IN THE COURT OF APPEALS OF IOWA

No. 7-311 / 05-1911
Filed June 27, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIMBERLY ANN CHIAVETTA,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

Kimberly Chiavetta appeals her judgment and sentences for second-degree murder and administering a harmful substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Harold S. Denton, County Attorney, and Russell Keast and Angeline Wilson, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

Frank Chiavetta, a non-diabetic, died of an insulin overdose. His wife, Kim Chiavetta, a nurse at a Cedar Rapids hospital, had access to insulin.

Following Frank's death, police officers questioned Kim Chiavetta and obtained her permission to search the couple's home. They found nothing inculpatory. That night, Chiavetta attempted suicide and was taken to a local hospital. While she was at the hospital, police officers elicited a verbal confession from her, which was later reduced to writing. They subsequently searched her home again and discovered a vial of insulin and a syringe.

The State filed charges and, following trial, a jury found Chiavetta guilty of second-degree murder and administering a harmful substance. Iowa Code §§ 707.3, 708.5 (2003).

On appeal, Chiavetta argues (1) the district court should not have denied her motion to suppress the confessions and evidence and (2) the district court abused its discretion in redacting portions of her written confession.

I. Motion to Suppress

A. United States Constitution

Chiavetta based her motion to suppress, in part, on the Fifth and Sixth Amendments to the United States Constitution. On appeal, she "agrees that her Sixth Amendment right to counsel had not attached at the time of her statements to police." She further agrees that "*Miranda*[1] warnings are not required unless a

[1] *See United States v. Miranda*, 384 U.S. 436, 469-70, 86 S. Ct. 1602, 1625-26, 16 L. Ed. 2d 694, 722 (1966).

suspect is both in custody and subjected to interrogation."[2] We begin with an analysis of the custody issue and end with the question of whether the confessions were voluntary. Both issues are reviewed de novo. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997).

1. Custody. The pertinent principles governing custodial interrogations are as follows:

> Before a person in custody may be interrogated, the person must be advised as to the right to remain silent and the right to have appointed counsel present. These *Miranda* requirements do not come into play unless both custody and interrogation are present. Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

State v. Simmons, 714 N.W.2d 264, 274 (Iowa 2006) (citations omitted).

The key issue is whether Chiavetta was in custody when two police officers questioned her at the hospital. The following four factors bear on this issue: (1) the language used to summon the individual; (2) the purpose, place and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of guilt; and (4) whether the defendant is free to leave the place of questioning. *Countryman*, 572 N.W.2d at 558.

With respect to the first factor, it is undisputed that Chiavetta was not summoned. However, it is clear that police officers initiated the contact with Chiavetta. *See State v. Miranda*, 672 N.W.2d 753, 759-60 (Iowa 2003). This

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[2] The United States Supreme Court has emphasized that *Miranda* warnings are simply a means to an end, protecting the right guaranteed by the Self-Incrimination Clause of the Fifth Amendment. *United States v. Patane,* 542 U.S. 630, 641, 124 S. Ct. 2620, 2628, 159 L. Ed. 2d 667, 677 (2004) ("[A] mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule.").

factor, therefore, might militate in favor of a finding of custody, but for the fact that police officers sought the permission of hospital personnel before they interviewed Chiavetta. Two days after Chiavetta was admitted, that permission was granted. A nurse testified that she consulted with a physician, who provided the approval, with the caveat that she was to remind the officers of Chiavetta's fragile mental condition. The physician testified by deposition that, on the morning of the questioning, Chiavetta "was appropriately nodding yes or no to the questions that I asked her, simple questions. She was able to follow commands and, you know, move all extremities, and there was no evidence she was no longer comatose (sic) at that point."

We recognize that the physician later advised defense counsel of his "strong feelings that Ms. Chiavetta was not capable of giving competent information due to the residual effects of the drugs she had previously taken in an effort to commit suicide." His subsequent equivocation does not alter the fact that police officers obtained advance permission from authorized personnel before questioning Chiavetta at the hospital. *See State v. Kyseth*, 240 N.W.2d 671, 672 (Iowa 1976).

Turning to the second factor, the purpose, place and manner of the interrogation, the purpose and place are uncontested. Specifically, there is no dispute that Cedar Rapids Detective Doug Larison and Robins Police Officer Carol Currans went to the hospital to question Chiavetta about Frank Chiavetta's death. There is also no dispute that the interview took place as Chiavetta was lying in a hospital bed in the intensive care unit, with intravenous lines hooked up to her arms. Finally, there is no dispute that the officers were the only individuals

in the room with Chiavetta. While these facts might suggest a custodial setting, it is noteworthy that Chiavetta's room was enclosed by glass and could be seen from the nurse's station. Therefore, Chiavetta was not under the exclusive control of the officers. *Cf. State v. Mortley*, 532 N.W.2d 498, 501-02 (Iowa Ct. App. 1995) (finding defendant in custody when he was separated from family member at police station, placed in a small room with an officer, and never told he was not under arrest or free to leave).

