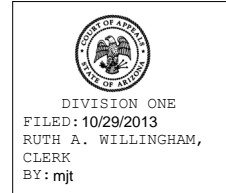


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0655
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
STEVEN MICHAEL MULVERHILL,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
_____)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201101064

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Linley Wilson, Assistant Attorney General
Attorneys for Appellee

Barbara Cook-Hamp, Mohave County Legal Advocate Kingman
By Jill L. Evans, Deputy Legal Advocate
Attorneys for Appellant

G O U L D, Judge

¶1 Steven Michael Mulverhill ("Appellant") appeals the trial court's order denying his motion to suppress statements he

made during police interrogation. Appellant requests that we reverse the trial court and suppress his statements to the police; vacate his conviction; and remand his case for a new trial. Because we find no error, we affirm.

Facts and Procedural Background

¶2 Appellant was indicted on the following offenses: Count 1, sexual conduct with a minor under the age of fifteen, a Class 2 felony; Count 2, molestation of a child, a Class 2 felony; and Count 3, attempted sexual conduct with a minor under the age of fifteen, a Class 2 felony. Following a jury trial, Appellant was found guilty on all three counts.

¶3 Prior to trial, Appellant filed a motion to suppress statements he made to the police. In his motion, Appellant asserted that police questioned him despite the fact he invoked his right to counsel.

¶4 Pursuant to Appellant's motion, the court held an evidentiary hearing. A DVD of Appellant's interview was admitted as evidence at the hearing. The DVD shows that Appellant was read his *Miranda* rights at the beginning of the interview, and that Appellant acknowledged he understood his rights and proceeded to answer a number of questions. Approximately twenty minutes into the interview, Detective Otero asked Appellant if he had been in a bathroom with the minor victim. When Appellant explained why he had entered the bathroom with the minor,

Detective Otero informed Appellant that his words contradicted the accounts of both the minor victim and an eyewitness. The following exchange then ensued:

Appellant: I think our conversation is done; I want a lawyer present now.

Detective Otero: OK.

Appellant: Because I'm being accused of something I know nothing about and I'm getting upset.

Detective Otero: You do know something about it, Steven, and you can be upset all you want, and I'm not mad at you, ok? You can ask for a lawyer, that is your right. . . .

Appellant: But I can also deny it right now too.

Detective Otero: What- what do you mean?

Appellant: I don't need a lawyer. You can finish asking me your questions.

Detective Otero: Ok, well why did you ask for a lawyer initially?

Appellant: Because I'm just being stupid.

Detective Otero: Ok, so. . . .

Appellant: I'm starting to get upset, and I can feel my blood pressure going up. I need to calm down.

Detective Otero: Ok, so, I'm asking you:
 do you want an attorney
 present or not?

Appellant: No. Continue.

¶5 At this point, another officer in the room asked Appellant if he wanted some water, and Appellant replied, "Yeah, my throat is getting dry." Detective Otero then told Appellant that he was going to step outside to give Appellant "a second to calm down." Appellant asked if he could use the restroom, and Detective Otero responded, "Absolutely." Appellant returned to the interview room two minutes later and was provided water. Detective Otero resumed the interview approximately seven minutes later by asking Appellant, "You still want to talk to me without the presence of an attorney, correct?" Appellant stated, "Mmm-hmm" and nodded in the affirmative.

¶6 After the evidentiary hearing, the trial court denied Appellant's motion to suppress. The court reasoned that while Appellant's initial statement would, in isolation, be viewed as an unequivocal invocation of Appellant's right to counsel, by continuing to discuss the accusations against him and immediately stating he did not want an attorney, Appellant sent the police a "mixed message" regarding his request for counsel. As a result, Appellant did not clearly invoke his right to counsel. The trial court further found that under these circumstances, Detective

Otero had a right to clarify whether Appellant was invoking his right to counsel. The trial court concluded that Appellant's responses to Detective Otero's clarifying questions made it clear that he was not requesting an attorney and that he was willing to continue to answer Detective Otero's questions.

¶7 After Appellant was sentenced, he filed a timely notice of appeal. This Court has jurisdiction under Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶8 A trial court's decision on a motion to suppress evidence is reviewed for an abuse of discretion and the evidence is viewed in the light most favorable to upholding the trial court's ruling. *State v. Moreno-Medrano*, 218 Ariz. 349, 351, ¶ 3, 185 P.3d 135, 137 (App. 2008). This court defers to the trial court's factual determinations, but reviews its conclusions of law *de novo*. *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009).

