STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1255

State of Minnesota,
Respondent,

vs.

Thomas Michael Luby,
Appellant.

Filed July 27, 2020
Reversed and remanded
Frisch, Judge

Dakota County District Court
File No. 19HA-CR-15-2637

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Frisch, Judge.

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

FRISCH, Judge

Appellant seeks reversal of his convictions for second-degree intentional murder, alleging that the district court erred by (1) denying his motion to suppress custodial

statements to law enforcement obtained in violation of his right to counsel; and (2) denying his request to instruct the jury on the lesser-included offense of first-degree heat-of-passion manslaughter.[1] We reverse and remand.

FACTS

This appeal follows the second trial in this matter. The underlying facts are summarized as follows.

At approximately 4:05 a.m. on August 7, 2015, appellant Thomas Michael Luby called 911 to report that he killed his girlfriend, K.A., after she attacked him with a knife. Luby told the 911 dispatcher: "I took the knife from her, and I turned it on her."

Luby and K.A. were drinking together in their home the previous evening. Luby described K.A. as "drunk as could be," and stated that she became angry with him because he would not let her continue drinking. Luby claims that while he watched a baseball game on their couch, K.A. attacked him with a butcher knife and cut him under his chin. Luby took the knife from K.A. and placed it on an ottoman in front of the couch. K.A. then fell asleep for a short period of time.

K.A. later woke up, demanded a drink, and picked up the knife. Luby took the knife from K.A. and then the two continued the altercation. Luby recalls stabbing K.A. a few times in her abdomen and mouth. Luby also recalls that, at some point thereafter, K.A. was lying dead on the floor. According to the medical examiner who performed K.A.'s

[1] Luby also seeks correction of the warrant of commitment and raises additional issues in his pro se supplemental brief. Because we reverse Luby's convictions and remand for a new trial, we do not reach these additional issues.

autopsy, K.A. had approximately 70 sharp-force injuries caused by an edged implement, such as a knife, along with a number of blunt force injuries.

Luby was not sure of the precise timing of these events but estimated that the entire altercation occurred between 9:00 p.m. and midnight. The medical examiner estimated that K.A. died at some point between 10:00 p.m. and 2:00 a.m. When asked whether the injuries could have occurred over a period of several hours, the medical examiner responded, "It's possible." Luby continued to drink after realizing that K.A. was dead.

Luby was interviewed twice by police officers on August 7, 2015, and provided the narrative of events set forth herein. A grand jury indicted Luby on charges of first- and second-degree murder. Following a 2016 trial, a jury found Luby guilty of first- and second-degree murder. The supreme court reversed those convictions due to ineffective assistance of counsel, remanding the matter for retrial. *State v. Luby*, 904 N.W.2d 453, 459 (Minn. 2017).

Following remand, Luby moved to suppress his statements made during the two interviews on August 7, 2015, arguing that the officers failed to stop the first interview and clarify whether he invoked his right to counsel. The district court denied the motion, and the matter proceeded to a second jury trial. At the close of the evidence, the district court denied Luby's request to instruct the jury on the lesser-included offense of first-degree heat-of-passion manslaughter but amended the indictment to add a charge of second-degree felony murder.

The jury found Luby not guilty of first-degree murder and guilty of second-degree intentional murder and second-degree felony murder. The district court sentenced Luby to

346 months in prison only on the second-degree intentional murder charge, but entered convictions for both counts of second-degree murder on the warrant of commitment. This appeal followed.

D E C I S I O N

Motion to Suppress

Luby first argues that the district court erred by denying his motion to suppress his custodial statements because the investigators failed to stop and clarify his ambiguous invocations of his right to counsel. "When a district court decides whether a suspect successfully invoked the right to counsel during a custodial interview, that determination involves intertwined questions of law and fact." *State v. Chavarria-Cruz*, 784 N.W.2d 355, 363 (Minn. 2010). We review a district court's application of the stop-and-clarify rule de novo and review the district court's findings of fact for clear error. *State v. Ortega*, 798 N.W.2d 59, 70 (Minn. 2011).

