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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/06/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0785
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
OMAR JOEY REINEKE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007592-001

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Around midnight on October 15, 2007, Tempe Police arrived at the AM/PM convenience store on West University Drive to investigate an assault and robbery reported by the victim,

J.G. As they searched the area surrounding the store, they discovered a man beaten, unresponsive, and bleeding from the mouth and ear lying in an area behind the AM/PM near a restaurant. As officers rolled him over to prevent him from choking on the blood in his mouth, they discovered abrasions that looked like shoeprints on his side and back. The unconscious man had no identification and no phone and could not identify himself, so when he was taken to the hospital, he was assigned a numeric identifier of Quebec 309.

¶2 Two days later, N.R. contacted Tempe Police to report that his roommate was missing. N.R. told police that he had last seen his roommate at their apartment just one block north of the AM/PM on October 15 at around 8:00 p.m., and he provided an officer with photographs to identify his roommate. The officer was aware of the unidentified victim in the October 15 incident and passed the information he received from N.R. to Tempe Police Detective David Larson. Larson was then able to identify the victim from the October 15 assault as N.R.'s roommate, T.L. T.L. spent two months in the hospital, including several days in a coma; he could not remember anything between the hours preceding the assault and Thanksgiving Day 2007. He had to undergo physical therapy to learn to walk again and speech therapy to regain his speech.

¶13 T.L.'s cell phone was taken during the assault and used to call the mother of two of the later identified juvenile suspects. When police contacted these suspects, they collected shoes with soles that matched the injuries left on T.L.'s back and sides. Continued investigation connected Omar Joey Reineke ("Defendant") to the juvenile brothers, and Detectives Larson and John McGowan interviewed Defendant -- who was in custody on an unrelated offense -- on November 20, 2008.

¶14 For his involvement in the assaults on J.G. and T.L., Defendant was indicted on September 3, 2009, with two counts of aggravated robbery, a class 3 felony (Counts 1 and 5); one count of theft of a credit card or obtaining a credit card by fraudulent means, a class five felony (Count 2); one count of aggravated assault, a class three dangerous felony (Count 3); one count of aggravated assault, a class six dangerous felony (Count 4); one count of aggravated assault, a class four felony (Count 6); and two counts of armed robbery, a class two felony (Counts 7 and 8).¹ An arrest warrant was issued and Defendant was picked up by police on November 24, 2009.

¶15 Defendant moved to suppress his statements to police on the ground that he had invoked his right to remain silent and the officers continued to question him after invocation. The

¹ Counts 1 through 4 and 8 are for the crimes against T.L. Counts 5 through 7 are for the crimes against J.G.

court held an evidentiary hearing on August 2, 2010, after which it denied Defendant's motion, acknowledging that "once a custodial suspect makes an unambiguous statement to either remain silent or to invoke his right to counsel, questioning by police authorities must cease. . . . It just didn't happen in this case."

¶16 Trial began on August 11, 2010. The state called one of the juvenile defendants, who had been given use immunity, but he claimed he did not remember the statements he made to police. The state was then allowed to impeach the juvenile defendant with the audio recording of his interview with police, during which he implicated Defendant in the assault and robbery of T.L. On day four, the state played the audio recording of Defendant's November 20, 2008 interview. The jury returned guilty verdicts on Counts 1 through 4 and Count 8, found dangerousness on Counts 3, 4, and 8 -- those relating to victim T.L. -- and returned not guilty verdicts on all the remaining Counts. The jury also found seven aggravating factors.

¶17 Defendant was sentenced to the presumptive 11.25 years on Count 1; the presumptive 5 years on Count 2; and aggravated sentences of life imprisonment on Counts 3, 4, and 8.²

² Defendant's sentences on Counts 1, 2 and 3 run concurrent to each other. Counts 4 and 8 are concurrent to each other and consecutive to Counts 1 through 3.

¶18 Defendant timely appeals. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) and 13-4031.

STANDARD OF REVIEW

¶19 We review a trial court's denial of a motion to suppress for an abuse of discretion, but review conclusions of law de novo. *State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). "We restrict our review to consideration of the facts the trial court heard at the suppression hearing." *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996).

