

752 N.W.2d 35 (Table), 2008 WL 942051 (Iowa App.)

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NOTICE: FINAL PUBLICATION DECISION PENDING

Court of Appeals of Iowa.
STATE of Iowa, Plaintiff-Appellee,
v.
James Carson EFFLER, Defendant-Appellant.
No. 06-1417.
April 9, 2008.

Appeal from the Iowa District Court for Polk County, [Artis Reis](#), Judge.
James Carson Effler appeals from his conviction following a jury trial for one count of first-degree kidnapping. **REVERSED AND REMANDED.**
[Angela Campbell](#) of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, [John P. Sarcone](#), County Attorney, and Jeff Noble and Frank Severino, Assistant County Attorneys, for appellee.

Heard by [MAHAN](#), P.J., and [EISENHAUER](#) and [BAKER](#), JJ.

[MAHAN](#), P.J.

*1 James Carson Effler appeals his conviction for first-degree kidnapping. He contends the district court erred in denying his motion to suppress, arguing his incriminating responses to police questions were made after he had made an unequivocal request for counsel. We reverse and remand.

I. Background Facts and Prior Proceedings

Melissa Martin was baby-sitting two-year-old J.M. on the morning of October 4, 2005. J.M. could walk, but she was only able to say a handful of words. Martin took J.M. to the Des Moines Central Library. Martin sat down at an Internet work station while J.M. stood beside her. The library manager saw J.M. drop a toy and then saw Effler pick up the toy and hand it back to J.M. Martin did not know Effler and did not see him interacting with J.M.^{[FN1](#)}

[FN1](#). J.M.'s mother also testified she did not know Effler.

After a few minutes, Martin realized J.M. had disappeared. Martin began to call out J.M.'s name. The library manager joined in the search and went with Martin to check the men's restroom. When they arrived at the small restroom, they found the door bolted shut. Martin called out J.M.'s name and two "bloodcurdling" screams emanated from behind the door. Martin and the manager pounded on the door and demanded it be opened, but the occupant refused to open the door. Staff members from other parts of the library heard the child's screams and came to render assistance. A maintenance person used a screwdriver to open the door. When the door opened, multiple witnesses saw Effler, shirtless, kneeling next to a naked J.M. Martin rushed in and pulled J.M. out of the bathroom. Effler tried to flee, but members of the library staff closed the door so he could not leave the bathroom. Two men held the door closed until police officers arrived and wrestled Effler to the ground as he tried to escape.

J.M. was sent to the hospital so that a doctor that specialized in sexually abused children could examine her. This doctor conducted a visual exam of J.M.'s genitals and found nothing remarkable, but did note her labia were "a little bit red."

Effler was transported to the police station and placed in a small interview room. A detective activated a video camera to tape the conversation. The detective noted that Effler smelled strongly of alcohol and "clearly had been drinking." [FN2](#) The detective first asked questions about Effler's address. Effler answered the questions with a very pronounced slur in his speech. Effler asked the detective if he was a lawyer. The detective said "No" and went on to explain he was a detective whose job it was "to make sure you don't get railroaded" and also that he was "somebody that's not sitting in judgment on you." Moments later, the following exchange took place between Effler and the detective:

[FN2](#). A urine specimen later revealed that his blood alcohol level was .094.

EFFLER: They said that I'm only being booked for intox in the public right now.

DETECTIVE: Oh.

EFFLER: Is that true?

DETECTIVE: I don't know that, you're not actually booked even yet, I mean, there's no booking been done.

*2 EFFLER: So I'm being released?

DETECTIVE: [mumbled response] Well if they book you for intox, then you got to, you know, you're not going to get released.

EFFLER: That would be overnight?

DETECTIVE: Usually it's overnight, the judge will usually let you out in the morning I suppose, huh?

EFFLER: Yeah.

DETECTIVE: You know what your rights are?

The officer then began to read Effler information from a *Miranda* waiver form. Seconds after the officer read the phrase “I do not want a lawyer at this time,” Effler interrupted and said, “I do want a court-appointed lawyer.” The detective said, “Okay” and then Effler said, “If I go to jail.” The detective responded by saying, “let me finish this and then we'll talk.” The detective finished reading the form, and Effler started making numerous requests for a cigarette. The detective told him he might be able to have a cigarette later. The detective then left to retrieve something from another room.

When he returned, the detective stated: “Here's all those things I talked to you about, the right to remain silent and all that, you remember? Well you know most of them. Do you want to read this, James?” Effler responded by stating “I already know them.” The detective said, “Okay, if you want to talk then sign there, then we'll get a smoke and then we'll talk a minute.” Effler signed the *Miranda* waiver form, and the two left the room so Effler could have a cigarette. When they returned, Effler answered the detective's questions and described how he took J.M.'s hand and walked her to the bathroom. He also described how he locked the bathroom door, took off all of her clothes, licked her “pussy,” and rubbed it with his fingers. He also told the detective he had masturbated and tried to place his penis inside J.M.'s vagina.

Effler was charged with the crimes of first-degree kidnapping, second-degree sexual abuse, and failure to register as a sex offender.

Prior to trial, Effler's counsel filed a motion to suppress, requesting that the videotaped confession and all statements Effler made to the detective be suppressed because his right to counsel had been violated. The district court denied the motion, finding Effler's request for counsel had been “conditioned upon his going to jail.”

Trial on this matter was held in August 2006. After hearing the aforementioned evidence, a jury found Effler guilty of first-degree kidnapping. The court sentenced Effler to the custody of the department of corrections for the remainder of his life without the possibility of parole.

On appeal, Effler claims the trial court erred in denying his motion to suppress. Effler also claims he was denied effective assistance of counsel. The State contends Effler's request for counsel was conditional, and also claims any potential error was harmless.

II. Standard of Review

In assessing an alleged violation of a constitutional right, we review de novo the totality of the circumstances as shown by the entire record. [State v. Breuer, 577 N.W.2d 41, 44 \(Iowa 1998\)](#).

III. Merits

A. Invocation of the Right to Counsel

*3 The fighting issue in this case is whether Effler requested an attorney prior to his confession.

The Fifth and Fourteenth Amendments to the United States Constitution require police to clearly inform a suspect of the right to counsel during a custodial interrogation.^{FN3} [Miranda v. Arizona](#), 384 U.S. 436, 473, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694, 723 (1966). In the landmark decision of *Miranda v. Arizona*, the United States Supreme Court determined an individual in custody

^{FN3}. The State does not dispute that Effler was in custody at the time of the interview. must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

[Id.](#) at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. The Court went on to state: If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

[Id.](#) at 474, 86 S.Ct. at 1628, 16 L.Ed.2d at 723. The Court also established that, absent a valid waiver of the right to remain silent and the right to the presence of an attorney, any statement made by an individual in response to custodial interrogation is inadmissible, and that, if a suspect requests counsel, the police must suspend interrogation until counsel is made available. [Id.](#) at 473-76, 86 S.Ct. at 1627-29, 16 L.Ed.2d at 723-25; accord [Edwards v. Arizona](#), 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 386 (1981). “If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his ... right to retained or appointed counsel.” [Miranda](#), 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724.

However, in order for a suspect to invoke his right to counsel, that suspect's request for counsel 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). “If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.” [Id.](#) at 461-62, 114 S.Ct. at 2356, 129 L.Ed.2d at 373. For example, a suspect's statement that he “might need a lawyer” is insufficient to invoke the right to counsel. [State v. Morgan](#), 559 N.W.2d 603, 608 (Iowa 1997). Likewise, a suspect's question, “Is my lawyer here?” is also insufficient to invoke the right to counsel. [State v. Brown](#), 589 N.W.2d 69, 72-73 (Iowa Ct.App.1998), *overruled on other grounds by State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001).

*4 Recently, our supreme court addressed a similar situation where a defendant claimed he was denied his constitutional right to counsel when police officers ignored his requests to speak with an attorney. In [*State v. Harris*, 741 N.W.2d 1, 4 \(2007\)](#), Kevin Harris was detained and questioned about his role in the death of man found inside a burned vehicle. Harris verbally agreed to answer questions without counsel present, but declined to provide a written waiver of his *Miranda* rights. [*Harris*, 741 N.W.2d at 6](#). The supreme court focused on two exchanges between Harris and the questioning detective.

First, after being questioned for one hour, Harris said, “If I need a lawyer, tell me now.” *Id.* The detective responded, “That's completely up to you” and continued to question Harris. *Id.* On appeal, Harris argued this statement was a request for counsel and that the detective should have stopped the interrogation. *Id.* at 4. The supreme court disagreed, concluding this statement was not sufficient because “[o]fficers have no obligation to stop questioning an individual who makes an ambiguous or equivocal request for an attorney.” *Id.* at 6.

However, the court found Harris's statements during the following exchange were neither ambiguous nor equivocal. *Id.* at 7. Ten minutes after the first exchange, Harris once again referenced his right to counsel when asked to explain his side of the story. *Id.* Harris told the detective, “I don't want to talk about it. We're going to do it with a lawyer. That's the way I got to go.” *Id.* The detective replied, “What do you mean?” *Id.* Harris answered, “You got all these trick questions. I don't understand.” *Id.* The detective said, “You want to do it with a lawyer, is that what you're saying?” *Id.* Harris replied, “Yeah, because I don't understand all these questions.” *Id.* The detective kept Harris talking, and eventually Harris revealed he had poured gasoline over the dead body and started the fire. *Id.* at 7-8.

The supreme court found Harris's second series of statements was a clear and unequivocal request for counsel. *Id.* at 7. The court noted that “[w]hile it is good practice to clarify an ambiguous request, it is not appropriate to ask a suspect to justify his unequivocal decision to have an attorney present.” *Id.* Ultimately, the court reversed the conviction and ordered a new trial. *Id.* at 11.

In the present case, it is indisputable Effler's first statement-“I do want a court-appointed lawyer”-was an unambiguous and unequivocal request for counsel. The State argues Effler's next statement-“If I go to jail”-made this request conditional and that the temporal aspect of Effler's request made it ambiguous because, arguably, Effler did not want counsel until he had actually arrived in jail. We disagree.

Any conditional aspect of this request had already been satisfied. Effler had been caught in the act of an alleged kidnapping, wrestled to the ground, handcuffed, and brought to the police station. Effler was clearly detained and had started down the inevitable path to a jail cell.^{FN4} The officer's attempt to avoid telling Effler he was not going to be released does not change the fact he was detained and would not be released

in the foreseeable future. The only reason he was not in jail at that moment was because he was being interrogated by this detective.

[FN4](#). During oral argument, the State conceded Effler was going to go to jail once the interview was over.

*5 We also reject the State's attempt to inject ambiguity into Effler's statement by arguing it was unclear whether Effler wanted counsel now, or when he arrived at the jail. The United State's Supreme Court has said “a suspect need not speak with the discrimination of an Oxford don” when making a request for counsel. [Davis, 512 U.S. at 459, 114 S.Ct. at 2355, 129 L.Ed.2d at 371](#). Instead, the defendant must make “his desire to have counsel present sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Id.*

We find that a reasonable police officer in these circumstances would have understood Effler's statement to be an immediate request for counsel. Effler was clearly intoxicated, yet he was still able to state that he wanted the assistance of a “court-appointed lawyer .” Instead of honoring this request, the detective ignored Effler and moved on to other matters. Later, the detective deftly implied that Effler could have a cigarette if he signed the *Miranda* waiver form. Effler signed the form, and was then given a cigarette.

Miranda and its progeny establish that an interrogation must cease once the suspect requests an attorney. Because the detective ignored Effler's request for an attorney and continued to try to have Effler sign the *Miranda* waiver form, there was no valid waiver. Consequently, the statements Effler made after he asked to speak with an attorney should have been suppressed. We find the court erred when it denied his motion to suppress.

B. Harmless Error

The State argues that even if the district court should have granted Effler's motion to suppress, it was harmless error to deny it.

The erroneous admission of evidence in violation of a defendant's Fifth Amendment rights does not require reversal if the error was harmless. [Harris, 741 N.W.2d at 10](#). To establish harmless error in this constitutional context the State must “prove beyond a reasonable doubt that the error complained of *did not contribute to the verdict obtained.*” [State v. Peterson, 663 N.W.2d 417, 431 \(Iowa 2003\)](#) (quoting [Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710 \(1967\)](#)) (emphasis added).

To prove Effler was guilty of kidnapping in the first degree the State had to prove that, as a consequence of the kidnapping, J.M. suffered serious injury, or was intentionally subjected to torture or sexual abuse. See [Iowa Code § 710.2 \(2005\)](#). Evidence that J.M. let out two bloodcurdling screams while she was locked in the bathroom with Effler, that she was naked and Effler did not have his shirt on when the door was opened, and that her labia were a “little bit red” may have been enough to convince a jury that J.M. was subjected to sexual abuse while she was in the bathroom. However, in this constitutional harmless error analysis, the inquiry “is not whether, in a trial that occurred without the

error, a guilty verdict would surely have been rendered.” [Peterson, 663 N.W.2d at 431](#). Instead, the analysis is “whether the guilty verdict actually rendered in this trial was *surely unattributable* to the error.” *Id.* (emphasis added). We find it more likely the improperly admitted confession describing how Effler licked J.M.'s vagina, rubbed her vagina with his fingers, and attempted to place his penis inside her vagina had a profound impact on the jury's consideration of whether she was subjected to sexual abuse. We simply cannot conclude Effler's graphic confession “did not contribute to the verdict obtained.” *See id.* Thus, a new trial is required.

IV. Conclusion

*6 In sum, we conclude Effler's Fifth Amendment right to an attorney was violated and the district court erred by not granting Effler's motion to suppress the statements he made to officers after he had requested an attorney. In addition, we conclude such error was not harmless beyond a reasonable doubt. We therefore reverse the district court's judgment of conviction and sentence and remand the case for a new trial.

REVERSED AND REMANDED.

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