IN THE COURT OF APPEALS OF IOWA

No. 2-019 / 11-0530
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY ANGEL ZARATE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Anthony Zarate challenges a district court's denial of his motion to suppress evidence of his confessions induced by promises of leniency. **AFFIRMED IN PART, REVERSED AND REMANDED IN PART.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant State Appellate Defender, and Mary K. Conroy, student intern, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, J.

TABOR, J.

The district court found Anthony Zarate guilty of five counts of first-degree robbery based on a stipulated record. The issue Zarate presents on appeal is whether the district court erred in denying the motion to suppress his confessions. Because the police officer induced seventeen-year-old Zarate's confession through what could reasonably be perceived as promises of leniency and the subsequent interviews exploited that initial illegality, we reverse the suppression ruling as to all of the incriminating statements. But given the overwhelming evidence of Zarate's participation in the September 24, 2009 robbery of an adult bookstore—including the corroborated testimony of his two accomplices—we find admission of his confession was harmless beyond a reasonable doubt and affirm the district court's finding of guilt on that count.

I. Background Facts and Proceedings

During August and September 2009, Zarate, along with one or two confederates, committed a string of five armed robberies around Waterloo. After being arrested for the fifth robbery, on September 24, 2009, Zarate confessed to his role in each of the separate crimes. We glean the following synopsis of each offense from the minutes of evidence, and attached police reports, which constituted the stipulated record presented at Zarate's bench trial.

The first robbery occurred on August 22, 2009. Zarate and Bradly Woods wore blue bandanas when they approached Derrell Gates, who was walking to a friend's house on the west side of Waterloo just after four in the morning. Woods and Zarate had followed Gates from an after-hours bar because they believed he

had been staring at them. Zarate pointed a handgun at Gates and threatened: "Want to get shot, give me everything you got!" Gates handed over his wallet, and the two men took off running. Milos Matijevic was waiting for Woods and Zarate in his car a few blocks away. Gates reported the hold-up to police officers at a nearby Kwik Star. Police eventually found Gates's wallet while executing a search warrant at Woods's residence.

The second robbery was a home invasion on September 2, 2009. Three men wearing bandanas and carrying pistols barged into a house at 235 Western Street. The intruders included Woods, Zarate, and a third man known as Pierre. Woods and Pierre used their guns to strike the victims. The intruders asked the residents if "they wanted to die and if they needed to kill someone for [them] to listen." The intruders patted the victims down for cell phones and money, taking about $200 from one victim's wallet. Zarate took marijuana from a toolbox in the living room.

The third and fourth robberies happened in quick succession. On September 11, 2009, around 11 p.m., Danielle West was sitting in a car with her boyfriend, William Downs, in Tibbetts Park. Two men wearing bandanas appeared at the side windows, pointed guns in the victims' faces, and demanded money. Matijevic had pulled his car behind Downs's parking spot so Downs could not back out. The gunmen, Zarate and Woods, took West's purse, Downs's wallet, his car keys, about $100 in cash, and both victims' cell phones.

Zarate then proposed robbing a taxi-cab driver. The trio used Downs's cell phone to call Kip's Yellow Cab in the early morning hours of September 12, 2009. Matijevic and Zarate waited in Mativejic's car while Woods took the cab ride. Just before 4 a.m., cab driver David Garner heard a gun being racked in his backseat and felt a barrel pressed behind his ear. The passenger, Woods, threatened to kill Garner and commanded: "give me all the money." Garner, who dropped off his cash with the cab company every hour, had only twenty dollars, which Woods grabbed before leaving the cab.

The fifth and final robbery took place in the early morning hours of September 24, 2009. Zarate and Woods robbed the Romantix Adult Emporium at gunpoint, while Matijevic drove the get-away car, a silver 1997 Dodge Avenger. Waterloo police stopped the Avenger less than fifteen minutes after dispatch received the robbery call. Police arrested all three occupants and read them their *Miranda* rights. Before transporting the three suspects to the police station, an officer escorted them into the store, where a clerk identified Zarate and Woods as the men who robbed her.

