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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOSHUA STEVEN TANNER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-3053

Opinion filed January 8, 2021.

Appeal from the Circuit Court for Charlotte County; George C. Richards, Judge.

Christopher H. Brown of Brown, Suarez, Rios & Weinberg, P.A., Fort Myers, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

MORRIS, Judge.

Joshua Tanner appeals his convictions after a jury trial for kidnapping, attempted second-degree arson, and resisting an officer without violence. On appeal, Tanner raises five issues. We agree that the trial court erred in denying his motion to

suppress and therefore reverse and remand for a new trial. We also address two meritorious issues that may arise again on retrial.[1]

I. Background

The State alleged that Tanner committed the offenses against Tanner's former paramour after their relationship had turned sour. However, the victim did not testify against Tanner at trial. Rather, the State presented the 911 call made by the victim on the night of the offenses. In the call, the victim reported that Tanner had hitched up the camper in which she was hiding and that Tanner was driving down a rural road in Charlotte County with her inside. She also said that Tanner was setting the camper on fire with her in it. She then said that the camper was on fire and that he was shooting at her. The call ended when law enforcement arrived. The 911 operator testified that she did not hear any sounds of gunshots during the call. When the victim spoke to law enforcement on the scene, the victim reported that Tanner had sent her threatening messages that day. A detective testified that he observed the threatening messages on the victim's phone.

When law enforcement officers responded to the scene, a car was observed trying to drive away from the scene, but the car became stuck in the mud. The driver, identified later to be Tanner, ran away into the woods. He was spotted by a helicopter unit and apprehended by the K-9 unit. Tanner was wet and cold when he was apprehended. He had in his possession personal items, including a lighter.

A rifle was found in Tanner's car. No bullet holes were found in the trailer, and no shell casings were found in the area. There was no evidence that the trailer had

[1]We find no merit to the other two issues raised by Tanner.

been burned, but there was a dark ring around the trailer that smelled of gasoline. A can of gasoline was found in the bed of Tanner's work truck. The victim had told law enforcement that there had been a burn on the property earlier that day, and law enforcement observed burned palm fronds or sticks near the camper. Gas was found on Tanner's shoes, a sock, and jeans and on a soil sample. Gas and kerosene were found on pieces of palm fronds. Photographs of the scene and evidence collected at the scene were introduced.

The State introduced a recorded statement that Tanner gave to detectives after he was apprehended and read his Miranda[2] rights. Tanner said that the victim was a liar and that he had been trying to get her out of his life. He had asked her to quit texting him and to get out of his life, but she refused to. Tanner said that the victim was not supposed to be on the property, which belonged to his boss. When he got there on the day in question, he found a note from the victim and the victim locked in his friend's camper. He admitted to hooking his work truck up to the camper to tow the camper away but then thought better of it because it occurred to him that it could be kidnapping with her inside. He admitted having rifles in his possession because he had been shooting earlier that day at his friend's ranch; he denied firing at or near the camper. He also denied that he had poured any gas around the camper. He admitted to sending the victim threatening text messages, but he said that he should not have sent them.

The defense's theory was that the victim had set the whole thing up and that the victim was lying in the 911 call. Tanner did not testify, but the lessor of the property, Joel Green, testified for the defense. Green said that Tanner was helping

[2]Miranda v. Arizona, 384 U.S. 436 (1966).

Green develop the property to build a gator farm. Green owned the camper and had told the victim she could not be on the property. Green was shown a photograph of the burned sticks and testified that it was consistent with the plants and trees that they frequently burn on the property. Green agreed that the camper had been moved twenty yards.

The jury convicted Tanner as charged on all counts. The victim testified for the defense at the sentencing hearing. She did not believe that Tanner should go to prison. The trial court sentenced Tanner to concurrent terms of nine years in prison on the kidnapping and attempted arson counts and to time served on the resisting count.

