**IN THE COURT OF APPEALS OF IOWA**

No. 1-155 / 10-0880
Filed March 30, 2011

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**GREGORY JAMES CAVINS,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Paul L. Macek (August 7, 2009 suppression ruling), and Gary D. McKenrick (nonjury trial), Judges.

The defendant appeals his convictions for third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Public Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald L. Feuerbach, Assistant County Attorney, for appellee.

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

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

**POTTERFIELD, J.**

Gregory Cavins appeals his convictions for two counts of third-degree sexual abuse in violation of Iowa Code section 709.1 and 709.4 (2007). The sole question before us is whether Cavins's recorded interview with police detectives should have been suppressed as no *Miranda* warnings were ever given. Because we conclude Cavins was not in custody at the time of the interview, *Miranda* warnings were not required and his motion to suppress the statements was properly denied.

**I. Background Facts and Proceedings.**

In 2008 and 2009, Cavins lived with his girlfriend, Jennifer; Jennifer's daughter, S.N.; Cavins's and Jennifer's daughter, Z.N.; and Jennifer's mother. In April 2009, Davenport Detective Kyle Chisolm was assigned to investigate allegations of sexual abuse made by Z.N. and S.N. to Kevin Schmitz, a child protective worker of the Department of Human Services.

Detective Chisolm attempted to telephone Cavins on two occasions, but received no answer. On the afternoon of April 6, 2009, Detective Chisolm and another detective, dressed in plain clothes, drove an unmarked vehicle to the defendant's residence. Detective Chisolm informed Cavins there had been some allegations made about him and asked if Cavins could come to the police station for an interview. Cavins agreed to accompany the detectives to the station.

At about 3:30 p.m., Detective Chisolm led Cavins to an interview room equipped with recording equipment. Upon entering the room, Cavins emptied his pockets and was frisked by Detective Chisolm. Cavins was then left alone in the room for about ten minutes. He replaced his personal items in his pockets and

his cell phone, which was on a strap, around his neck. He received a call to which he stated to the caller, "let me call you back."

At about 3:40, Detective Chisolm entered the room, introduced himself, and told Cavins he was not under arrest and was free to leave at any time. The interview proceeded in conversational tones. Over the course of the next few minutes, Detective Chisolm asked Cavins about his living arrangements and then informed Cavins of statements made by his daughter, Z.N. (that Cavins was touching her) and Jennifer's daughter, S.N. (including that "daddy used to fuck me" and made her watch movies about fucking). Cavins first denied having touched either girl "in a wrong way." He stated S.N. may have come into his room while he and Jennifer were watching a porn film, but Jennifer turned it off and he did not make S.N. watch porn. He admitted that he had inappropriately touched a child when he was seventeen. Cavins said he did not want to go to jail. At 3:55, Cavins admitted touching S.N. "where I shouldn't have," and then stated he touched her in her privates and had her touch him. He said the "same thing" happened with Z.N. He told Detective Chisolm it would not happen again and he needed help. At about 4:00, Detective Chisolm told Cavins he could not guarantee Cavins would not be going to jail. Chisolm then left the room. Cavins received a telephone call on his cell phone.

At about 4:07 p.m., Detective Chisolm returned to the interview room with a "couple more questions" and asked for consent to search Cavins's residence. Cavins agreed and asked, "Are we both going up there?" Detective Chisolm said another detective was going to go. Cavins stated, "So, I'm staying down here until then?" Chisolm responded, "Yup." Cavins gave his house key to Detective

Chisolm and explained the lock could be difficult. Cavins also told Detective Chisolm where he would find the only remaining porn film as he had disposed of the rest earlier. Detective Chisolm left the room with Cavins's key and Cavins used his cell phone.

While Cavins waited for the search to be conducted, he remained in the interview room. He was allowed to use the restroom. At about 4:20, Detective Chisolm returned to the interview room and continued speaking with Cavins. The tone remained conversational. At about 4:30 p.m., Cavins stated he attempted to place his penis inside S.N. but it "didn't work." A couple minutes later he stated he placed his penis inside Z.N.'s mouth.

Cavins was in the interview room for several minutes alone and continued to use his cell phone. At about 4:50, Detective Chisolm returned to the interview room with another individual and Cavins spoke with him for a few minutes. At about 5 p.m., Detective Chisolm informed Cavins he was "probably going home tonight." Cavins asked about getting his key back and Detective Chisolm informed him it would be returned when the search was completed. Cavins asked for a glass of water. Detective Chisolm and the other man left the room after shaking hands with Cavins.

Cavins remained in the interview room alone for about an hour, except when a glass of water was delivered and he was told the search was "wrapping up." Cavins used his cell phone during this time apparently texting messages and listening to music. He received a telephone call.

At about 6 p.m., Detective Chisolm returned and asked Cavins if he needed a ride home. Cavins declined and the two left the room.

Cavins was charged with two counts of third-degree sexual abuse.[1] He filed a motion to suppress the April 6 recorded interview because "defendant's statement was a custodial interrogation" he "was not advised of his Miranda rights." Following a hearing at which Detective Chisolm testified, the district court (Judge Macek) denied the motion to suppress. The court found the "defendant was at no time in custody and therefore no Miranda warnings were necessary."

Trial was to the court on a stipulated record and the Cavins was found guilty. He now appeals.

**II. Scope of Review.**

Our review of the district court's refusal to suppress Cavins's statements is de novo. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997); *see also State v. Bogan*, 774 N.W.2d 676, 679 (Iowa 2009) (reviewing *Miranda* violation de novo). This review requires us to make an independent evaluation of the totality of the circumstances, while deferring to the district court's findings of fact due to the court's opportunity to assess witness credibility. *Bogan*, 774 N.W.2d at 679.

**III. Custodial Interrogation.**

"In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court required the police to advise suspects of their rights under the Fifth and Fourteenth Amendments before beginning a custodial interrogation." *State v. Ortiz*, 766 N.W.2d 244, 250–51 (Iowa 2009). Cavins contends that because he was not given *Miranda* warnings prior to custodial

[1] Cavins was originally charged by trial information on May 4, 2009, with four counts of second-degree sexual abuse. An amended and substituted trial information charging two counts of third-degree sexual abuse was approved by the court in a March 23, 2010 hearing.

interrogation, his statements were inadmissible. The State argues Cavins was not in custody and thus no *Miranda* warnings were required. We agree with the State.

A suspect is in custody after the suspect is formally arrested or "otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. "A custody determination depends on objective circumstances, not the subjective belief of the officers or the defendant." *Bogan*, 774 N.W.2d at 680.

> In determining whether a suspect is in custody at a particular time, we examine the extent of the restraints placed on the suspect during the interrogation in light of whether 'a reasonable man in the suspect's position would have understood his situation' to be one of custody.

*Ortiz*, 766 N.W.2d at 251 (citation omitted). "[T]he standard to be applied in determining the overall custodial character of the situation is that of the reasonable person in the defendant's situation, not taking into account any prior record or possible guilt of the defendant." *State v. Smith*, 546 N.W.2d 916, 923 n.2 (Iowa 1996); *see United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988) (explaining the focus is on the state of mind of the reasonable person—one who is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances").

We apply a four-factor test. *State v. Miranda*, 672 N.W.2d 753, 759 (Iowa 2003). These factors are (1) "the language used to summon the individual"; (2) "the purpose, place and manner of the interrogation"; (3) "the extent to which the defendant is confronted with evidence of [his] guilt;" and (4) "whether the defendant is free to leave the place of questioning." *Id.* This requires

examination of the totality of the circumstances with no one particular fact or factor being determinative of the issue. *Smith*, 546 N.W.2d at 922 (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L .Ed. 2d 1275, 1279 (1983)).

When the four factors are applied to the facts here, it does not objectively appear that Cavins was in custody during his interview.

The district court examined these factors and wrote:

> The language used to summon the defendant was not forceful, threatening or coercive. The defendant was merely asked if he would accompany the police officer to the police station and the defendant voluntarily agreed. The defendant was told that he was free to leave at any time and, indeed, he was free to leave. In fact, even after the incriminating statements the defendant made, he was allowed to leave the police station and walk home. The defendant was given the opportunity to be driven home by the police officer. The questioning was open ended. At times the detective guided the defendant or focused the defendant on a particular issue, but the detective's approach was to allow the defendant to talk freely, which the defendant did.

On our de novo review of the record, we agree with the district court.

Cavins analogizes the facts of this case to *Ortiz*, 766 N.W.2d at 251–52, in which the supreme court found the defendant was in a custodial setting. However, Ortiz "spoke little or no English." *Id.* at 246. The police officer who came to Ortiz's door brought with him a special agent of the Federal Immigration and Customs Enforcement Agency to interpret. *Id.* at 247. The court also noted the police officer's badge and gun were on his waist and in full view of Ortiz; and while Ortiz was informed he was not under arrest and could refuse to go to the station, "Ortiz's transportation was miles away from the station." *Id.* at 252. Once at the police station, Ortiz signed a waiver of his *Miranda* rights. *See id.* at

248. An officer acted as a translator at the police station. *Id.* at 247. Ortiz twice stated he did not understand his rights contained in the badly-translated Spanish version of the *Miranda* advisory, resulting in the translator providing a different version. *Id.* at 249. The court also noted a key card was used to access the elevator, "leaving the impression a key card would be required to exit the area as well." *Id*. at 252. Ortiz was never told he was free to leave the station. *Id.* These facts recited by the *Ortiz* court paint a picture of a more coercive setting than presented here.

Courts have held custody is not implicated merely because questioning takes place at the police station or the defendant is the sole subject of a police investigation. *See Beheler*, 463 U.S. at 1125, 103 S. Ct. at 3520, 77 L. Ed. 2d at 1279; *Oregon v. Mathiason*, 429 U.S. 492, 493, 97 S. Ct. 711, 713, 50 L. Ed.2d 714, 718 (1977) (rejecting Oregon Supreme Court's finding of custodial interrogation where "there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody 'or otherwise deprived of his freedom of action in any significant way.'"); *Jenner v. Smith*, 982 F.2d 329, 334–35 (8th Cir.), *cert. denied*, 510 U.S. 822, 114 S. Ct. 81, 126 L. Ed. 2d 49 (1993) (suspect held not to be in custody when he voluntarily went to police headquarters and was free to leave even though the interrogation lasted seven hours and the defendant was subjected to a polygraph test).

Cavins had no difficulty understanding the detectives and voluntarily accompanied the plain-clothed detectives to the station. While the interview took place in an interview room inside the police station, Cavins was told he was not under arrest and was free to leave at any time. *See Mathiason*, 429 U.S. at 494–95, 97 S. Ct. at 713–14, 50 L. Ed. 2d at 719 (finding of coercion mitigated where suspect was free to leave and was informed he was not under arrest); *United States v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990) (stating the "most obvious and effective means" of showing a suspect is not in custody "is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will"); *Bogan*, 774 N.W.2d at 681 (finding custody where defendant was never told he could leave place of questioning). Cavins was informed of statements made by the children, but the interview was open-ended, calm, non-confrontational, and conversational. *State v. Smith*, 546 N.W.2d 916, 924 (Iowa 1996) (noting we look to "whether a confrontational and aggressive style is utilized in questioning, or whether the circumstances seem more relaxed and investigatory in nature"). Cavins had access to and used his cell phone during the time he was in the interview room. And even though Cavins was at the station for more than two hours, he spoke with the detective for less than an hour. *See Countryman*, 572 N.W.2d at 558 (noting three-hour length of the conversation did not render it custodial); *State v. Brown*, 341 N.W.2d 10, 16 (Iowa 1983) (finding no custody where the defendant was questioned intermittently for approximately two hours). Moreover, Cavins walked out of the police station at the conclusion. And while we do not know exactly how far away Cavins's residence was from the station, we do know Cavins declined a

ride and walked home. *Cf. Ortiz*, 766 N.W.2d at 252 (noting his "transportation was miles away").

Because Cavins was not in custody, the district court was correct in denying his motion to suppress his statements on the basis of Miranda. Accordingly, we affirm.

**AFFIRMED.**