¶9 A defendant must clearly and unambiguously invoke his right to counsel. *Davis v. United States*, 512 U.S. 452, 459 (1994); *State v. Eastlack*, 180 Ariz. 243, 250-51, 883 P.2d 999, 1006-07 (1994); *State v. Spears*, 184 Ariz. 277, 286, 908 P.2d 1062, 1071 (1996). A defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable

police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459.

¶10 If a defendant's request for counsel is not sufficiently clear the interview may continue. *Davis*, 452 U.S. at 459. That is, if a defendant makes an ambiguous comment from which a reasonable police officer "would have understood only that the suspect *might* be invoking the right to counsel" the police do not need to stop questioning. *Id.* In addition, the police are not required to clarify an ambiguous request for counsel; further questioning may be on any subject matter. *Id.* at 461-62; *Eastlack*, 180 Ariz. at 250, 883 P.2d at 1006.

¶11 *Davis* and its progeny place a strong emphasis on the context of the asserted invocation of counsel. A defendant's statement is not analyzed in isolation, but must be clear and unambiguous under the circumstances. *Davis*, 512 U.S. at 460; *Eastlack*, 180 Ariz. at 250-51, 883 P.2d at 1006-07; *State v. Newell*, 212 Ariz. 389, 397, ¶ 29, 132 P.3d 833, 841 (2006). A police officer may continue questioning of a suspect if anything about the request or the circumstances leading up to the request would render the request ambiguous. *Eastlack*, 180 Ariz. at 250-51, 883 P.2d at 1006-07.

¶12 Even if a defendant clearly invokes his right to counsel, he may subsequently waive this right by voluntarily

initiating a discussion with the police without counsel present. *Minnick v. Mississippi*, 498 U.S. 146, 152 (1990); *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), an officer read Bradshaw his *Miranda* rights and, after the officer accused him of murder, Bradshaw clearly stated that he wanted an attorney. 462 U.S. at 1041. A short time later, Bradshaw inquired as to what was going to happen to him, and the officer reminded him that because he had requested an attorney, continuing the conversation "has to be at your own free will." *Id.* at 1042. Bradshaw said he understood and continued the conversation. *Id.* The Supreme Court noted, "Although ambiguous, the respondent's question . . . as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46. The Court concluded that Bradshaw's statements were admissible because he knowingly waived his right to remain silent. *Id.* at 1046.

¶13 Here, Appellant claims that he "clearly and unambiguously invoked his right to counsel" and therefore "the police had no right to ask any clarifying questions." We disagree. When taken in context, Appellant sent a mixed message to police regarding his right to counsel. Appellant's initial statement, even if unequivocal, was immediately followed by Appellant retracting the statement and telling the police he did

not want an attorney. Moreover, despite his brief comment regarding counsel, Appellant promptly expressed his willingness to continue discussing the case without an attorney present. Accordingly, the record shows that Appellant did not make a clear and unequivocal request for counsel.

¶14 Moreover, even if Appellant unambiguously invoked his right to counsel, he waived this right by re-initiating questioning with the police. After Appellant stated that he wanted an attorney present, Detective Otero immediately began collecting his paperwork and did not ask any further questions. Appellant then re-engaged Detective Otero by continuing to discuss the accusations against him, and stating that he wished to continue the interview without an attorney present. In an effort to clear up any confusion, Detective Otero asked Appellant whether he wanted an attorney. Detective Otero then gave Appellant a short break to "calm down," use the restroom, and have some water. After the break, Detective Otero gave Appellant another opportunity to clarify whether he wanted an attorney; Appellant made it clear that he did not want an attorney, and wanted to continue the interview. See *Bradshaw*, 462 U.S. at 1046 ("[W]ithin a short time after requesting an attorney he changed his mind without any impropriety on the part of the police.").

¶15 Appellant argues that after he invoked his right to counsel, he only resumed the interview because Detective Otero

coerced him into making a statement by inviting him to tell his side of the story. However, our review of the record does not support Appellant's argument. Detective Otero's statements, when taken in context, were not designed to undermine Appellant's will or his invocation of counsel; rather, they were simply questions seeking to clarify whether Appellant wanted to invoke his right to counsel, or proceed with the interview.

Conclusion

¶16 Because we find no error, we affirm the decision of the trial court denying Appellant's motion to suppress. Accordingly, Appellant's convictions and sentences are affirmed.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Judge

/S/
DONN KESSLER, Judge