II. Motion to suppress

Prior to trial, Tanner filed a motion to suppress statements, claiming that during his interview with police on the night of the alleged offenses, he invoked his right to remain silent. He alleged that the police ignored his invocation of the right to silence and continued to question him, eliciting incriminating statements.

At the hearing on the motion to suppress, Detective Bailey of the Charlotte County Sheriff's Office testified that he responded to the rural area of the offenses around 1:00 a.m. After Detective Bailey interviewed the victim, he interviewed Tanner in an unmarked sheriff's vehicle at approximately 4:45 a.m. Tanner was "wet, shaking cold," with "sand, scratches, dirt all up and down his body." It was cold that night, so Detective Bailey turned the heat on in the vehicle. Tanner was read his Miranda rights and indicated he understood. Detective Bailey stated that Tanner was in custody and handcuffed at the time and sitting in the front passenger seat of the vehicle. Tanner was calm and conversational at first, but at one point in the interview, he became

agitated, angry, and upset. Detective Bailey did not believe that Tanner made any statement during the interview that invoked Tanner's right to remain silent. A recording of Tanner's statement was admitted into evidence.

Detective Coleman testified that he sat in the backseat of the vehicle during the interview. Coleman confirmed that Tanner was read his Miranda rights and indicated he understood those rights. Tanner was "[a] little aggravated" about the situation with the victim but was "for the most part cooperative." Detective Coleman did not believe that Tanner asserted his right to remain silent at any point in the interview. Detective Coleman agreed that Tanner made comments about "being done" but that those comments could have meant that Tanner was done with "the whole situation" with the victim.

The recorded statement is transcribed in the record. In regard to the right to remain silent, the recorded statement contains the following conversation:

> Bailey: Well, I'm gonna read them anyway. Um, Joshua, "You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and have him with you during questioning. If you decide to answer--" excuse me. "If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." Do you understand each of these rights I have explained to you, Joshua?
>
> Tanner: Yes, sir.
>
> Bailey: Okay. I'm gonna explain the definition of perjury. Um, perjury can be committed by telling lies. Do you know what a lie is?
>
> Tanner: Yes, sir.

Bailey: Okay. It can also be committed by leaving out facts or omitting information to put yourself or someone else in a better light or a worse light, you know. Do you understand?

Tanner: Yes, sir.

Bailey: Okay. So, we need the truth and nothing but the truth. You understand that, I'm sure, right?

Tanner: Yes, sir.

Bailey: Okay. Prior to taking a sworn statement, I'm gonna place you under oath. Can you raise your right hand? . . . There you go. Um, do you swear or affirm the statement you're about to give will be the truth, the whole truth, and nothing but the truth?

Tanner: Yes, sir.

Bailey: Okay. Joshua, could you explain to me why law enforcement's out here today?

Tanner: Nope.

Bailey: You could not?

Tanner: No.

Bailey: Not at all?

Tanner: No, sir.

Bailey: Okay. Joshua, you're covered in water and sand, and you didn't stick around when law enforcement arrived to this address. Why is that?

Tanner: Because I'm wet.

Bailey: You're wet?

Tanner: Yes, sir.

Bailey: That's why you--well, you--you're wet because you didn't--

Tanner: I don't got nothing to say to y'all. I don't--I don't know what's going on. I'm fucking freezing.

Bailey: Well, that's--that's--okay.

Tanner: I was sitting right there (unintelligible).

Bailey: I--I understand that.

Tanner: Yes, sir. Sorry.

Bailey: I understand that. Okay? But Joshua, you understand there's some serious accusations. And we would love to hear your side of the story, and we can't do that.

Tanner: Yes, sir.

Bailey: Would you like to give me your side of the story?

Tanner: No, sir.

Coleman: Joshua, you need to understand something, okay?

Tanner: Yes, sir.

Coleman: As of right now, all right, we're out here; we were called out here; you're here; your other half is here, uh, [the victim], okay? I know you guys are split up at this point and everything else. We've talked to her. We have received her side of the--of--of what occurred. We don't have your side. I know you know this and I know you understand that. Okay? But right now with what we have, it looks like we're dealing with an attempted homicide.

