IN THE COURT OF APPEALS OF IOWA

No. 8-220 / 07-0452
Filed June 11, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VINCENT FITZGERALD WALLS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

A defendant appeals from the district court's denial of his motion to suppress. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble and Susan Cox, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

A Des Moines detective interrogated Vincent Walls about the sex abuse and beating of a woman and the confinement of another woman in the trunk of a car. Walls partially confessed.

The State charged Walls with first- and second-degree sexual abuse, second-degree kidnapping, first-degree robbery, and willful injury causing serious injury. Iowa Code §§ 709.1, .2, .3; 710.1, .2; 711.1, .2; 708.4(1) (2005). Prior to trial, Walls's attorney moved to suppress the confession on the ground that the detective continued to question Walls after he asked for an attorney. The district court denied the motion, the confession was admitted at trial, and a jury found Walls guilty of the sex abuse, kidnapping, and willful injury counts, and of assault, a lesser included offense of robbery.

On appeal, Walls challenges the court's denial of his motion to suppress. Because this challenge implicates constitutional rights, our review is de novo. *State v. Harris*, 741 N.W.2d 1, 5 (Iowa 2007).

I. Analysis

A. Request for an Attorney

During a custodial interrogation, police are required to clearly inform suspects of their right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 473, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966). If a clear request for counsel is made at any point during the interrogation, further questioning must immediately cease until a lawyer has been made available or the suspect reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378, 386 (1981). A suspect's request must be unambiguous

and unequivocal. *Davis v. United States*, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 2357, 129 L. Ed. 2d 362, 373 (1994).

These rights derive from the Fifth Amendment to the United States Constitution. U.S. Const. amend. V. They are made binding on the states through the due process clause of the Fourteenth Amendment to the federal constitution. *See State v. Peterson*, 663 N.W.2d 417, 423 (Iowa 2003).[1]

It is undisputed that Walls was subjected to a custodial interrogation. It is also undisputed that the detective clearly informed Walls of his right to counsel. The source of disagreement lies in whether Walls unequivocally invoked this right.

After the detective read Walls his *Miranda* rights, the following exchange occurred:

> [Detective]: OK. With having those rights in mind, and if you want to talk to me, I've put an "X" right there where it says "sign" and that's for you to sign. If you want you can sign that and we'll go over your side of what happened that day.
> [Walls]: Could you get in contact with Roger Owens?
> [Detective]: I didn't hear you.
> [Walls]: Roger Owens.
> [Detective]: What about him?
> [Walls]: Could you get in contact with him?
> [Detective]: I can get in contact with him, yeah.
> [Walls]: That's my attorney.[2]

[1] Walls focuses on his Fifth Amendment right against self-incrimination as amplified by *Miranda*. He does not argue that his right to counsel under the Sixth Amendment to the United States Constitution was violated. *See State v. Peterson*, 663 N.W.2d 417, 426 (Iowa 2003).

[2] The State offered an uncertified transcript of the audio-recording but conceded there were some discrepancies between the transcript and the recording. The compact-disc recordings were also admitted into evidence. The quoted portions are from the transcript prepared by the State. The audio recording also has been considered. We note no material discrepancies between the audio tape and the cited portions of the transcript.

Walls did not sign the waiver form at that time, and the detective did not contact Walls's attorney.

Walls maintains he clearly invoked his right to counsel. He argues the detective "was at this point bound to scrupulously honor the defendant's request for an attorney and cease any further questioning-including his requests for the defendant to sign the waiver." Instead, according to Walls, the detective "played hard of hearing and acted as though he did not know the defendant had invoked his right to counsel."

The State preliminarily counters that the detective was not "feigning deafness" as Walls claims, but was legitimately trying to hear Walls. The audio-recording confirms the State's characterization. The detective's assertion that he could not hear Walls came immediately after Walls's soft-spoken statement. The audio recording does not suggest the detective's statement was feigned or contrived.

We turn to Walls's statements, quoted above. Walls asked the detective to get in touch with a named person who he identified as "my attorney." There was nothing unclear about this request. The detective was obligated to immediately suspend any further conversation with Walls until the attorney was present. The detective did not do so, electing instead to continue the questioning. His decision to proceed was a violation of Walls's Fifth Amendment right as amplified in *Miranda*. *See State v. Harris*, 741 N.W.2d 1, 7 (Iowa 2007) (stating defendant "could not have been more clear" that he wanted an attorney during police questioning when the defendant told the detective he wanted him to call his attorney). *Cf. Davis*, 512 U.S. at 462, 114 S. Ct. at 2357, 129 L. Ed. 2d at

373 (finding defendant's statement "Maybe I should talk to a lawyer," was not a request for counsel); *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997) (holding suspect's statement "I might need a lawyer," was not a request for counsel).

The State concedes these initial statements "appear to be a request for counsel," but argues Walls subsequently limited his request. The State points to the following exchange that immediately ensued:

> [Detective]: Is that what you're wanting me to do?
> [Walls]: Yeah, because I'd love to talk to you but I couldn't talk to you on that recorder.
> [Detective]: You what?
> [Walls]: I said I couldn't talk to you on that recorder.
> [Detective]: OK.
> [Walls]: I can talk to you off the record so you can get some kind of general basis.
> [Detective]: OK.
> [Walls]: But I couldn't, I couldn't . . .
> [Detective]: OK, let me, I need to clarify it then.

There is no doubt that "[c]larifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one." *Davis*, 512 U.S. at 461, 114 S. Ct. at 2350, 129 L. Ed. 2d at 373. But, "[w]hile it is good police practice to clarify an ambiguous request, it is not appropriate to ask a suspect to justify his unequivocal decision to have an attorney present." *Harris*, 741 N.W.2d at 7.

The detective did just that, prolonging the interrogation under the guise of obtaining clarification. First, he asked, "Is that what you're wanting me to do?" Then he stated, "OK, let me, I need to clarify it then." Next, he stated the recording device "is there for yours and my protection . . . . We don't use it to, to screw people per say (sic), we use it to protect people." He continued,

> Well if you want to talk to me about the stuff that you're being accused of that's fine. If you want me to get a hold of Roger

> Owens, that's fine. But clarify for me what you want to do at this point, before we go any further.

After some discussion about another crime, during which Walls asked about the *Miranda* waiver form and stated, "[b]ecause if I'm going to sign this and I'm going to talk to you thinking I'm helping . . .," the detective brought the conversation back to this crime. At that point, the following exchange occurred:

> [Detective]: We can talk about your side and what happened that day or you can speak with Roger Owens. But enough has been said, you need to clarify it for me.
> [Walls]: And he'll be present in this interview with me when I talk to you?
> [Detective]: Well I'm not, I'm not going to say that, I don't know if he would come over or not. I have, as a matter of fact getting a hold of Roger Owens right now would probably be next to impossible. I mean you can try to call him if that's what you want to do, that's up to you. I can't say if he's in court or in his office or where he's at at this point. All you can do is try to call him.[3]

Further tangential discussion ensued. Then, the detective stated,

> OK, Vincent, we either want to talk about this or, or, or not. But there's guidelines that I have to follow. I want to sit here and tell you everything and I want you to sit here and tell me what happened, but I . . . listen . . . .

Walls responded, "it's recorded though." The detective acknowledged this fact, then stated,

> I have to know the law and I'm telling you the guidelines that I, I have to follow, I can't go on any further until this form is signed and you're agreeing to talk to me because you've already indicated you kind of want, you want, you wanted to talk to Roger Owens.

Walls responded, "Yeah, yeah because I need to know what to say and what not to say."

[3] The State concedes it was improper for the detective to tell Walls it would be "next to impossible" to get in contact with his attorney.

Even after this conversation, the detective continued to ask for "clarification." After twenty-two minutes of largely unrelated conversation, the detective asked, "OK. Are we going to discuss Sunday morning or not?" Walls finally agreed to sign the waiver form, and to "just take the 5th" on questions he did not wish to answer.

This entire attempt at clarification was constitutionally impermissible, given Walls's request to contact his attorney, Roger Owens. *See Harris*, 741 N.W.2d at 8 ("There was no valid reason to continue questioning Harris after his request to speak with Mr. Grinde. If Mr. Grinde was unavailable, then Harris should have been returned to his jail cell."). However, the subsequent exchange, if considered, bolsters rather than undermines Walls's invocation of his right to counsel.

First, as quoted above, the detective ultimately acknowledged that Walls made a request for counsel, stating, "you've already indicated you kind of want, you want, you wanted to talk to Roger Owens." Second, Walls elaborated on his request for counsel several times, stating, (a) "I just don't want to think I'm helping myself and helping you get some kind of closure on this, and then I'm screwing myself," (b) "And [my lawyer] will be present in this interview with me when I talk to you?" and (c) "I need to know what to say and what not to say." Finally, the claimed limitation Walls placed on his request for counsel was not honored; the interview was audio-recorded despite Walls's request for counsel if the interview was going to be recorded. *See Connecticut v. Barrett*, 479 U.S. 523, 529, 107 S. Ct. 828, 832, 93 L. Ed. 2d 920, 928 (1987) (holding defendant's refusal to give police a written statement without counsel, but willingness to give

an oral statement, was not an all-purpose request for counsel but stating, "It is undisputed that Barrett desired the presence of counsel before making a written statement. Had the police obtained such a statement without meeting the waiver standards of *Edwards*, it would clearly be inadmissible.").

We conclude the State violated Walls's Fifth Amendment right against self-incrimination as amplified in *Miranda*. Accordingly, Walls's motion to suppress his partial confession should have been granted.

II. Harmless Error

The State argues that even if the district court erred in denying Walls's motion to suppress, the error was harmless. To show that error is harmless, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict. *Harris*, 741 N.W.2d at 10. This is a two-step process. *State v. Peterson*, 663 N.W.2d 417, 430 (Iowa 2003). The first step is to ask what evidence the jury actually considered in reaching its verdict. *Id.* at 431. The second step is to weigh the probative force of that evidence against the probative force of the erroneously admitted evidence standing alone. *Id.* "[T]he key question . . . is whether . . . the erroneously admitted statements are so unimportant in relation to everything else the jury considered that there is *no reasonable possibility* they contributed to" the conviction. *Peterson*, 663 N.W.2d at 434 (emphasis in original).

We begin our harmless-error analysis with the properly-admitted evidence the jury actually considered. Nancy Pilcher, a woman who lived in Des Moines, testified that an unknown woman whose name turned out to be Susan came running into her house "all bloody and physically hurt." Pilcher described Susan

as “[s]cared for her life, running, real panicky.” Pilcher testified that Susan told her she met up with a friend in Des Moines to get drugs. Susan asked Pilcher to call 911, stating “he’s going to kill me.” Then the woman collapsed in a fetal position.

A Des Moines police officer testified that when she arrived at Pilcher’s house, she found Susan “in pretty bad shape.” Susan told her a man wanted her to perform a sex act and, when she refused, he pistol-whipped her. Police retrieved physical evidence from Susan’s car and also spoke to Susan’s companion, Cathy.

Cathy testified that she had been using drugs since she was “about nine years old.” She stated she and Susan were going to pick up some money to buy drugs. Walls jumped into the back seat of Susan’s car, grabbed Cathy’s hair from behind, pulled her into the back seat, made her strip, hit her, and put her in the trunk of the car naked. She was able to push in the back seat from the trunk and heard Walls hitting Susan.

Susan testified. She confirmed she was an alcoholic and a crack addict. She stated that, when Walls jumped into the car, he was “very angry.” He wanted to know where his crack was and where his money was. He directed Susan where to drive but, soon, told her to put the car in park. He asked her to perform a sex act. Then he tried to perform a sex act. As he attempted to do so, an outside distraction afforded Susan the opportunity to open the door. She started to scream and began to run away. Walls stopped her, hit her with a gun, and stomped on her hand. When he left, Susan ran to a house across the alley.

As noted, we are obligated to weigh this untainted evidence "against the probative force of the erroneously admitted evidence standing alone." *Id.* The entire recording of the police interrogation was introduced into evidence, as was the transcript of the recording prepared by the State. Walls did not confess to all the crimes with which he was charged. He adamantly denied that he committed sexual abuse. However, he admitted to past crimes and admitted to hitting both women and confining one in the trunk of the car.

Walls's admissions were relevant to the kidnapping, willful injury and assault counts. However, when weighed against the detailed and graphic testimony of the untainted witnesses, we are not persuaded that the verdict would have been any different had his admissions been excluded. In reaching this conclusion, we have considered *Peterson*, where the court found the error was not harmless. *Id.* at 435-36. Unlike that case, none of the untainted testimony here came from accomplices. *See id.* at 434. Additionally, much of Susan and Cathy's testimony was corroborated by independent witnesses such as Pilcher and the police officer who arrived at the scene, and by each other. For these reasons, we conclude the district court's denial of the motion to suppress met the constitutional harmless error standard. *See Harris*, 741 N.W.2d at 10 (distinguishing between constitutional and non-constitutional harmless error standards). Accordingly, we affirm Walls's judgment and sentence.

AFFIRMED.