed he was not under arrest, that he was free to leave, and that he would be able to return to work. He drove himself to the police station and drove back to work after the interview. Because he was not in custody, there was no requirement that *Miranda* warnings be given. *See Countryman*, 572 N.W.2d at 557. We affirm the district court's conclusion that

[4] Officers testified that no key or pass was needed to exit from the interview room, or from the back part of the police station. They did not explain this to Vasquez. Officer Buckles, however, testified he came in and left the interview room several times, and Vasquez would have been able to see that he did not need a key to do so.

there was no violation of Vasquez's Fifth Amendment right against self-incrimination.

B. Vasquez claims his statements should be suppressed because they were not voluntary. He claims he made the statements in exchange for a promise of custodial leniency. On voluntariness, the motion to suppress states only, "Gabriel Vasquez was not a voluntary participant in the interrogation which was started in motion by a demand that he attend and cooperate, a significant restraint . . . ." The motion does not raise the issue of custodial leniency, and the district court did not address this issue. We conclude it has not been preserved for our review. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (noting we do not consider issues raised for the first time on appeal, even those of a constitutional dimension).

C. Vasquez claims his statements should be suppressed based on Article I, section 9 of the Iowa Constitution, which provides, "no person shall be deprived of life, liberty, or property, without due process of law." The district court stated, "The Court applies the law of the Fifth Amendment of the United States Constitution," and did not mention the Iowa Constitution. "Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal." *State v. Manna*, 534 N.W.2d 642, 544 (Iowa 1995) (finding issue had not been preserved although arguably raised in a motion to suppress where the district court did not rule on it and the defendant did not request such a ruling). We conclude this issue has not been preserved for our review.

III. Psychological Records.

A. Vasquez asserts the district court abused its discretion in determining C.V.'s psychological records were inadmissible for impeachment purposes. He states C.V.'s credibility was a pivotal issue. He argues he should have been able to present evidence of statements C.V. made to medical care providers that was inconsistent with later statements she made to law enforcement officers. Before trial the court inspected the records and determined there was nothing that would be relevant to the case. The issue was raised again during the trial, and the court found there was no evidence of inconsistencies, and the evidence would be more prejudicial than probative.

Under Iowa Rule of Evidence 5.608(*b*), in its discretion, the court may permit inquiry into specific instances of conduct on cross-examination if the evidence is probative of a witness's character for truthfulness or untruthfulness. *State v. Knox*, 536 N.W.2d 735, 740 (Iowa 1995). On this issue the court considers the probative value of the evidence. *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994). The court also considers whether the probative value is outweighed by the danger of unfair prejudice. *Knox*, 536 N.W.2d at 740. We will disturb the court's ruling only if its discretion has been obviously abused. *State v. Frazier*, 559 N.W.2d 34, 38 (Iowa Ct. App. 1996).

After examining the medical records, the court determined they were not relevant to the trial of the case. In instances where the evidence is only minimally probative, the district court does not abuse its discretion by determining the evidence is inadmissible. *See Smith*, 522 N.W.2d at 593. Based on a finding

the medical records were not probative to the issue of C.V.'s credibility,[5] we conclude the district court did not abuse its discretion in ruling the records were not admissible.

B. Vasquez claims the district court's ruling deprived him of his constitutional right to present a defense. On constitutional issues, our review is de novo. *State v. Cashen*, 789 N.W.2d 400, 405 (Iowa 2010). A defendant has a constitutional right to present a defense.[6] *Id.* "[A] criminal defendant has a due process right to present evidence to a jury that might influence the jury's determination of guilt." *Id.* at 407. A defendant's right to produce evidence involves evidence that is relevant to the defendant's guilt or innocence. *Id.*

There can be no constitutional violation if the suppressed evidence is not relevant to the charge. *See Knox*, 536 N.W.2d at 741. "The Constitution, however, ordinarily requires only the introduction of otherwise relevant and admissible evidence." *State v. Clarke*, 343 N.W.2d 158, 161 (Iowa 1984). We have already determined the evidence in question was not relevant, and even if relevant, the prejudicial effect outweighed its probative value. In these circumstances defendant's "Sixth and Fourteenth Amendment rights were not implicated by the district court's action in denying admission of this marginally relevant, highly prejudicial evidence." *See Knox*, 536 N.W.2d at 741.

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[5] We note there is absolutely no probative evidence in the record to show C.V. made inconsistent statements. Vasquez's claims that C.V.'s medical records show she made statements inconsistent with her later statements to police officers is pure speculation.

[6] The trial in this case was before the ruling in *Cashen*, 789 N.W.2d at 408-10. After a hearing, the court ordered the records would be examined by the court, an attorney for the State, and an attorney for the defendant. The court ultimately concluded the records did not contain exculpatory evidence. Even under *Cashen*, 789 N.W.2d at 409, defense counsel is ultimately entitled to copies of only records containing exculpatory evidence.

IV. Sentencing.

Vasquez claims the district court improperly considered his continuing denial of guilt in imposing consecutive sentences on the two counts of second-degree sexual abuse. At sentencing, the district court stated:

> I agree with counsel for the State that your statements before the jury were not to be believed, and obviously, the jury's verdict reflects that. Your statements to the officer, I think, were detailed and unforced, and they indicate multiple offenses against this young victim. You had the opportunity not to do that, obviously. I agree with counsel for the State that I think you pose a risk to the community due to the multiple times that you committed these offenses, based on the statements you made to the officer and based on the jury's verdict. . . . I believe based on the multiple offenses, and especially the facts and circumstances that reflect the offenses and the gravity of those offenses, that consecutive sentences on Counts 1 and 2 are required in order to protect the community and further victims should you be allowed to be released earlier than that.

The court's statement does not show it relied upon defendant's lack of remorse in determining his sentences for second-degree sexual abuse should be served consecutively. Furthermore, the court can properly consider a defendant's lack of remorse. *See State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005). We conclude the district court did not abuse its discretion in sentencing Vasquez.

We affirm Vasquez's convictions.

AFFIRMED.