Tanner: Do it. Um, whatever she says. I don't--

Coleman: Well, and that--that's not good. You shouldn't be like that because if that's not the case--

Tanner: Yeah.

Coleman: --we wanna hear what was really going on. Listen, we know how this stuff goes.

> Tanner: Yeah.
>
> Coleman: I mean, you guys have been in a relationship on and off for three years. Okay? We understand that things break down. Sometimes they--they get hot and heavy. I know women cheat sometimes, men cheat. We--you know, stuff happens. We don't know. We don't know if this is--if all of this was fueled by passion. We don't know if this was something that, you know, you just had your fill of her. Don't know if you had been drinking. Any number of things. But we'd like to kinda get an idea, so that when this goes to the State, and we have to say, okay, well, we talked to [the victim], and this is what she told us, and everything kinda meets up to an attempted homicide, that doesn't look good for you. We're here to talk to you to get your side. There has to be more to this. But, I mean, if you're good with that, that's -- I'm--I'm just giving you an idea now what you'll be charged with.
>
> Tanner: Yes, sir.
>
> Coleman: And you're--
>
> Tanner: Um, at this point, I am not a lawyer, and I don't know what to say, the right, wrong, or different. So, I have nothing to say, sir. And I do apologize for that. But, um, I--anything I say, is--I'm afraid it'll--gonna, uh, get me in deeper trouble. And I don't know what I'm -- what to do.

The detectives continued to ask Tanner questions, and Tanner began to tell them about his relationship with the victim and the incident in question. Later in the interview, Tanner states, "Charge me with whatever. I'm done talking, dude." The detectives continued to ask Tanner about the incident.

After the hearing, the trial court entered a written order denying Tanner's motion to suppress:

> [T]he Court finds that Detective Bailey properly administered Miranda warnings to the Defendant and the Defendant validly waived those rights. After considering the totality of the circumstances, including the context of the statements and the overall circumstances of the interrogation, the Court

> finds that the statements of the Defendant, as contained in the Defendant's motion, indicating that he had nothing to say were equivocal or ambiguous and the police were authorized to continue questioning the Defendant. See Deviney v. State, 112 So. 3d 57, 74-79 (Fla. 2013); Braddy v. State, 111 So. 3d 810, 830-832 (Fla. 2012).

During trial, the State introduced the recording of Tanner's interview. Detective Bailey also testified to the statements made by Tanner in the interview.

On appeal, Tanner argues that the trial court erred in denying his motion to suppress because he never indicated in the interview that he was waiving his right to remain silent. He further contends that even if he had waived his right to remain silent, he unequivocally revoked that waiver, or invoked his right to remain silent, when he clearly indicated that he did not want to speak to the detectives.

"Appellate courts accord a presumption of correctness to the trial court's ruling on a motion to suppress with regard to the determination of historical facts, but must independently review mixed questions of law and fact that determine constitutional issues arising in the context of the Fifth Amendment and article I, section 9, of the Florida Constitution." Kalisz v. State, 124 So. 3d 185, 201 (Fla. 2013) (first citing Delhall v. State, 95 So. 3d 134, 150 (Fla. 2012); then citing Miller v. State, 42 So. 3d 204, 220 (Fla. 2010)). "The right to remain silent is one of four procedural warnings that must be provided before questioning commences with regard to a suspect who is in custody to protect his or her privilege against self-incrimination." Id. at 202 (citing Miranda, 384 U.S. at 479). "A defendant may waive th[is] right[], provided the waiver is voluntary, knowing, and intelligent." Id. (citing Miranda, 384 U.S. at 444). "Florida courts rely on the 'totality of the circumstances' approach to assess the validity of a waiver." Id. (quoting Ramirez v. State, 739 So. 2d 568, 591-92 (Fla. 1999)).

"[T]he prosecution does 'not need to show that a waiver of Miranda rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence.' " Id. at 203 (quoting Berghuis v. Thompkins, 560 U.S. 370, 384 (2010)).[3] "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Cuervo v. State, 967 So. 2d 155, 161 (Fla. 2007) (quoting Miranda, 384 U.S. at 473-74). "The phrase 'in any manner' simply means that there are no magic words that a suspect must use to invoke his rights." Dixon v. State, 72 So. 3d 171, 175 (Fla. 4th DCA 2011) (quoting State v. Owen, 696 So. 2d 715, 719 (Fla. 1997)). But "police in Florida need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her Miranda rights." Owen, 696 So. 2d at 719.

> A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation.

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[3]Here, the detectives did not expressly ask Tanner if he wished to waive his Miranda rights. They simply explained his rights, assumed he wanted to make a statement, and moved onto questioning him. Even though law enforcement is not required to obtain an express waiver, it is the best practice for them to do so, and an express waiver may weigh heavily in a close case in which the defendant later claims he did not waive his Miranda rights. See North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that while an express waiver "is not inevitably either necessary or sufficient to establish waiver," "[a]n *express* written or oral statement of *waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver*" (emphasis added)).

Owen, 696 So. 2d at 718 (quoting Coleman v. Singletary, 30 F. 3d 1420, 1424 (11th Cir. 1994)).

Here, Tanner waived his right to remain silent at the beginning of the interview by speaking to police. But he later articulated his desire to terminate the questioning with sufficient clarity that a reasonable police officer would understand his statements to be an assertion of the right to remain silent. Tanner answered three times that he did not want to tell the detectives "why law enforcement's out here today." Then, he stated "I don't got nothing to say to y'all," he answered "No" when he was asked if he would like to give his side of the story, and then he said "I have nothing to say, sir." These six statements constituted an unequivocal and clear indication that Tanner did not wish to talk to the detectives about the offenses and that he wished to invoke his right to remain silent; the detectives were therefore required to cease questioning. See Deviney v. State, 112 So. 3d 57, 77 (Fla. 2013) (holding that defendant's "*six references* to the fact that he was 'done' with questioning represented an unequivocal invocation of his right to remain silent and end questioning"); Dixon, 72 So. 3d at 176 (holding that the "defendant unequivocally invoked his right to remain silent" when he stated numerous times that he did not want to talk about the burglaries he was being asked about); Alvarez v. State, 15 So. 3d 738, 745 (Fla. 4th DCA 2009) ("[I]f a suspect has not answered any questions and fails to clearly waive his right to remain silent, or has waived his right but then answered only 'mundane' questions before any substantive questioning, announcing he does not want to answer anymore, it is reasonable to conclude that he has decided not to speak."); Smith v. State, 915 So. 2d 692, 693 (Fla. 3d DCA 2005) (holding that defendant unequivocally expressed his

"wish to remain silent" where defendant "stated in no uncertain terms that he had 'nothing to say' to" the detective). The fact that Tanner indicated six times that he did not want to talk makes this case distinguishable from those relied on by the State on appeal. Cf. State v. Pitts, 936 So. 2d 1111, 1130-31 (Fla. 2d DCA 2006) (holding that police were justified in clarifying defendant's intent where defendant had just agreed to talk with police before he indicated a single time that he did not wish to talk); Joe v. State, 66 So. 3d 423, 426 (Fla. 4th DCA 2011) (holding that defendant's single statement that he "ain't got nothing to say" was equivocal where he indicated a willingness to talk in his statements made before and after the single statement).

Because Tanner unequivocally invoked his right to remain silent, the trial court erred in denying his motion to suppress statements. The error cannot be considered harmless. See Deviney, 112 So. 3d at 79 ("Miranda violations are subject to a harmless error analysis."). The victim did not testify against Tanner at trial; therefore, the State relied heavily on her 911 call and Tanner's statements to law enforcement. In the interview, Tanner admitted to hooking the trailer up to his work truck, that the reason he stopped towing the trailer was because it occurred to him that it might be kidnapping, and that he sent the victim threatening texts. Thus, it cannot be said that his statements did not contribute to the jury's decision to convict him. Accordingly, we reverse Tanner's conviction and remand for further proceedings in which his statements are suppressed.

III. Additional issues

Because Tanner is entitled to a new trial, we address two evidentiary errors raised by Tanner that may come up in the event of a retrial. Tanner first contends that the trial court erred in allowing the State to call Detective Wedgewood for

the sole purpose of creating an inference that Tanner had hidden incriminating evidence from law enforcement by failing to give them the correct code to unlock his phone.

At trial, prior to Detective Wedgewood's testimony, the defense argued that Detective Wedgewood's testimony was not relevant because it had not been established that the phone belonged to Tanner but rather the phone had belonged to somebody else. The trial court overruled the defense's objection. Detective Wedgewood testified that he was unable to analyze a phone that was collected in the case because he could not bypass the security code. Wedgewood had been told by another detective that the phone belonged to Tanner, and Wedgewood said that Tanner had provided a code that did not work on the phone collected. After the testimony, the defense moved to strike the testimony and for a mistrial on the basis that the State had not identified the phone as belonging to Tanner.

We agree that the trial court abused its discretion in allowing this testimony where the State did not prove that the phone analyzed by Detective Wedgewood was relevant. Even though the State presented a photograph that depicted a phone inside the car that Tanner was driving, the State did not establish that the phone analyzed by Detective Wedgewood was the phone found in the car. The State did not introduce the phone into evidence or testimony from the crime scene investigator that the phone was collected from the car. Without such evidence connecting the phone to Tanner or the offenses, Detective Wedgewood's testimony did not have a logical tendency to prove any fact that is of consequence to the outcome of the case. See State v. Horwitz, 191 So. 3d 429, 442 (Fla. 2016) ("Relevancy has been

described as 'whether the evidence has any logical tendency to prove or disprove a fact.' " (quoting Charles W. Ehrhardt, Ehrhard's Florida Evidence § 401.1 (2011 ed.))).

Tanner also argues that the trial court erred in admitting hearsay testimony regarding text messages observed on the victim's phone. During trial, Detective Coleman testified, over a hearsay objection by the defense, that he viewed text messages on the victim's phone that appeared to be threatening in nature: "There was a message that was telling her to say hello to her grandmother, and I later discovered that her grandmother was deceased. There was a reference to burning her alive or burning her and not having a second thought about it." When asked by the State if the messages appeared to come from Tanner, Detective Coleman answered: "From what she had explained to me, it was—it was from Joshua Tanner." The victim's phone was not collected as evidence or admitted into evidence at trial, and the text messages themselves were not admitted into evidence.

This testimony was improper hearsay testimony. See Banks v. State, 790 So. 2d 1094, 1097 (Fla. 2001) ("Hearsay is defined as a statement, other than one made by the declarant while testifying at trial or hearing, offered to prove the truth of the matter asserted." (citing § 90.801(1), Fla. Stat. (1997))). Detective Coleman's testimony regarding the content of the text messages was hearsay because those statements were offered to prove the truth of the matter asserted in them, i.e., that the person sending the text messages intended to harm the victim. And Detective Coleman's testimony that the victim told him the messages were from Tanner was an out of court statement offered to prove the truth of the matter asserted, i.e., that the messages were from Tanner. The trial court abused its discretion in admitting this testimony which

constituted classic hearsay.[4] See id. at 1098 ("[W]hen the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay . . . ." (quoting Keen v. State, 775 So. 2d 263, 274 (Fla. 2000))).

Reversed and remanded.

SILBERMAN and LUCAS, JJ., Concur.

[4]The State did not demonstrate that the hearsay fell within any applicable hearsay exception.