DISCUSSION

¶10 Under *Miranda*, criminal suspects subjected to custodial interrogation must be advised of the Fifth Amendment right to remain silent and to have counsel. *Thompson v. Keohane*, 516 U.S. 99, 102 (1995). As with the right to counsel, invocation of the right to remain silent during a custodial interrogation must be unequivocal and unambiguous to require cessation of further questioning. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260-61 (2010); *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) (citing *State v. Finehout*, 136 Ariz. 226, 229, 665 P.2d 570, 573 (1983)). When invocation is not unequivocal or unambiguous, law enforcement is permitted, but not required, to seek clarification to determine whether the

suspect intended to invoke his right to silence under *Miranda*. *Berghuis*, 130 S. Ct. at 2259-60; see *State v. Lawson*, 144 Ariz. 547, 554-55, 698 P.2d 1266, 1273-74 (1985). When the court reviews the admissibility of a confession, it must consider the totality of the circumstances. *Lawson*, 144 Ariz. at 555, 698 P.2d at 1274.

¶11 Here, there is no dispute that Defendant received *Miranda* advisements, that he understood his *Miranda* rights or that he knowingly and voluntarily waived those rights before the relevant portion of the interview -- Defendant's contention is that he asserted the right to remain silent during the following exchange:

Detective McGowan (DM): Can you tell us why you were in there that night?

Defendant: I can't remember, man.

Detective Larson (DL): Starting to recall back what we're here talking about now? What this is about?

Defendant: Yeah, well, I already knew what you was talking about . . . (inaudible)

DL: Okay. Can we talk about that, then?

Defendant: Listen, I'm not fin to admit nothin', you know what I mean?

DL: You're not going to what?

Defendant: I said I'm not fin to admit nothing, I did anything or didn't do it, you know what I mean, I'm not fin to say nothing.

DL: You have nothing to say?

Defendant: Nah.

DL: Okay. You know if something happened right before that? Pretty bad.

Defendant: I can't say that I do.

DL: Okay. Well then with, I can't say I'm, I pretty much have a straight question. Do you feel like talking to us anymore? 'Cause we got some more questions with you but if you're not going to answer one way or the other then there's not a whole lot of point what[']s going on with the questions.

Defendant: What's the questions?

¶12 Defendant asserts that through the above quoted statements, he unequivocally and unambiguously invoked his right to remain silent and that the interviewing detective's further question beyond Defendant's "Nah" was not to clarify whether he was invoking his silence right but rather that "further questioning by the officers was an interrogation technique to have [Defendant] second-guess his right to remain silent." We disagree.

¶13 We find the analysis in *Lawson* most applicable to the circumstances here. In *Lawson*, the defendant had waived his right to remain silent after receiving *Miranda* warnings and was speaking with investigators about his involvement in a murder. 144 Ariz. at 554, 698 P.2d at 1273. The investigators explained what they wanted to talk to defendant about and when asked if he had anything to say, he replied "I've got nothing to say." *Id.*

The investigator then asked, "Are you denying being there?" to which the defendant responded, "Yeah." *Id.* Our supreme court held that a fair reading of the interview transcript evidenced that the defendant's "I've got nothing to say" was not "even an ambiguous request that interrogation cease" in that it was "no more than a response to [the investigator's] questions" about whether the defendant had anything to say about the murder, and therefore further questioning was not improper. *Id.* at 555, 698 P.2d at 1274.

¶14 Here, after the interrogation began to focus on Defendant's known location at 11:40 p.m. on October 15, 2007, McGowan asked, "Can you tell us why you were in there that night?" to which Defendant replied, "I can't remember, man." When Lawson asked him if they could talk about that night, Defendant replied, "I'm not fin to admit nothin', you know what I mean?" Lawson asked him "You're not going to what?" and Defendant replied, "I said I'm not fin to say nothing, I did anything or didn't do it, you know what I mean, I'm not fin to say nothing." Lawson then asked, "You have nothing to say?" and Defendant replied, "Nah."

¶15 This series of questions and answers does not lead to the conclusion that the detectives were attempting to get Defendant to "second-guess his right to remain silent." The detective's questions were simply reprises of the inquiry into

whether Defendant had anything to say about that night and the statements that followed were nothing more than responses to those questions -- assertions that Defendant is not willing to admit involvement in the crimes, not that he is unwilling to continue speaking with the detectives. And Defendant's immediate inquiry into the nature of the other questions the detective had belies any suspicion that an unequivocal invocation of the right occurred. Accordingly, we cannot find that the trial court abused its discretion in allowing Defendant's interview to be played for the jury.

CONCLUSION

¶16 For the reasons discussed above, we affirm the Defendant's convictions and sentences.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge