IN THE COURT OF APPEALS OF IOWA

No. 7-478 / 06-1207
Filed October 24, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN RAY WICHHART,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn and R. David Fahey, Judges.

Ryan Wichhart appeals his judgment and sentence for first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Taylor, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Ryan Wichhart appeals his judgment and sentence for first-degree murder. Iowa Code §§ 707.1, 707.2(1) and 707.2(2) (2005). He argues (1) the district court should have granted his motion to suppress a videotaped confession, and (2) trial counsel was ineffective.

I. Background Facts and Proceedings

Wichhart was a patient at Alcohol and Drug Dependency Services (ADDS), a substance abuse and alcohol treatment facility in Burlington. Kathi Mertens was an employee of ADDS, working the midnight to eight a.m. shift. Early one morning, Wichhart accosted Mertens in the medication room, struck her, and choked her. Mertens died. Wichhart stole some medication from the room and left the facility.

Police discovered Mertens's body at the facility. They also found Wichhart the next morning and arrested him on a charge of public intoxication. The police transported Wichhart to the police station, where he was allowed to sleep for approximately seven hours. A detective with the Burlington police department and an agent of the Department of Criminal Investigation then interrogated Wichhart in a room equipped with a camera. Before beginning the substantive questioning, the detective administered *Miranda*[1] warnings and had Wichhart sign a written waiver of his *Miranda* rights. During the interrogation, Wichhart

[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) (holding person subject to custodial interrogation must be advised that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

confessed to killing Mertens. He was arrested on an additional charge of first-degree murder.

Prior to trial, Wichhart moved to suppress his videotaped confession. The district court denied the motion after adducing testimony on the issue. The case proceeded to trial and a jury found Wichhart guilty as charged. This appeal followed.

II. Suppression Ruling

A *Miranda* waiver must be made knowingly, intelligently, and voluntarily, and must not be induced by intimidation, coercion or deception. *State v. Hajtic*, 724 N.W.2d 449, 453 (Iowa 2006).[2] Wichhart maintains he did not voluntarily waive his *Miranda* rights.[3] He claims his answers to questions about his rights and his written waiver of those rights "were given while he was in a drug-induced fog." Our review of this issue is de novo. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

There are two components to an analysis of whether a *Miranda* waiver is coerced.

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite

[2] *Miranda* warnings need only be given when a person is in police custody and subject to interrogation. *State v. Peterson*, 663 N.W.2d 417, 423 (2003). The State concedes these predicates are satisfied.

[3] In his motion, Wichhart also contended his statement to police was involuntary. Wichhart appears to have abandoned this argument on appeal.

> level of comprehension may a court properly conclude that the Miranda rights have been waived.

Colorado v. Spring, 479 U.S. 564, 573, 107 S. Ct. 851, 857, 93 L. Ed. 2d 954, 965 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 421 (1986)).

The testimony elicited at the suppression hearing and at trial reveals Wichhart ingested several prescription and over-the-counter drugs before he was apprehended. This testimony, viewed in isolation, might support Wichhart's assertion of involuntariness. However, the record also includes the videotaped confession. This videotape exemplifies the saying that "a picture is worth a thousand words." It shows that Wichhart was tired but lucid enough to appropriately answer questions concerning his constitutional rights. His answers were not simply "yes" or "no." The detective specifically asked Wichhart to explain each of the constitutional rights contained in the *Miranda* warning and Wichhart did so. The following exchange is instructive:

> Q. Okay. This is what I need to . . . the . . . before I ask you these questions about your . . . your intox arrest, I got . . . I need you to understand something. Okay. Um, before you answer any questions or make any statement, you must fully understand your rights. Okay. You have the right to remain silent. Do you understand that? A. (Nods head yes.)
>
> Q. Can you tell me what that means to you? A. It means if I don't want to incriminate myself (UNINTELLIGIBLE) . . . I can keep quiet.
>
> Q. Okay. Anything you say can and will be used against you in a court of law. Do you understand that? A. (Nods head yes.)
>
> Q. What does that mean to you? A. If I say something that can be used in court then . . . then they can use it.
>
> Q. Okay. You have the right to counsel . . . or consult with a lawyer before you answer any questions or make any statements and to have a lawyer present during questioning. Do you understand that? A. Yeah.