At the police station, Officer Robert Duncan again advised Zarate of his *Miranda* rights. Zarate agreed to speak to the officer. Their videotaped conversation is at the center of the controversy on appeal. The interview began just after 3 a.m. and spanned more than two hours, though the time the officer spent questioning Zarate totaled less than forty-five minutes.

Officer Duncan launched the interview by telling Zarate he was "caught with his hand in the bag" and was looking at a charge of first-degree robbery which carried a prison term of twenty-five years.[1] Zarate responded that he "wasn't even in there before they came and got me." The officer told Zarate not to lie, that the evidence lined up against Zarate and he was "doomed," and that unless he wanted to be honest they were done talking. The officer went on to say that he knew other people were involved and that there was "lots of other stuff going on around here that we need to get cleared up." At just about five minutes into the interview, the following exchange occurred:

> Duncan: Dude, I'm not going to listen to you lie to me, all right? So what happened tonight?
> Zarate: So either way. What's gonna happen?
> Duncan: You're getting charged with first degree robbery.
> Zarate: That's what I'm getting charged with?
> Duncan: Yeah. And whether or not you spend twenty-five years in prison is up to you. If you want to sit there and lie to me about it, we're done talking. I'll move on to the next case.
> Zarate: . . . I just want to go home and be with my kid.
> Duncan: You ain't going home. You ain't gonna be with your kid.
> Zarate: I ain't never gonna be with my kid?
> Duncan: It's up to you. You ain't going home right now.
> Zarate: I want to be with him though, so what can I do about that?
> Duncan: Be truthful. That's all I'm asking. Don't lie to me.
> Zarate: Be truthful. . . .
> Duncan: What happened tonight?
> Zarate: How long would it take for me to be with my son?
> Duncan: That's up to you.
> Zarate: That's up to me?
> Duncan: That's completely up to you.
> Zarate: So everything is just up to me?
> Duncan: Yeah.

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[1] The State offered recordings of the interviews as exhibits, but they were not transcribed. We rely on our own opportunity to listen to the recordings in quoting the statements at issue in this appeal.

> Zarate: Okay . . . I prefer to go home than to stay here.
>
> Duncan: Then don't lie to me man.
>
> Zarate: I'm gonna try . . . if you say that you can help me out. . . . .
>
> Duncan: Whatever you tell me Anthony right now, whether you say you did it or you didn't do it, you're gonna get charged, okay? Whether you say you did it or didn't do it, I'm confident you'll get convicted of it, okay? But there's a lot of different aspects here that we need to talk about.
>
> Truthful people and other people that are involved in this have all kinds of different areas, things that could happen to them. And I think there's a lot more than just what happened tonight that's been going on. And I think that could play into what could happen to you in the future.
>
> You're only seventeen years old. I don't want to have to put you in front of a judge and a jury and go to trial with you because I'm telling you, I'm being straight up honest with you, because I've been doing this a long time and I've sat there and talked to sixteen and seventeen year old kids who've been involved in armed robberies. Dude, you're dead to rights here. You can say you weren't there, you weren't there, you weren't there, all you want. You're dead to rights. And we'll go that route and you'll do twenty-five years, seventeen year minimum. It's a forcible felony, it's first-degree robbery, it's seventeen year minimum. And you're only seventeen, be thirty-four before you get out.
>
> Zarate: I don't want that.
>
> Duncan: All right, I mean, your kid's gonna be what? Eighteen, nineteen?
>
> Zarate: That's a lot of years to miss out on.
>
> Duncan: And I don't have a problem with that if you don't want to be truthful with me.
>
> Zarate: I do, I just . . . .

