STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2054

State of Minnesota,
Respondent,

vs.

Melissa Marie Fostvedt,
Appellant.

Filed November 27, 2017
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-CR-15-9523

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges her conviction of unintentional second-degree felony murder and her sentence, arguing that the district court erred by not suppressing her statement to

police and that the sentencing judge exhibited judicial bias during her sentencing. We affirm.

FACTS

After appellant Melissa Fostvedt reported in a 911 call that a male, T.J., "had fallen on a knife at her apartment," police detained, *Mirandized*, and interviewed her at a police station. During the interview, Fostvedt explained that T.J. had been cutting up shrimp for scampi while angry with her because she and he had not had sexual intercourse for two or three days. Fostvedt said that T.J. was "talking sh-t to [her]," she was ignoring him, and the "next thing [she] kn[e]w," he was "laying on the floor." The police sergeant discontinued the interview when Fostvedt later stated that she "want[ed] an attorney."

Respondent State of Minnesota charged Fostvedt with one count of second-degree intentional murder and one count of second-degree unintentional felony murder. Fostvedt moved to suppress the statements she made during her police interview, claiming that the interviewer coerced her statements and ignored her request for an attorney. The district court denied the motion, and a jury found Fostvedt guilty of second-degree unintentional felony murder. The court sentenced her to 198 months' imprisonment, a top-of-the-box sentence.

This appeal follows.

D E C I S I O N

I.

The United States and Minnesota Constitutions provide that individuals have the right to be free from compelled self-incrimination. U.S. Const. amend. V; Minn. Const. art.

I, § 7. The measures set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), "protect suspects from the inherently coercive nature of custodial interrogations." *State v. Ortega*, 798 N.W.2d 59, 67 (Minn. 2011). Statements provided during custodial interrogation are inadmissible unless *Miranda* rights are validly waived. *Id*.

On appeal, Fostvedt argues that the district court erred by not suppressing her statements during her interrogation because the police "failed to 'stop and clarify' whether [she] wanted an attorney present during her interrogation." We construe this argument as an alleged failure by the police to vindicate Fostvedt's right to counsel when she allegedly invoked it during her police interrogation.

If a suspect invokes his or her right to counsel during a custodial interrogation, all questioning must cease, and the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the [suspect] himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 1884–85 (1981); *State v. Ortega*, 813 N.W.2d 86, 94 (Minn. 2012) (quotation omitted). "Under the U.S. Constitution, a suspect must unambiguously and unequivocally invoke his right to counsel and investigators are not required to clarify ambiguous requests for an attorney." *Ortega*, 798 N.W.2d at 71. A suspect's request for counsel is unequivocal if "a reasonable police officer, in the circumstances, would understand the statement to be a request for an attorney." *Id.* (quotation omitted).

The Minnesota Constitution affords suspects greater protection against compelled self-incrimination. *Id.* When a Minnesota suspect makes an equivocal or ambiguous

statement that could be construed as a request for counsel, investigators must cease questioning the suspect except as to "narrow questions designed to 'clarify' the accused's true desires respecting counsel." *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988). This court reviews de novo the application of the "stop and clarify" rule, but defers to any factual findings by the district court that are not clearly erroneous. *Ortega*, 798 N.W.2d at 70.

Here, the record reflects that Fostvedt waited alone in an interrogation room for about 30 minutes. When the police sergeant entered the room and began giving Fostvedt her *Miranda* warning, she repeatedly interrupted the sergeant, asking whether she was under arrest and stating that she understood her rights and that she "went to college for this." When the sergeant asked Fostvedt if she understood that she had "the right to remain silent and refuse at any time to answer any questions asked by a police officer," she replied, "Yeah, I [inaudible on tape] a lawyer." Throughout the sergeant's reading of the remainder of the *Miranda* advisory, Fostvedt repeatedly stated that she understood her rights, that she was working toward her degree in criminal justice, and that she was familiar with the criminal justice system. Fostvedt even read her rights out loud along with the officer at times. When the sergeant finished reading the *Miranda* advisory, Fostvedt initialed each paragraph and signed the *Miranda* advisory. Only then did the sergeant begin the interrogation, and he stopped the interrogation when Fostvedt said, "I want an attorney."

As to the inaudible portion of her videotaped interrogation, Fostvedt argued in district court that she answered the sergeant's question, "Yeah, I *want* a lawyer." (Emphasis

added.) The district court found that the sergeant testified credibly at the suppression hearing that Fostvedt stated, "'Yeah, I *am* a lawyer.'" (Emphasis added.)

Fostvedt argues on appeal that the video of her interrogation is unclear about whether she stated, "I want a lawyer" or "I am a lawyer," and that the district court's finding that she said, "I am a lawyer," is clearly erroneous. Fostvedt further argues that she made an "equivocal and ambiguous" request for counsel that required the sergeant to "stop and clarify" whether she wanted a lawyer. Fostvedt claims that the sergeant's failure to stop and clarify rendered the interrogation unconstitutional. We disagree. We conclude that the district court's finding that Fostvedt stated, "I *am* a lawyer," is not clearly erroneous, based on the interrogation video and the sergeant's testimony. (Emphasis added.)

Moreover, we defer to the district court's credibility determination about the sergeant's testimony. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (stating that district court findings are not reversed unless clearly erroneous, and great deference is given to court's determinations regarding credibility of witnesses), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993); *see also State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012) (stating that this court defers to a district court's credibility determinations when reviewing a pretrial order on a motion to suppress evidence). We conclude that the district court's finding that Fostvedt stated, "I am a lawyer," is not clearly erroneous.

Fostvedt argues that even if we conclude that she stated, "I am a lawyer," we also must conclude that "[her] statement could be construed as an equivocal request for counsel" because the sergeant knew that she was not a lawyer; and her "demeanor during the interrogation established that her statement 'I am a lawyer,' could be construed as a request

for a lawyer." But the supreme court has previously observed that "not every mention of the word 'lawyer' or 'counsel' or 'attorney' by a suspect 'arguably' suggests that the suspect wants a lawyer before submitting to further questioning." *State v. Hale*, 453 N.W.2d 704, 708 (Minn. 1990). "If a statement, viewed in the context in which it is made, does not even arguably suggest that the accused is asserting that he or she does not wish to continue the custodial interrogation without the aid of counsel, then continuation of the interrogation is proper." *State v. Risk*, 598 N.W.2d 642, 649 (Minn. 1999).

In our view, Fostvedt's statement—"I am a lawyer"—did not arguably suggest that she was asserting her right to counsel. Considered in the context of Fostvedt's demeanor and brazenness while the sergeant read her the *Miranda* rights, her statement was not an equivocal or ambiguous request for counsel. The statement therefore did not require the sergeant to "stop and clarify" before continuing with the interrogation. We conclude that "a reasonable police officer, in the circumstances," would not have understood Fostvedt's statement, "I am a lawyer," to be a request for an attorney. The district court therefore properly denied Fostvedt's suppression motion.

II.

Fostvedt argues that she is entitled to be resentenced because the sentencing judge exhibited judicial bias during her sentencing. A criminal defendant is entitled to an impartial tribunal. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). "The presence of an impartial judge is critical to ensure the fairness and integrity of the judicial process." *State v. Schlienz*, 774 N.W.2d 361, 369 (Minn. 2009). But "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or

of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Adell*, 755 N.W.2d 767, 775 (Minn. App. 2008) (quoting *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008)), *review denied* (Nov. 25, 2008). We presume that a district court judge will "set aside collateral knowledge and approach cases with a neutral and objective disposition." *Id.* (quotation omitted). To overcome this presumption, the party charging bias must "adduce evidence of favoritism or antagonism." *Id.* (quotation omitted).

In this case, the district court asked Fostvedt at sentencing:

> Why don't you say what really happened that day? Because we all know that he did not slip and fall on the knife. That story is disrespectful of his life and his memory. So why don't you say what really happened? Maybe that might contribute giving the family some peace so that they know what the circumstances of his death were. What happened Ms. Fostvedt?

When Fostvedt responded: "That is what happened," the district court stated:

> That you do not have the decency to say what really happened is inhumane, it's disgraceful, it's selfish, and it demonstrates a lack of any responsibility and a lack of remorse on your behalf. The evidence in this case is overwhelming of your culpability in the death of [T.J.] . . . . You caused his death.

Fostvedt argues that we must reverse her sentence "because the district court exhibited judicial bias and personal hostility towards [her] by criticizing her for not confessing to the crime at [the] sentencing hearing."

Judges must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and

the appearance of impropriety." Minn. Code Jud. Conduct Rule 1.2. Whether a judge has violated the Code of Judicial Conduct is a question of law that is reviewed de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005). The judge's remarks in this case were inappropriate and concerning, particularly because the privilege against compelled self-incrimination "continues until the time for appeal has expired or until the conviction has been affirmed on appeal." *United States v. Duchi*, 944 F.2d 391, 394 (8th Cir. 1991).

But Fostvedt is unable to show that she was prejudiced by the judge's inappropriate conduct because Fostvedt received a presumptive sentence. A sentence within the range provided in the appropriate box on the sentencing guidelines grid is not a departure from the presumptive sentence and therefore is not an abuse of discretion. *See Rushton v. State*, 889 N.W.2d 561, 565 (Minn. 2017) (stating that "the district court has the discretion to specify any minimum term of imprisonment that falls within the presumptive range as the minimum terms of imprisonment"). This court presumes that a sentence within the sentencing range is appropriate. Minn. Sent. Guidelines 2.D (Supp. 2015). Although the district court imposed a top-of-the-box sentence, the court did not state that it was imposing that sentence, rather than a middle-of-the-box sentence, based on Fostvedt's refusal to admit guilt.

We afford the district court "great discretion" in the imposition of sentences and will reverse a sentencing decision only for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014) (quotation omitted). And this court has affirmed a sentence—in fact an upward-departure sentence—even when it determined that a judge showed personal bias during the sentencing hearing. *State v. Simmons*, 646 N.W.2d 564, 570 (Minn. App.

2002), *review denied* (Minn. Sept. 17, 2002). We therefore conclude that Fostvedt is not entitled to be resentenced.

Affirmed.