> Q. I'm sorry? A. Yes.
>
> Q. You do understand that. Okay, what does that mean to you? A. Um, it just means if I wanted a lawyer here to help me. I guess that's all I really get out of that one.
>
> Q. Okay, do you understand the fact that . . . that, uh, you can request an attorney? A. Yeah.
>
> Q. Okay, if you cannot afford a lawyer, one will be appointed for you before questioning or at any time during questioning if you so desire. Do you understand that? A. Mm hmm.
>
> Q. Okay. Do you understand what that means to you? A. Yeah.
>
> Q. If you answer questions or make any statement . . . If you answer questions or make any statement without consulting a lawyer or without having a lawyer present during questioning, you will have the right to stop answering questions or making any statement until you consult with a lawyer or have a lawyer present during further questioning. Do you understand that? A. Yeah.
>
> Q. What does that mean to you? A. I don't know but I'm clear on what it means.
>
> Q. You're clear on what it means? A. Yeah.
>
> Q. Can you explain to me what it means? A. No.
>
> Q. I'll read it to you one more time. If you answer any questions or make any statement without consulting a lawyer or without having a lawyer present during questioning, you will have the right to stop answering questions or making any statement until you consult with a lawyer or have a lawyer present during further questioning. A. Okay.
>
> Q. Got that? A. Yeah.
>
> Q. Okay. What does that mean to you? A. It means that if I don't have a lawyer here and you guys are asking me all sorts of questions then I don't have to answer it until I get a lawyer.
>
> Q. Okay. And you can . . . you can stop answering questions at any time if you want to, you understand that? A. Yeah.
>
> Q. Okay. What I'm gonna do here is I'm gonna sign this that I've advised you of your rights. Okay. Now what I'd like you to do . . . do you understand the English language? A. Yeah.
>
> Q. Can you read? A. Yes.
>
> Q. Okay. What I'd like you to do is read this paragraph and place your signature there please.

After this colloquy, Wichhart read and signed the written waiver.

During this exchange, Wichhart's answers were responsive and his demeanor conveyed an engagement in the interrogation process. Although he

dozed off during later breaks in the questioning, the officers were absent during those breaks. When they returned, he woke up. At worst, he did not immediately respond to a few questions and those questions had to be repeated. Wichhart's answers were responsive to the repeated questions.

We recognize that Wichhart exhibited certain lapses in memory. For example, during the questioning about Mertens's death, Wichhart misidentified ADDS, referring to it more than once by the name of another facility. However, he explained that he used that name because of his past association with the other facility. It is also true that Wichhart could not recall where he was or what he did for several hours after he left ADDS. However, he provided a detailed timeline of what happened before he left ADDS—a timeline independently corroborated with facility records. He also remembered other details such as the color of the suitcase he took with him and when and where he graduated from high school. We conclude Wichhart's isolated lapses in memory did not render his waiver of *Miranda* rights involuntary.

We now turn to the conduct of the law enforcement officers. *Spring*, *id.* at 573, 107 S. Ct. at 857, 93 L. Ed. 2d at 965. Both officers were calm and courteous. During the *Miranda*-related questioning, the detective rephrased sentences in laypersons' terms and asked follow-up questions to calibrate Wichhart's understanding of the constitutional rights being read to him. His questions were direct and non-confrontational during this portion of the colloquy.

While the detective conceded he later misled Wichhart by suggesting Wichhart did not intend to commit the crime, "deception standing alone does not render a waiver of constitutional rights involuntary as a matter of law unless the

deceiving acts amount to a deprivation of due process." *State v. Jacoby*, 260 N.W.2d 828, 833 (Iowa 1977). We believe the demeanor of the officers and of Wichhart, together with certain other factors, outweigh the effect of the detective's misleading statements.

Examining those other factors, police allowed Wichhart to sleep before the interrogation, offered him drinks during the two-hour interrogation, gave him a soda, afforded him lengthy breaks, asked him if he was okay when they found him asleep after one of the breaks, (to which he nodded his head affirmatively and straightened up), and took him to the restroom. Based on the videotape, we agree with the district court that Wichhart's waiver of his *Miranda* rights was voluntary.

III. Ineffective-Assistance-of-Counsel

A. Sexual Evidence and Comments. At trial, the State introduced evidence pointing to a possible sexual assault of Mertens by Wichhart. During closing arguments, the prosecutor commented on this evidence, suggesting it provided a motive for the crime. Defense counsel did not object to the testimony or argument. On appeal, Wichhart argues both "were irrelevant" and "were offered to prejudice and inflame the trier of fact." He appears to acknowledge that error was not preserved and, alternately, raises the issue under an ineffective-assistance-of-counsel rubric.

We agree error was not preserved. Wichhart filed a pre-trial motion in limine seeking to exclude the sexual comments. The district court overruled the motion, stating: "[T]he Court's ruling on the pending Motions in Limine should not be construed as a definitive or unequivocal holding concerning the admissibility

or exclusion of evidence." In light of this ruling, defense counsel was obligated to object to the sexual evidence if he wished to preserve error. *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006). He did not do so. Therefore, the appropriate vehicle for review of this assertion is as an ineffective-assistance-of-counsel claim.

We do not find the claim too general to address or preserve, as the State contends. We preserve this claim for postconviction relief proceedings to afford defense counsel an opportunity to respond to the assertions. *State v. Martinez*, 679 N.W.2d 620, 626 (Iowa 2004).

B. Limiting Instruction. During the videotaped interview, the officers made statements implying that Wichhart sexually assaulted Mertens. The officers also questioned Wichhart about why his bed sheets from his bed at ADDS were missing. Wichhart argues the jury should have been instructed that statements made by the officers could not be used as evidence of the truth of the statements made. As error was not preserved, Wichhart asks that this claim also be reviewed under an ineffective-assistance-of-counsel rubric. We agree it should be reviewed in this fashion and, like the previous claim, we preserve this claim for postconviction relief proceedings. *Id.*

AFFIRMED.