Officer Duncan again asked Zarate: "what went down tonight?" And Zarate then confessed to committing the armed robbery of the adult book store with Woods and Mativejic. Zarate also told the officer he had "heard about" robberies involving a taxi driver and a home invasion, but did not admit his own involvement in them. Zarate repeatedly told the officer that Woods was the ringleader and Zarate was afraid to refuse when Woods asked him to participate in the robberies.

Near the end of the first interview, Zarate initiated the following exchange with Officer Duncan:

> Zarate: You told me if I be honest and don't lie to you then I would be out.
>
> Duncan: I told you straight up at the get-go that you're gonna be charged, right?
>
> Zarate: I know you said you're gonna charge me.
>
> Duncan: But there's lots of things that can happen to you after leaving here, you know, through the court system. And typically what helps people out is if they have information that can help them out with the sentencing down the road with the judge, the county attorney will say, "hey, he's given us this information, they've helped us out on cases, you know, we recommend this sentence over the full twenty-five years."
>
> Can I promise you anything Anthony? I can't promise you anything.

Five days later, on September 29, 2009, Officer Duncan interviewed Zarate a second time. The interview started at 11:19 a.m. and lasted about an hour. At the outset, the officer told Zarate he did not want to talk about the Romantix robbery. Instead, Officer Duncan asked Zarate about the robbery of the young couple in Tibbetts Park. Zarate admitted being one of the gunmen during the hold-up. Zarate also confessed to participating in the August 22nd robbery of a man on the street. He likewise admitted to his participation in the taxi cab robbery. Zarate discussed the home invasion, but did not acknowledge being personally involved.

A third and final interview took place on October 2, 2009. After re-Mirandizing Zarate, Officer Duncan again asked him about the home invasion on Western Avenue involving the theft of a marijuana stash. This time, Zarate admitted to participating in the robbery with Woods and another person, whose

name he could not recall. Zarate claimed his limited role was to take "the weed" from inside a tool box.

The county attorney charged Zarate with the Romantix robbery in a trial information filed on September 29, 2009, and with the other four robberies in a second information filed on October 12, 2009. On January 13, 2010, Zarate filed motions to suppress his statements to Officer Duncan. The district court heard evidence on the suppression motions on February 5 and February 26, 2010. The court declined to suppress the statements in an order issued on March 10, 2010. The case proceeded to a trial on the minutes of testimony on August 13, 2010. The court found Zarate guilty on all five counts and sentenced him to concurrent terms not to exceed twenty-five years with a seventy percent mandatory minimum. Zarate now appeals.

II. Issues on Appeal

Zarate alleges law enforcement induced him to confess by telling him that whether he spent twenty-five years in prison was "up to him" and insinuating he would be reunited with his young son if he was truthful about participating in the Romantix robbery. Zarate further contends Officer Duncan exploited the illegality from the first interview to obtain additional inculpatory statements during two subsequent interviews.

The State argues that Officer Duncan's statements were not specific enough to constitute promises of leniency. Applying the totality of the circumstances test, the State contends Zarate's September 24, 2009 confession was voluntary. The State also offers contingent arguments that the

circumstances of Officer Duncan's two subsequent interviews with Zarate—on September 29 and October 2, 2009—were so attenuated that the defendant's additional incriminating statements were admissible despite any promises of leniency in the initial interview. Finally, the State argues that Zarate's guilt in the Romantix robbery could be "convincingly established without the use of his statements to police."

III. Scope of Review/Preservation of Error

The parties agree that Zarate preserved error on the issue of whether his statements to police were voluntary under the Fifth Amendment. Zarate and the State also agree that we engage in a de novo review when assessing the voluntariness of confessions under the federal Due Process Clause. *See State v. Hodges*, 326 N.W.2d 345, 347 (Iowa 1982). Under that standard, we independently evaluate the totality of the circumstances surrounding the confession. *Id*.

Zarate alternatively cites *State v. Quintero*, 480 N.W.2d 50, 52 (Iowa 1992) for the proposition that "the court has treated the admission of involuntary confessions as an evidentiary matter, and the standard of review for the district court's decision to admit or exclude evidence is abuse of discretion."

Our supreme court has suggested a challenge to the voluntariness of a confession may be decided under either a totality-of-the-circumstances test or on an evidentiary basis. *See State v. McCoy,* 692 N.W.2d 6, 28 (Iowa 2005). The *McCoy* court identified *State v. Mullin*, 249 Iowa 10, 18, 85 N.W.2d 598, 602–03 (1957) and *Quintero,* 480 N.W.2d at 52, as precedent for deciding admissibility

on an evidentiary basis alone.[2] But the *McCoy* court also indicated that it was not undertaking a constitutional analysis because error was not preserved on the Fifth Amendment question, noting "the State filed no post-hearing motion asking the court to employ the federal totality-of-the-circumstances test."

By contrast, Zarate raised only constitutional claims in his suppression motions. The district court framed the suppression question as follows:

> Defendant's allegations are essentially that his Fifth Amendment rights were violated on voluntariness grounds. In determining voluntariness, the court again considers the totality of the circumstances involved in the interview. *State v. Rhomberg*, 516 N.W.2d 803 (Iowa 1994). A statement is deemed voluntary if is the product of an essentially free and unconstrained choice, made by the defendant whose will was not overborne and whose capacity for self-determination was not critically impaired. *State v. Smith*, 546 N.W.2d 916 (Iowa 1996).

The district court stated it was deciding the voluntariness issue under a totality of circumstances test, though its analysis focused on Officer Duncan's representations to Zarate during the interview.

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[2] The *McCoy* opinion blurred two distinct concepts: the means for determining if a confession is voluntary and the mechanism for excluding the confession if it is determined involuntary. *McCoy* relied on *Mullin*, but that decision did not describe a dichotomy between evidentiary and constitutional grounds for determining the voluntariness of confessions. Instead, it explained that usually it is the trial court's duty to determine the admissibility of a confession and only "[c]onflicts in testimony giving rise to a question of fact concerning its procurement must . . . be submitted to the jury." *Mullin*, 249 Iowa at 14, 85 N.W.2d at 600. *McCoy* also championed *Quintero*, but that decision did not reject the use of a totality-of-the-circumstances test to determine voluntariness. Instead, it held that a coerced confession was inadmissible "not on the basis of a constitutional principle, but as a matter of the law of evidence." *Quintero*, 480 N.W.2d at 51–52 (sidestepping question whether Due Process Clause of the Iowa Constitution required automatic reversal of a conviction based on the admission of involuntary confession when United States Supreme Court embraced a harmless error analysis under federal due process in *Arizona v. Fulminante,* 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

Given the constitutional foundation for Zarate's appellate challenge, we are inclined to employ a de novo review and assess the voluntariness of his confession by considering the totality of the circumstances. But even if we were to look at the question as a more narrow challenge to the introduction of unreliable evidence under the *Mullin-Quintero-McCoy* line of cases, our bottom line would be the same.

IV. Admissibility of Confessions

A. Did Officer Duncan Induce Zarate's September 24, 2009 Confession by Promises of Leniency?

Voluntary confessions are an "unmitigated good" and "essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Maryland v. Shatzer*, 559 U.S. ___, ___, 130 S. Ct. 1213, 1222, 175 L. Ed. 2d 1045, 1055 (2010). But Iowa courts exclude involuntary statements as unreliable. *State v. Lowe*, ___ N.W.2d ___, ___ n.10 (Iowa 2012). In deciding which side of the line a suspect's statements fall, we are afforded "no talismanic definition of voluntariness." *State v. Cullison*, 227 N.W.2d 121, 127 (Iowa 1975). Jurists have described "the notion of voluntariness" as "an amphibian." *See Schneckloth v. Bustamonte,* 412 U.S. 218, 224, 93 S. Ct. 2041, 2046, 36 L. Ed. 2d 854, 861 (1973). The *Schneckloth* decision reasoned that "neither linguistics nor epistemology" provided a ready definition, but observed that "'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect." *Id*. at 224–25, 93 S. Ct.at 2041, 36 L. Ed. 2d at 861.

We do know that to be voluntary, a confession must be "made of the free will and accord of the accused, without coercion, whether from fear of any threat of harm, promise, or inducement, or any hope of reward." *Mullin*, 249 Iowa at 15, 85 N.W.2d at 600. A confession induced by "the flattery of hope" carries a fair risk that it is false as the suspect would lie to gain some special favor. *Id*. at 16, 85 N.W.2d at 601.

The *Mullin* court explained a suspect would not be likely to "falsify bad conduct for good conduct" if the officer did nothing more than tell the suspect that it would be "better or wiser to tell the truth." *Id*. But if the officer goes on to explain

> how it will be better or wiser for the accused to speak, these 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.

Id. at 16, 85 N.W.2d at 601–02.

Boiled down, the question is "whether the language used amounts to an inducement which is likely to cause the subject to make a false confession. If so, the evidence must be considered involuntary and inadmissible." *Id*. at 17, 85 N.W.2d at 602. The likelihood that the officer's language will overbear the suspect's will depend on both the suspect's characteristics and the details of the interrogation. *Schneckloth,* 412 U.S. at 226, 93 S.Ct. at 2047, 36 L. Ed. 2d at 862. "Many factors bear on the issue of voluntariness." *State v. Davis,* 446 N.W.2d 785, 789 (Iowa 1989). Our courts have considered the following:

> 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. When the suspect is in custody, we also consider his knowledge and waiver of his *Miranda* rights and the length of his detention. *Id*.

At the time of the interrogation, Zarate was seventeen years old, a fact suggesting he would be more susceptible to an officer's inducements. *See In re J.D.F.*, 553 N.W.2d 585, 589 (Iowa 1996) (finding promise to take juvenile home rather than to detention center prejudiced him "especially in light of his age"); *see also Graham v. Florida,* ___ U.S. ___, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825, 841 (2010) (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").

On the other hand, the record does not show that Zarate was lacking in intelligence; in fact, he told the officer in a later interview that he was doing well in high school. Zarate did not have any trouble understanding Officer Duncan's inquiries. The officer engaged Zarate in active questioning for less than one hour, though Zarate remained in the interrogation room for more than two hours. In addition, Zarate had experience with the criminal justice system; he had been questioned by this officer before in connection with a separate murder investigation. *See State v. Pearson*, 804 N.W.2d 260, 269 (Iowa 2011) (noting prior experience with law enforcement can support conclusion that confession is voluntary). Zarate understood he was in custody and would be charged with

robbery, and had been twice advised of his *Miranda* rights. Zarate did not show much emotion during the interview, though he did repeatedly express his desire to go home to his young son.

The critical factor in this case is whether the officer used improper promises to gain Zarate's admissions. At one point, Officer Duncan told Zarate: "Be truthful. That's all I'm asking. Don't lie to me." Standing alone, that admonishment to be honest did not amount to a promise of leniency. But the officer further suggested to the teenager how it would be better for him to speak. The officer told Zarate he would be charged with first degree robbery regardless of whether he talked, but then created a hope in Zarate for a better deal by adding: "whether or not you spend twenty-five years in prison is up to you." When Zarate asked how long it would take to be with his son, the officer repeated: "That's up to you. . . . That's completely up to you." When Zarate said he would "prefer to go home than to stay here," the officer responded: "then don't lie to me man."

The officer was frank with Zarate about the sentence that he faced and the damning evidence arrayed against him. But the officer's statements "went beyond exhorting defendant to tell the truth." *See State v. Hodges*, 326 N.W.2d 345, 349 (Iowa 1982) (suppressing confession where the officer told an eighteen-year-old laborer that a lesser charge would be more likely if he gave "his side of the story"). The problem was that Officer Duncan tied the harsh consequences of a first-degree robbery conviction to the suspect's continued denial:

> You can say you weren't there, you weren't there, you weren't there, all you want. You're dead to rights. And we'll go that route and you'll do twenty five years, seventeen year minimum.

The officer also manipulated Zarate's vulnerability, reminding him that his son would be eighteen or nineteen before Zarate was released from prison. In response to Zarate's lament: "That's a lot of years to miss out on," Officer Duncan proclaimed: "And I don't have a problem with that if you don't want to be truthful with me."

The only logical inference that the suspect could draw from the officer's language was that insisting he didn't commit the robbery would net him seventeen years in prison, while admitting his involvement might allow him to miss out on fewer years of his son's life. The officer implied that when Zarate was going to "be with [his] kid" was "up to him" but if Zarate continued to deny that he participated in the robbery he would serve the mandatory minimum prison term. These representations constituted implicit promises of leniency.

The State argues the officer's proposition that it was "up to" Zarate whether he would spend twenty-five years in prison was too vague to be considered a promise of leniency. We do not view the officer's exhortations as ambiguous, but even if they could be construed as such, the next step would be to determine if the officer's statements nevertheless misled the suspect because of the suspect's specific vulnerability. *See Brown v. State*, 117 S.W.3d 598, 600 (Ark. 2003). In this case, although Officer Duncan did not introduce the topic of the suspect's family into the conversation, his appeal to Zarate's relationship with his son contributed to the overbearing of the suspect's will at the time of his

confession. *See Lynumn v. Illinois,* 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922, 926 (1963) (ruling confession involuntary where police told the accused that if she did not cooperate financial aid would be cut off from her children and they would be taken away).

After admitting his role in the Romantix robbery, Zarate reminded the officer: "You told me if I be honest and don't lie to you then I would be out . . . ." It was only then that Officer Duncan explained the role of the county attorney in recommending a certain charge or sentence if a defendant provides helpful information in solving crimes: "Can I promise you anything Anthony? I can't promise you anything." This disclaimer came too late to ensure that Zarate's confession was voluntary.

Officer Duncan testified at the suppression hearing that he did not deliberately promise Zarate he would "get less time" or any other specific benefit if he admitted his involvement in the robbery. But we are not concerned with the subjective intent of the interrogator; the question is whether the language used was sufficient to justify a reasonable belief in the accused that if he confessed he would receive more lenient treatment or some special consideration not available if he denied his guilt. *See Mullin*, 249 Iowa at 18, 85 N.W. at 602–03. Viewing the interrogation—and surrounding circumstances in their entirety—we find the officer's statements that the prison time Zarate would eventually serve for the crime was "up to him" left the false impression that the suspect would receive more lenient treatment if he admitted his participation in the armed robbery.

Zarate's confession was not voluntary. His motion to suppress the September 24, 2009 statements to Officer Duncan should have been granted.

B. Did Officer Duncan Exploit Previous Illegality in Obtaining Zarate's Subsequent Confessions?

Having decided Zarate's September 24, 2009 confession was the product of promissory leniency, the next question is whether his statements during two subsequent interviews are inadmissible as fruits of the poisonous tree. Officer Duncan questioned Zarate again on September 29 and October 2, 2009. During the second and third interviews, the officer did not return to the subject of the Romantix robbery, but instead focused on obtaining information about four additional robberies that Zarate committed with his associates.

Evidence is not excludable as fruit of the poisonous tree if it is "sufficiently attenuated from the original illegality." *State v. Lane*, 726 N.W.2d 371, 382–83 (Iowa 2007). But if the police exploit the prior illegality in securing the additional statements, the new information is likewise tainted and inadmissible. *See id*. When a prior statement is impermissibly induced, several factors bear on the question whether the illegality has carried over into subsequent confessions, for example, the time between the confessions, any change in the place of the interrogations, or in the identity of the interrogators. *Oregon v. Elstad*, 470 U.S. 298, 310, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222, 232–33 (1985). In determining attenuation, we also look to any intervening circumstances and the purpose and flagrancy of the official misconduct. *See Lane*, 726 N.W.2d at 383.

Here, five days elapsed between the first and second interview, and eight days between the first and third interview. The State does not highlight any significant intervening events. Zarate remained in custody after the initial interview. The first and second interviews both occurred at the Waterloo police station, while the third interview took place at the Black Hawk County jail. Officer Duncan conducted all three interviews.

The defense contends that last factor is determinative in this case: "Because of the continued presence of the same interrogator who made the improper promises, the promises were still in Zarate's mind and were the driving force behind all of his statements." We tend to agree. In the second interview, Zarate confessed to participating in the August 22, 2009 robbery of Derrell Gates; the September 11, 2009 robbery of a couple at Tibbetts Park; and the September 12, 2009 robbery of a cab driver. After providing details of these crimes, Zarate told Officer Duncan he wanted "to help you guys out" and asked what information he can provide to avoid a lengthy prison sentence. In the third interview, Zarate confessed to his role in the September 2, 2009 home invasion. Zarate continued to ask the police officer how he could work with them to reduce his potential prison time. Zarate took to heart the officer's statements that Zarate had control over the length of time he would spend away from his son and tried to mitigate his own exposure by unveiling details about additional robberies. While Officer Duncan's implied promises—that by admitting his guilt, Zarate could serve less than the mandatory seventeen years—did not constitute flagrant misconduct, they nonetheless achieved their purpose through more subtle

means. The implication left by the officer's "it's-up-to-you" message during the first interview created a lingering motivation for Zarate to keep talking during the subsequent interviews. *See State v. Kase*, 344 N.W.2d 223, 226 (Iowa 1984) (suppressing later statements where official promises of leniency were never retracted). Because the State cannot establish adequate attenuation, the later confessions should likewise be suppressed.

C. Was the District Court's Finding of Guilt on the Romantix Robbery "Surely Unattributable" to the Erroneously Admitted Confession?

Finally, the State contends that even if the district court erred in overruling Zarate's motion to suppress his statements to police, reversal is not required on his conviction for the Romantix robbery.[3] The erroneous admission of evidence in violation of a defendant's Fifth and Fourteenth Amendment rights is subject to a harmless error analysis. *See State v. Peterson*, 663 N.W.2d 417, 430–431 (Iowa 2003) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d at 331–32 (1991)); *see also State v. Mortley*, 532 N.W.2d 498, 503 (Iowa Ct. App. 1995) ("Where the State has otherwise overwhelming evidence of a defendant's guilt, the erroneous admission of a defendant's incriminating statement may be harmless beyond a reasonable doubt.").

The harmless error review examines the basis on which the fact finder "actually rested" its adjudication of guilt. *See Peterson*, 663 N.W.2d at 431. We

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[3] The State does not argue that overwhelming evidence exists for the other four counts of robbery in the first degree. Accordingly, we do not apply the harmless error analysis to those convictions.

don't look to see if the defendant would have been convicted in a trial free of the error, but whether the finding of guilt before us was "surely unattributable" to the error. *Id*. To determine if the State can meet its burden to prove beyond a reasonable doubt that the error did not contribute to the finding of guilty, we follow a two-step analysis: (1) we focus on the evidence the fact finder actually considered and (2) we "weigh the probative force of that evidence against the probative force of the erroneously admitted evidence standing alone." *Id*.

1. Evidence Actually Considered

Zarate was convicted following a bench trial on stipulated evidence.[4] At the trial on the stipulated proof, the prosecutor stated:

> Even if he had not confessed, . . . there's sufficient evidence to convict Mr. Zarate of each and every element . . . by virtue of the statements from Mr. Matijevic and Mr. Woods, who are also listed in the minutes of testimony.

The district court specifically mentioned the minute presented for co-defendant Bradly Woods. Woods, who confessed to the crime, was expected to testify that he and Zarate robbed the Romantix adult bookstore.[5] An attached report written by Officer Duncan recounted his interview with Woods and Woods' statement that "[h]e and Anthony both had guns and entered the Adult Book Store." When Officer Duncan asked Woods why they robbed the store, Woods said that he and Anthony both needed money.

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[4] Zarate personally waived his right to a jury trial and agreed to the trial judge assessing his guilt on a stipulated record including the minutes of evidence and an exhibit offered by the State consisting of twenty photographs depicting the Dodge Avenger, guns, cash, masks, and bandanas used in the Romantix robbery, as well as photographs of Zarate, Woods and Matijevic after their arrests.

[5] Woods agreed to testify against Zarate in return for the State's recommendation of concurrent terms of incarceration for multiple counts of first-degree robbery.

The stipulated record also included police reports documenting the phone calls to dispatch reporting the Romantix robbery and the prompt stop of the vehicle matching the make, model, and plate number in the dispatch reports. Zarate and Woods were passengers in the Avenger driven by Matijevic. A search of the vehicle yielded guns, cash, clothing, and disguises used in the robbery. The items found matched a description of the perpetrators from witness Greg Leahy, who reported the robbery in progress.

The police reports also featured statements by co-defendant Milos Matijevic implicating Zarate. Matijevic told investigators Zarate carried a .45 mm pistol during the robbery. In addition, Jennifer Paoni, a clerk at Romantix, was expected to testify she was robbed at gunpoint and that she positively identified Zarate as one of the gunmen shortly after the incident when police brought the suspects back into the bookstore. Paoni told police the robbers took a little more than $100 and police recovered $120 during the traffic stop.

The district court characterized the record submitted as "replete with additional corroborative evidence" of co-defendant Woods's statements. The court noted the investigator's interviews with victims who identified the perpetrators and "evidence found in the vehicle occupied by [Zarate] and his codefendants immediately after the Romantix robbery, including the gun and clothing."

2. Probative Force of Stipulated Record Weighed Against Probative Force of Zarate's Incriminating Statements to Officer Duncan

For the second step, we must decide if Zarate's admissions to robbing the Romantix clerk at gunpoint were "so unimportant in relation to everything else the [fact finder] considered that there is *no reasonable possibility* they contributed to [Zarate's] conviction." *Peterson*, 663 N.W.2d at 434 (rejecting harmless error argument where corroboration of accomplice testimony was "tenuous at best") (emphasis in original).

In contrast to the situation in *Peterson*, in the instant case, the minutes contained strong corroboration of Zarate's accomplices. The stories offered by Woods and Matijevic were consistent. An eyewitness identified both Zarate and Woods as the gunmen. Police found the vehicle and other critical items described by another eyewitness within minutes of the robbery report. Essentially, law enforcement caught the trio red-handed. Officer Duncan told Zarate during the interview that he was "caught with his hand in the bag" and that the evidence placed him "dead to rights." We are confident that what Zarate confessed to the officer paled in comparison to the other evidence of his guilt. *See State v. Hensley*, 534 N.W.2d 379, 384 (Iowa 1995). We find that admission of his statements was harmless beyond a reasonable doubt.

V. Disposition

In sum, we conclude the district court should have suppressed Zarate's statements made to Officer Duncan during all three interviews. Accordingly, we reverse Zarate's convictions and sentences for the robberies that occurred on August 22, 2009; September 2, 2009; September 11, 2009; and September 12, 2009; and remand those cases for new trials. But because the stipulated record

contained overwhelming evidence of Zarate's guilt in connection with the September 24, 2009 robbery of the Romantix Adult Emporium, we find admission of his confession to that offense was harmless beyond a reasonable doubt. Accordingly, we affirm his conviction for the Romantix robbery.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART