

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3016

MARCUS DEANGELO KNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
Jennie Kinsey, Judge.

November 9, 2022

PER CURIAM.

A jury convicted Marcus Knight of second-degree murder. The trial court sentenced him to life in prison. Knight appeals on two grounds. First, he argues the trial court erred by allowing the State—over objection—to make certain statements in closing argument that he contends were improper comments on his right to remain silent. Second, even though this is a direct appeal and Knight did not ask the trial court for new counsel, he contends he is entitled to a new trial because his counsel rendered ineffective assistance. He contends that his trial counsel should have moved to suppress a recording of a second interview of Knight by police and then should have objected to the admission of statements where Knight invoked both his right to remain silent and his right to counsel. We affirm.

After Knight was charged with killing his grandfather, he was interviewed by police on two separate occasions. We do not see where trial counsel filed a motion to keep evidence about Knight's statements in the interviews (the recordings, testimony from the detectives, or both) out of the trial.

In the first interview, Detective Alverson advised him of his rights to remain silent and to have a lawyer present during questioning, and she advised Knight of the consequences that could flow from not taking advantage of those rights. The detectives then began questioning him. Knight told the detectives that he slept at the train station the night before. He also told them that his grandfather had a gun and pointed it at him the night of the murder. Knight then made several statements to the detectives about his actions the previous day, and when the detectives pressured him to confess to what happened between him and his grandfather, Knight asked for an lawyer. The questioning promptly ceased.

The second interview took place three weeks later. It is unclear whether Knight waived his right to counsel at some point during those three weeks. It is also unclear whether the detectives sought out Knight or vice versa. Because his counsel did not seek to suppress this interview, we have no record of anything extrinsic to the interview that could shed light on this. We do know, from viewing the interview, that his lawyer was not present for this interrogation. Before questioning started, Detective Alverson meticulously went over Knight's rights again. She paused after reading to him each right to ensure he understood. Toward the end of this preliminary conversation, she reviewed with him all of the rights they had just gone over. When she asked whether he consented to answer questions without a lawyer present, he paused. Detective Alverson then assured him: "And this is important. You can stop answering at any time." He paused, thought about it, and stated, "Well I'll stop then." Detective Alverson clarified that if "at any point you don't want to talk anymore, you can stop, okay?" Knight agreed.

Detective Alverson then proceeded to ask Knight a series of questions related to the crime over nearly thirty minutes, and Knight freely answered them. She showed Knight various pieces

of evidence that she had that incriminated him and asked him to explain. The purpose of this interview obviously was to address the inconsistencies in Knight's statements during the first interview and also to seek a confession, "to get this off your chest." Toward the end, when he was more aggressively pressed on inconsistencies in his story, Knight declared, "I don't want to talk no more." The second interview ceased at that point.

With no objection from Knight's counsel, recordings of both interviews were received into evidence and published to the jury while Detective Alverson was on the stand. The State asked her some follow-up questions after the first interview was published:

[STATE]: Detective Alverson, did he [Knight] ever tell you what happened?

[ALVERSON]: No, he did not.

[STATE]: Did you give him every opportunity to tell you his story?

Knight's trial counsel objected on the basis that this line of questioning was an improper take on his client's right to remain silent. The trial judge sustained the objection and instructed the State to move on. No curative instruction was requested or given.

Immediately before closing arguments, Knight's counsel brought up the aforementioned line of questioning. She stated the following:

[MS. LATOUR]: Due to questions that were asked yesterday regarding a defendant's right to remain silent, I just wanted to ensure that during closing argument, Mr. Gordon [the prosecutor] would not be making any improper commentary on the right to remain silent, suggestive of the defendant's silence during the interviews or the detective having—I think his language was "every opportunity to get him to confess."

Throughout the State's closing argument, Knight's trial counsel objected to the statements that she believed could potentially be improper comments on Knight's right to remain silent. Every

objection was overruled. We now turn to Knight's claims of reversible error.

Knight's primary point of error pertains to comments that the trial court allowed the State to make to the jury, over objection, during closing argument: that Knight had refused to answer certain questions from law enforcement, that he never denied being guilty, and that he never answered "the hard questions." Knight contends that these arguments were clear comments on his right to remain silent and suggested to the jury that Knight was guilty. The State's comments were obviously meant to cast doubt on Knight's voluntarily offered statements from the first interview. The State responds that the prohibition against commenting on Knight's silence does not apply since Knight waived his right against self-incrimination when he voluntarily answered Detective Alverson's questions. We agree with the State.

Much of the State's closing argument was spent discrediting Knight's responses—or lack thereof—to Detective Alverson's questions. These comments would be inappropriate if they referred to Knight's post-arrest, post-Miranda silence and if Knight had chosen to sit mute. He did not. In both interviews, Knight was cautioned about his rights to have a lawyer present and to not answer questions. Instead, he chose to respond to many of Detective Alverson's questions and to engage with her during the interrogations. There were times throughout when he just sat silently in the face of a difficult question, but he did not indicate during those times that he wanted to terminate the interviews. These intermittent stops and starts during the interrogations—choosing to answer some questions and responding in non-verbal ways to others, but sometimes just not responding at all to other questions—do not constitute a re-invoking of the rights he waived by talking. *See Downs v. Moore*, 801 So. 2d 906 (Fla. 2001) (holding that when a defendant refuses to answer one question out of many during a lengthy interrogation following the defendant's waiver of his constitutional rights, the State is *not* precluded from admitting evidence of the defendant's silence at trial). Knight's argument is, therefore, without merit because the State was merely commenting on Knight's voluntarily given statements that were offered *after* he waived his rights and before he reclaimed them. Recordings of both interviews were properly admitted without

objection, so Knight's statements and non-statements during those interviews were fair game for comment by the State during closing argument.

Knight also seeks a new trial, contending that his trial counsel rendered ineffective assistance of counsel. We do not reach this issue because we cannot address an unpreserved claim of ineffective assistance of counsel on direct appeal that does not allege fundamental error. *See Steiger v. State*, 328 So. 3d 926, 929 (Fla. 2021) (“[B]ased on the plain language of section 924.051(3), unpreserved claims of ineffective assistance of counsel cannot be raised or result in reversal on direct appeal because the statute requires the more demanding showing of fundamental error.”). Knight did not ask for new counsel, and there was nothing about the trial proceedings that would have made a need for new counsel readily apparent to the trial court. We cannot say, then, that the trial court committed fundamental error by not intervening, without prompting from Knight, on the question of the effectiveness of his counsel.

AFFIRMED.

M.K. THOMAS and TANENBAUM, JJ., concur; LEWIS, J., concurs in result only.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jessica J. Yeary, Public Defender, and Pamela D. Presnell, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Michael L. Schaub, Assistant Attorney General, Tallahassee, for Appellee.