As for the manner of questioning, the interview was brief, lasting less than forty minutes. *See State v. Smith*, 546 N.W.2d 916, 924 (Iowa 1996) (examining brevity of interviews, ranging from twenty to forty minutes, in deciding custody determination); *State v. Cain*, 400 N.W.2d 582, 584 (Iowa 1987) (finding no custodial interrogation despite officer's two-hour presence with defendant in hospital). A nurse testified Chiavetta was "fully alert and oriented." Officer Larison stated Chiavetta appeared comfortable despite the intravenous lines in her arms.

Before beginning the interview, Larison preemptively read Chiavetta her *Miranda* rights but did not secure a written waiver of those rights.[3] Both officers

[3] Larison testified he gave the warnings "just in case it was decided that [Chiavetta] was in any type of being detained or felt she was being detained." In a notice of additional authority, appellate defense counsel cited two opinions, one published and one unpublished, that mention the effect of preemptive *Miranda* warnings on the custody analysis. *See State v. Astello*, 602 N.W.2d 190 (Iowa Ct. App. 1999); *State v. Schwebke*, No. 03-1194 (Iowa Ct. App. Sept. 29, 2004). At oral arguments, counsel maintained that the giving of *Miranda* warnings could transform a noncustodial interrogation into a custodial interrogation. *See United States v. Harris*, 221 F.3d 1048, 1051 n.3 (8th Cir. 2000). *See, e.g., United States v. Bautista*, 145 F. 3d 1140, 1151 (10th Cir. 1998); *Sprosty v. Buchler*, 79 F.3d 635, 642 (7th Cir. 1996); *Tukes v. Dugger*, 911 F.2d 508, 516 n.11 (11th Cir. 1990); *Davis v. Allsbrooks*, 778 F.2d 168, 172 (4th Cir. 1985); *United States v. Charles*, 738 F.2d 686, 694 n.6 (5th Cir. 1984), *overruled on other grounds by United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988); *United*

spoke to Chiavetta for approximately ten minutes. At that point, Chiavetta became irritated with Officer Larison and advised him she wished to speak to a lawyer. Larison told her she had a right to speak with a lawyer, but she also had a right to change her mind. As he was leaving the hospital room, he told Chiavetta she could speak with Currans if she changed her mind. Currans remained in the hospital room. While preparing contact information to give Chiavetta, she asked Chiavetta if there was anything she needed. Currans placed the information card on the table next to the hospital bed and, as she did so, Chiavetta reached out and touched Currans's arm. Currans asked her if she wanted to talk. Chiavetta nodded her head affirmatively. Currans then said, "this whole thing was too big for her to carry and that the truth would come out." Chiavetta began to cry, and asked the officer what would happen. Currans responded that she could not make any promises because she did not know what happened. She stated everything hinged on the truth and only Chiavetta knew the truth. Chiavetta looked away from the officer and said she had done a "horrible thing." She proceeded to describe the circumstances surrounding

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States v. Lewis, 556 F.2d 446, 449 (6th Cir. 1977); *State v. Wallace*, 94 P.3d 1275, 1285 (Hawaii 2004). *Cf. Beckwith v. United States,* 425 U.S. 341, 347-48, 96 S. Ct. 1612, 1617, 48 L. Ed. 2d 1, 8 (1976) ("Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive."); *State v. Mayberry*, 411 N.W.2d 677, 683 (Iowa 1987), *overruled on other grounds by State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), (finding characterization of interrogation as custodial or noncustodial insignificant in face of detailed *Miranda* warnings and written waiver); *In re A.T.S.*, 451 N.W.2d 37, 39 n.3 (Iowa Ct. App. 1989) (same). This "transformation theory" was neither raised before the district court nor argued in appellate counsel's brief. Therefore, error was not preserved or was waived, and we decline to address it. *See State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) (stating issues not raised before district court cannot be raised for first time on appeal); *State v. Floyd*, 466 N.W.2d 919, 924 (Iowa Ct. App. 1990) ("It is well settled that we will not address questions not presented to the trial court and that new theories may not be presented on appeal.").

Frank's death. She stated she twice injected Frank with insulin while he slept and subsequently hid vials and a syringe in a hole in her daughter's bedroom.

Currans summoned Larison and the verbal confession was repeated with both officers present. The officers left the hospital without posting a guard on the door or taking other measures to prevent Chiavetta from leaving the hospital. Officer Currans typed a statement based on the verbal confession. Currans returned to the hospital with another officer and had Chiavetta sign it.