Under both the Fifth Amendment to the United States Constitution and article I, section 7 of the Minnesota Constitution, "the right to have counsel present during an interrogation while [a] suspect is in police custody is an indispensable prophylactic measure to protect the constitutional privilege against self-incrimination." *Chavarria-Cruz*, 784 N.W.2d at 360. While under the United States Constitution investigators are not required to clarify an ambiguous request for counsel, *Ortega*, 798 N.W.2d at 71, "[i]n Minnesota, suspects are afforded one further level of protection. Where a suspect's request is equivocal or ambiguous but subject to a construction that the accused is requesting counsel, all further questioning must stop except that narrow questions designed to clarify

the accused's true desires respecting counsel may continue." *Chavarria-Cruz*, 784 N.W.2d at 361 (quotation omitted).

Following the administration of the *Miranda* warning, Luby informed the officers that he was mentally unwell. The interview commenced, and the following exchange occurred at the outset:

> Luby: Should I be saying this stuff without an attorney?
> Officer: Well that's totally up to you, right? I mean you still have uh choices and options in life and I'm grateful actually . . .
> Luby: I've nothin' ta hide.
> Officer: Okay. We'll start yeah and you understand that it would . . .
> Luby: I mean her, her mom will support me one hundred percent.
> Officer: (cleared throat)
> Luby: . . . (inaudible)
> Officer: Tom just so you know for me to give you advice like that would be uh unethical.
> Luby: I know.
> Officer: And just so . . .
> Luby: I know.
> Officer: . . . and you, you have choices in life. I, truly our objective today in talking to you is ta help um really bring closure to this and figure out what happened cuz you know we can't figure out, we can figure out some stuff right. I mean we got smart people that do . . .
> Luby: Well here's the thing. I had a woman that I loved very much . . .

The interview continued. A short time later, Luby again paused to ask the officers:

> Luby: Should I get an attorney I mean I'm, I feel like I'm just being way too . . .
> Officer: Well . . .
> Luby: . . . forthright here.
> Officer: Tom, I tell ya what, you are being forthright we're, we're, I'll speak for myself I won't speak for [the other officer present] but I, we appreciate that and we

understand you've been through a traumatic experience. I don't wanna, I don't wanna force you to do anything that you don't . . . .

Luby: It's horrible.

Officer: I don't wanna force ya to do anything you don't wanna do uh but I-I, these explanations are helpful uh to the case investigation.

Luby: Oh, okay.

Officer: Okay.

The interview continued.

Under *Chavarria-Cruz*, the district court was required to determine whether a reasonable officer in the circumstances would understand Luby's statements as a request for an attorney. *See* 784 N.W.2d at 363 (examining whether a reasonable officer would have understood that defendant requested counsel). In so doing, the district court was required to evaluate the recording of the interview and consider factual elements regarding the exchange, including "the suspect's precise words, the volume at which the words were spoken, the volume relative to the suspect's other words, the positions of participants and the recorder in the room, and the actions and impressions of the suspect and officer, among others." *Id.* Although here the district court concluded that "[t]he police were not unreasonable in assessing Luby's mention of speaking to an attorney as ambiguous," the district court did not conduct an objective inquiry as required under the Minnesota Constitution to determine if the officers stopped and clarified whether Luby intended to invoke his right to counsel.

The state argues that, notwithstanding this error, the ultimate decision to deny the suppression motion was still correct. The state asserts that Luby's statements did not amount to an ambiguous invocation of his right to counsel and the officers appropriately

clarified whether he desired to invoke his right to counsel before continuing the interview. We disagree.

First, each of Luby's two questions, on their face, required the officers to pause the interview and clarify whether he was invoking his right to counsel. "To trigger the requirement . . . the content of [the suspect's] words must have been at least subject to a construction that he was requesting counsel." *Chavarria-Cruz*, 784 N.W.2d at 361 (quotation omitted). While both of Luby's statements were phrased as questions, they were both subject to the construction that he requested counsel. *See Ortega*, 798 N.W.2d at 71-72 (stating that "an inquiry as to whether [the suspect] needed an attorney" constituted an equivocal request for counsel that required officers to seek clarification).

Second, the officers did not clarify whether Luby was invoking his right to counsel, nor did Luby voluntarily continue the interview. In both instances where Luby raised the issue of whether he should have counsel present, the officer responded, not with clarification, but instead with encouragement that Luby continue participation in the interview. After Luby first asked, "Should I be saying this stuff without an attorney?" the interviewing officer responded: "Well that's totally up to you, right? I mean you still have uh choices and options in life and I'm grateful actually . . . . We'll start yeah and you understand that it would . . . ." The officer did not pause his questioning or clarify Luby's ambiguous invocation of his right to counsel, but instead talked over Luby's request, and encouraged his continued participation.

The officer went on to again tell Luby that "you have choices in life. I, truly our objective today in talking to you is ta help um really bring closure to this and figure out

what happened cuz you know we can't figure out, we can figure out some stuff right." This response by the officer was not clarification; it was prohibited encouragement. *See State v. Doughty*, 472 N.W.2d 299, 303 (Minn. 1991) (stating that the officer's continuation of the interview by saying "I'm very interested in hearing your side of the story" did not constitute a proper clarification of the appellant's equivocal request for counsel).

The same is true for Luby's second equivocal invocation of his right to counsel. Again, the interviewing officer made no attempt to clarify the question and statement by Luby: "Should I get an attorney I mean I'm, I feel like I'm just being way too . . . forthright here." Instead of stopping and clarifying Luby's question and his stated concern, the officer responded, "I don't wanna force ya to do anything you don't wanna do uh but I-I, these explanations are helpful uh to the case investigation."

The failure to stop and clarify is particularly egregious during this second exchange, where Luby expressly raises reservations about continuation of the interview. The officers also failed to re-inform Luby of his *Miranda* rights following each of his ambiguous invocations of his right to counsel. *See Ortega*, 798 N.W.2d at 72 ("Our case law illustrates that proper recitation of the suspect's constitutional rights is key to proper clarification."). Because the interviewing officers failed to halt the interview, clarify whether Luby was invoking his right to counsel, or re-inform him of his *Miranda* rights following his two equivocal invocations of the right to counsel, the district court erred by admitting Luby's statements to police.

"The erroneous admission of a defendant's statements to police entitles the defendant to a new trial unless the admission of the statements was harmless beyond a

reasonable doubt." *Chavarria-Cruz*, 784 N.W.2d at 365. The state bears the burden to show that the guilty verdicts were surely unattributable to the erroneous admission of Luby's statements. *Id*. In order to determine whether the guilty verdicts were surely unattributable to the erroneous admission of Luby's statements, we consider "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by defendant." *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

At trial, Luby testified that he did not intentionally kill K.A., and raised the affirmative defenses of self-defense and intoxication. The state asserts that the jury would have found Luby guilty regardless of his custodial statements given Luby's other statements during the 911 call, the number of times he stabbed K.A., the length of time between K.A.'s death and when he called 911, and the testimony of the interviewing officer that Luby's behavior on the morning of arrest did not comport with the normal indicia of intoxication.

But the state structured its prosecution of Luby around the admissions in his custodial statements. Luby's statements to the police essentially formed the entire basis of the state's argument to the jury that he intentionally assaulted and murdered K.A.[2] During its closing argument, the state played ten separate clips from Luby's custodial statements to show that Luby intentionally murdered K.A., that Luby was not so intoxicated that he

[2] The state's closing argument focused largely on the premeditation element of first-degree murder, but because the state did not make separate arguments regarding the intent element of second-degree intentional murder and second-degree felony murder, the state relied almost exclusively on Luby's statements to prove those offenses as well.

lacked the requisite intent, and that Luby contradicted himself and was therefore not credible.

While other evidence may have provided a basis separate from Luby's custodial statements from which the jury could have concluded that Luby intentionally assaulted and murdered K.A., the existence of other evidence does not negate the central role of Luby's inadmissible statements during trial and especially during closing argument. Because Luby's statements formed "the central focus of the prosecutor's closing argument," the district court's erroneous admission of the statements was not harmless beyond a reasonable doubt. *See Chavarria-Cruz*, 784 N.W.2d at 365. Luby is therefore entitled to a new trial due to the erroneous admission of his statements to the police.

Lesser-Included Offense

Luby is also entitled to a new trial on the independent basis that the district court erred by denying his request to instruct the jury on the lesser-included offense of first-degree heat-of-passion manslaughter. We review the denial of a request to instruct the jury on a lesser-included offense for an abuse of discretion. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). However, "where the evidence warrants a lesser-included offense instruction, the trial court *must* give it." *Id*. "[W]hen evidence exists to support the giving of the instruction, it is an abuse of discretion for a trial court judge to weigh the evidence or discredit witnesses and thereby deny an instruction." *Id*. at 598.

First-degree heat-of-passion manslaughter is a lesser-included offense of second-degree intentional murder. *State v. Johnson*, 719 N.W.2d 619, 625-26 (Minn. 2006). A district court must give the requested lesser-included offense instruction when "1) the

lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Dahlin*, 695 N.W.2d at 597. When "evaluating whether a rational basis exists in the evidence for a jury to acquit a defendant of a greater charge and convict of a lesser, [district] courts must . . . view the evidence in the light most favorable to the party requesting the instruction." *Id.*

A rational basis for a guilty verdict for first-degree heat-of-passion manslaughter and acquittal for second-degree intentional murder exists where "(1) the killing [was] in the heat of passion, and (2) the passion [was] provoked by words and acts of another such as would provoke a person of ordinary self-control under the circumstances." *Johnson*, 719 N.W.2d at 626 (quotation omitted); *see also* Minn. Stat. § 609.20(1) (2014). Luby argued that he was provoked into killing K.A. in the heat of passion when she attacked him with the knife.

The district court denied Luby's request to instruct the jury on the lesser-included offense of first-degree manslaughter, because

> we have multiple stabbings that occurred over a significant period of time. How much time, we don't know but *I certainly have the impression* that it was *maybe* up to an hour. The . . . medical examiner talked about the fatal blows. Those *had to have* occurred during the latter part of the stabbings. Given that all the evidence indicates that it happened over a long period of time, I don't find that there was a heat of passion. *I don't believe* his willpower was so clouded or weakened during that time period. The second element, establishing whether a person of ordinary self-control under like circumstances would have been provoked, it says requires an objective standard. *I believe* under that standard, it does not apply, additionally.

(Emphasis added.)

The district court erred by improperly weighing evidence and by failing to view the evidence in the light most favorable to Luby. *Dahlin*, 695 N.W.2d at 597-98 (stating that courts "must look at the evidence in the light most favorable to the party requesting the instruction" and "may not weigh the evidence"). Furthermore, the district court did not accurately state the substance of the medical examiner's testimony. In response to the question: "these injuries, could they have occurred over a period of several hours?" the medical examiner testified: "It's possible." When viewed in the light most favorable to Luby, this testimony did not establish that killing occurred over "a long period of time" as opined by the district court.

The district court also erred because the evidence at trial warranted the instruction. "In determining whether the district court erred in denying the instruction we look for a heat of passion that clouds a defendant's reason and weakens his willpower. Anger alone is not enough." *Johnson*, 719 N.W.2d at 626 (quotation omitted). "The second element of the heat-of-passion defense is objective, analyzing whether the passion was provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances." *Id.* at 627 (quotation omitted).

The supreme court has found it appropriate to include the lesser-included instruction for heat-of-passion manslaughter in similar cases. In *State v. Shannon*, a heat-of-passion manslaughter instruction was required where the defendant admitted he may have choked his girlfriend to death during a dispute over the volume of defendant's radio, which turned into a physical altercation between the defendant and victim. 514 N.W.2d 790, 793 (Minn.

1994). There, the defendant was under the influence of alcohol and crack cocaine and claimed that his memory was hazy and he could not clearly recall what occurred. *Id.* Similarly, in *Johnson*, a heat-of-passion manslaughter instruction was warranted where the evidence supported the conclusion that the defendant and his girlfriend "engaged in an increasingly heated argument . . . that escalated to a physical altercation in which [the victim] shot [the defendant]—provoking [the defendant] to shoot her back just seconds later." 719 N.W.2d at 628.

When viewed in the light most favorable to Luby, the evidence that K.A. attacked Luby with a knife and his claim that "[s]he came after me with a knife and we started fighting and I ended up stabbing her," like the altercations in *Shannon* and *Johnson*, support an instruction for first-degree heat-of-passion manslaughter. The district court therefore abused its discretion by declining Luby's request to instruct the jury on the lesser-included offense.

Despite this error, Luby is only entitled to a new trial if he was prejudiced. *Dahlin*, 695 N.W.2d at 598. "[W]hen determining if a defendant has been prejudiced by the court's failure to give a requested lesser-included offense instruction, appellate courts should consider the instructions actually given and the verdict rendered by the jury." *Id.* at 599. Here, the jury acquitted Luby of first-degree murder and convicted him of second-degree intentional murder and second-degree felony murder. Because first-degree heat-of-passion manslaughter would have provided the jury with an alternative to a second-degree murder

conviction, Luby was prejudiced by the erroneous denial of the requested instruction. *See Johnson*, 719 N.W.2d at 626. Therefore, Luby is entitled to a new trial.

Reversed and remanded.