We conclude the time, place, and manner of the interrogation did not render the interview custodial. *Cf. State v. Peterson*, 663 N.W.2d 417, 427-28 (Iowa 2003) (finding defendant in custody when officer escorted defendant to interrogation room, officer shut the door and stood guard outside, defendant was told to sit down when he stood up during interview, and detective testified defendant could not have voluntarily left the room). While Officer Currans remained in the room and continued to talk to Chiavetta in a sympathetic tone, these facts do not require a different conclusion. *Countryman*, 572 N.W.2d at 558.

The third factor, the extent to which the suspect is confronted with evidence of guilt, might militate in favor of a determination that Chiavetta was in custody. Larison questioned Chiavetta about how her husband received the insulin, and questioned her about whether she thought he was "in a better place." According to Currans, Chiavetta said Larison was trying to "paint [her] into a corner." Notwithstanding this evidence, we believe the first, second, and fourth factors support a determination that Chiavetta was not in custody.

The final factor is whether Chiavetta was free to leave the place of questioning. The only circumstances limiting Chiavetta's ability to leave were medical circumstances, such as the intravenous lines in her arms and the fact she had not been medically discharged. *See Cain*, 400 N.W.2d at 584 (noting officer's testimony that defendant could have gotten up and walked out and officer could have done nothing about it). As noted, no guards were posted at her door after the officers left and the officers did not ask for or obtain any restrictions on her movement.

We agree with the district court that Chiavetta was not in custody in her hospital room. Accordingly, *Miranda* warnings were not required. Based on our conclusion, we find it unnecessary to address Chiavetta's contention that police violated her Fifth Amendment right to counsel and her right to remain silent and her contention that her waiver of *Miranda* rights was involuntary.

2. Voluntariness of Confession. Chiavetta next argues that her hospital statements to police were involuntary. This "separate claim" requires the State to prove by a preponderance of the evidence that the statements were voluntarily given. *Countryman*, 572 N.W.2d at 558. A predicate to a finding of involuntariness is coercive police conduct. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473, 484 (1986) ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.").

In evaluating this issue, both Chiavetta and the State use the totality-of-the-circumstances test. *See State v. Payton*, 481 N.W.2d 325, 328-29 (Iowa

1992); *State v. Vincik*, 398 N.W.2d 788, 789 (Iowa 1987). Therefore, so will we. *Cf. State v. McCoy*, 692 N.W.2d 6, 27-28 (Iowa 2005) (evaluating voluntariness of confession using evidentiary test).

The district court thoroughly analyzed the circumstances surrounding Chiavetta's hospital statements, as follows:

> The officers here did not use any deceit or improper promises, threats or deprivation in gaining the admissions. The Court also considers the following: Chiavetta was thirty-six years of age at the time of the interview, she had completed a degree at Kirkwood Community College, she was employed as a nurse, the interview lasted only forty minutes, she had been interviewed two days earlier and had been informed of her rights at that time as well. Officers noted Chiavetta did not exhibit signs of impairment but appeared coherent. She responded appropriately to questions and did not appear confused. Chiavetta recognized Detective Currans and greeted her. Voices were not raised.

Additionally, the court addressed the physician's concerns about Chiavetta's fragile mental condition, noting the physician did not have specific information on what, if any, drugs were still in her system. The court pointed out that several witnesses, including the physician, testified Chiavetta was alert and oriented on the day of questioning.

In addition to these factors, we note that Chiavetta's drug overdose occurred two days earlier of her own volition. *Countryman*, 572 N.W.2d at 558 ("It was of her own volition that [the defendant] ingested any drugs affecting her."). As soon as she was admitted to the hospital, Chiavetta was given charcoal to deactivate those drugs.

On the day of the interview Chiavetta was taking an antidote to Tylenol, which was found in her system, a medication to protect her stomach against ulcers, a medicine to prevent blood clots, and an antibiotic for possible

pneumonia. An anti-depressant was not started until the day after the interview. The record contains no indication that the drugs administered at the hospital caused confusion or lack of orientation.

Notably, although Chiavetta was comatose when she arrived at the hospital, police were not allowed to question Chiavetta until the second day following her admission. At this juncture, tubes that helped Chiavetta breathe had been removed and, as noted, Chiavetta was awake and oriented.

Chiavetta was twice informed of her *Miranda* rights, once during the interview at the police station two days earlier and once at the hospital. This factor has been deemed important in the "voluntary statement" analysis. *See Vincik*, 398 N.W.2d at 790.

Finally, while Larison confronted Chiavetta with evidence of her guilt, there was no evidence that either officer threatened her or promised her lenient treatment if she confessed. *Countryman*, 572 N.W.2d at 560. At worst, Currans lent a "sympathetic ear," *Countryman*, 572 N.W.2d at 558, but we are not convinced her "exit comments" and actions amounted to the type of coercive conduct that has rendered a confession involuntary. *See State v. Morgan*, 559 N.W.2d 603, 608-09 (Iowa 1997); *State v. Jennett*, 574 N.W.2d 361, 366 (Iowa Ct. App. 1997) ("A statement to a criminal suspect that implies empathy or understanding for the suspect does not amount to improper inducement or coercion.") We conclude Chiavetta's verbal confession was voluntary.

Chiavetta also argues that her written statement was involuntary. There is scant evidence that the circumstances described above had changed between

the time Chiavetta verbally confessed and the time she signed the written confession. Accordingly, we reject this argument.

Chiavetta finally argues that, because her confessions were involuntary, any fruits of the confession must be suppressed. Having concluded that her confessions were voluntary, we reject this contention. *See United States v. Patane*, 542 U.S. 630, 634-37, 124 S. Ct. 2620, 2624-26, 159 L. Ed. 2d 667, 673-75 (2004).

B. Iowa Constitution

Chiavetta maintains that the state constitutional right to counsel articulated in *State v. Newsom*, 414 N.W.2d 354, 359 (Iowa 1987) is based on concerns that "are no less apparent in pre-arrest custodial interrogations and therefore the right to counsel is applicable under the due process provision of Article I section 9 of the Iowa Constitution." She also broadly requests that "[s]hould this court find [her] claims fail under the federal constitutional provisions cited above, . . . her claims also be considered under the related provisions of the Iowa Constitution."

The Iowa Supreme Court has stated: "Iowa constitutional due process claims follow federal principles, and thus, we do not address the state due process claim separately." *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000). We decline to deviate from this precept.

II. District Court's Redaction of Portions of Chiavetta's Confession

In her written statement to the police, Chiavetta referred to her use of the anti-depressant Effexor and the effect of the drug on her state of mind. Prior to trial, the State applied to have these references redacted, noting that Chiavetta did not file a notice of intent to rely on the defenses of diminished responsibility or

insanity. The State asserted that, in the absence of evidence or jury instructions on these defenses, the statements would be "misleading and confusing" to the fact-finder on "the issues of specific intent and malice aforethought and therefore prejudicial." The district court granted the request, ruling "the State is allowed to excise from the statement of Kimberly A. Chiavetta taken on July 14, 2004, her statements suggesting diminished responsibility from the effects of her medication."

> The following italicized portions of her statement were redacted:
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> *Several weeks ago, Frank thought that I was too drowsy and he wanted me to take only half of my Effexor. Effexor has an effect on my moods and it's a blood level drug. After I started taking less and less of my Effexor, I started getting horrible thoughts in my head.*
>
> * * *
>
> I just want everyone to know that I didn't mean for Frank to die. I don't know what I was thinking *and I know it's because of the Effexor*. I'm so sorry.

This redacted version was admitted at trial, over defense counsel's objection.

Chiavetta maintains that her entire statement should have been admitted under the rule of completeness. *See* Iowa R. Evid. 5.106.[4] We agree with the State that the district court had discretion to determine what portions of the statement would be admitted. *State v. Austin*, 585 N.W.2d 241, 243-44 (Iowa 1998).

[4] "When an act, declaration, conversation, writing, or recorded statement, or part thereof, is introduced by a party, any other part or any other act, declaration, conversation, writing, or recorded statement is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation." Iowa R. Evid. 5.106(*a*).

The district court did not abuse its discretion. The redacted evidence was essentially an assertion of diminished responsibility. That defense was not formally raised by defense counsel. Moreover, Chiavetta was found guilty of second-degree murder, which is not a specific intent crime to which the defense applies. *See State v. Jacobs*, 607 N.W.2d 679, 684 (Iowa 2000) ("The diminished responsibility defense is a common law doctrine that permits proof of a defendant's mental condition on the issue of the defendant's capacity to form specific intent in those instances in which the State must prove a defendant's specific intent as an element of the crime charged."); *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Third, diminished responsibility cannot negate the element of malice aforethought. *State v. Plowman*, 386 N.W.2d 546, 547-48 (Iowa Ct. App. 1986). Finally, the court left in the following sentences: "I just want everyone to know that I didn't mean for Frank to die. I don't know what I was thinking." These sentences conveyed to the jury her defense, as characterized by appellate counsel, that "she acted recklessly and that Frank's death was accidental and not intended." For these reasons, we affirm the district court's redaction ruling.

III. Disposition

We affirm Chiavetta's judgment and sentence.

AFFIRMED.