STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1596

State of Minnesota,
Respondent,

vs.

Dustin Joe Martin,
Appellant.

Filed September 17, 2012
Affirmed in part, reversed in part, and remanded
Wright, Judge

Douglas County District Court
File No. 21-CR-09-1374

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Chad M. Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of third- and fourth-degree criminal sexual conduct and obstructing legal process. He asserts that the district court erred by (1) denying his motion to suppress a statement he made to a police officer after he had

been appointed counsel, (2) admitting in evidence the statement appellant made to the police because it is inadmissible under the Minnesota Rules of Evidence, and (3) entering his conviction of fourth-degree criminal sexual conduct, a lesser-included offense, because both criminal-sexual-conduct convictions arise from a single behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

On May 31, 2009, Douglas County Sheriff's Deputy Richard Schley arrived at Glacial Ridge Hospital in Glenwood to investigate a sexual assault reported by R.D. After interviewing R.D., Deputy Schley suspected that appellant Dustin Joe Martin committed the sexual assault. Deputy Schley went to Martin's residence to question him. After Martin declined to answer any questions, Deputy Schley told Martin that he was under arrest. Martin initially resisted arrest but subsequently was taken into custody. On June 2, 2009, the state charged Martin with third-degree criminal sexual conduct, a violation of Minn. Stat. § 609.344, subd. 1(c) (2008) (sexual penetration accomplished through force or coercion); fourth-degree criminal sexual conduct, a violation of Minn. Stat. § 609.345, subd. 1(c) (2008) (sexual contact accomplished through force or coercion); and obstructing legal process, a violation of Minn. Stat. § 609.50, subd. 1(2) (2008). That same day, the district court appointed counsel to represent Martin.

On June 8, 2009, Martin, who remained in police custody, asked to meet with Douglas County Sheriff's Sergeant David Ahlquist. Martin explained that other inmates had told him that Sgt. Ahlquist could help him "get out of some charges." At the beginning of the meeting, Sgt. Ahlquist told Martin that ordinarily he does not speak with

someone who is represented by counsel. Immediately thereafter, he advised Martin of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628 (1966). Martin stated that he understood his constitutional rights and needed "to get out of these charges somehow." He offered to conduct "controlled buys" of marijuana to help "get these charges reduced to . . . something where I'm not gonna go to prison." In response, Sgt. Ahlquist said, "Okay" and asked Martin what had happened on the date of the offense.

Martin explained that, on the evening of May 30, 2009, he was socializing at his home with his friend, J.P., Martin's girlfriend, S.S., and S.S.'s sister, R.D. Martin told Sgt. Ahlquist several different versions of the events that occurred after J.P. and S.S. went to sleep. First, Martin said that he went to bed with S.S. When R.D. woke him the next morning, Martin explained, he believed that J.P. had assaulted her. After Sgt. Ahlquist told Martin that the police had collected DNA evidence, Martin stated that, because he had been intoxicated, it was possible—but unlikely—that he had sex with R.D. without remembering it. This was Martin's second version of the events. Sgt. Ahlquist replied that lying would reflect poorly in court, but honesty would help Martin. Martin then gave a third version, admitting that he and R.D. went for a walk and later engaged in consensual sex in a storm shelter. But Martin denied being the aggressor and asserted that R.D. initiated the sexual conduct.

Before trial, Martin moved the district court to suppress his recorded statement to Sgt. Ahlquist on the grounds that the statement was obtained in violation of his constitutional right to counsel and the Minnesota Rules of Professional Conduct. The

district court denied Martin's motion. In its written order, the district court concluded that Martin knowingly, intelligently, and voluntarily waived his right to counsel after Sgt. Ahlquist read Martin the *Miranda* warning. The district court also concluded that Minnesota rule of professional conduct 4.2 governs only the conduct of attorneys. Because Sgt. Ahlquist did not contact the prosecutor before or during his interview with Martin, the district court determined that Sgt. Ahlquist's conduct is not attributable to the prosecutor.

At the jury trial that followed, the state presented a redacted version of Martin's recorded statement to Sgt. Ahlquist. The state also presented the testimony of R.D., Deputy Schley, Sgt. Ahlquist, and the doctor and nurse who attended R.D. at the hospital. R.D. testified that, after J.P. and S.S. had gone to sleep, she and Martin went for a walk at Martin's request. Martin held her hand, kissed her, and put his hand down the front of her pants. She slapped his hand and told him to stop. When they reached a storm shelter, Martin suggested that they go inside to talk. R.D. agreed. Once inside, Martin again made physical advances to which R.D. said, "[N]o." But Martin removed R.D.'s pants and underwear and penetrated her vagina and mouth with his penis.

The next day, R.D. told her mother about the sexual assault, and they went to the hospital. R.D. complained of discomfort, a burning sensation in her vaginal area, and heavy vaginal bleeding. The doctor who treated R.D. found a one-centimeter vaginal tear and bleeding in R.D.'s vaginal area. He testified that R.D.'s condition was consistent with a sexual assault. After testing biological samples collected from R.D., the police confirmed that R.D.'s vagina contained semen that matched Martin's DNA.

The jury returned a guilty verdict on each of the charges. The district court imposed an executed sentence of 48 months' imprisonment for Martin's conviction of third-degree criminal sexual conduct and a concurrent sentence of 365 days' incarceration for his conviction of obstructing legal process. The district court also adjudicated Martin guilty of fourth-degree criminal sexual conduct without imposing a sentence for that offense. This appeal followed.

D E C I S I O N

I.

Martin argues that the district court erred by denying his motion to suppress the statement he made to Sgt. Ahlquist. Specifically, Martin contends that (1) his waiver of the constitutional right to counsel was invalid and (2) his statement was obtained by improper police contact after Martin's counsel had been appointed. When reviewing an order denying a motion to suppress evidence based on the district court's application of the law to undisputed facts, we determine as a matter of law whether the evidence must be suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

A.

Martin first asserts that he did not knowingly, intelligently, and voluntarily waive his constitutional right to counsel. The United States Constitution and the Minnesota Constitution guarantee the accused in a criminal prosecution the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also Gideon v. Wainwright*, 372 U.S. 335, 342-44, 83 S. Ct. 792, 795-96 (1963) (holding that requirements of Sixth Amendment apply to criminal defendant in state court proceedings). The right to counsel

attaches to all critical stages after the state initiates adversary judicial proceedings against an accused. *State v. Willis*, 559 N.W.2d 693, 697 (Minn. 1997) (citing *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882 (1972)); *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 839 (Minn. 1991). A police interrogation is one such "critical stage." *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012). The right to counsel may be waived even if the decision to waive that right is uncounseled. *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 2085 (2009); *State v. Kivimaki*, 345 N.W.2d 759, 763 (Minn. 1984). But the burden of demonstrating that a defendant's waiver of the right to counsel was knowing, intelligent, and voluntary rests with the state. *Kivimaki*, 345 N.W.2d at 763-64.

The state's burden is satisfied when it demonstrates that (1) the police fully advised the accused of his or her constitutional rights using the *Miranda* warning and (2) the accused acknowledged understanding those rights before giving an incriminating statement. *State v. Jones*, 566 N.W.2d 317, 322 (Minn. 1997). The record reflects that Sgt. Ahlquist gave Martin a *Miranda* warning, explained Martin's right to counsel a second time, and asked Martin what he wanted to do. Martin replied, "I wanna talk" and began to speak with Sgt. Ahlquist. Martin also acknowledged that he had heard the *Miranda* warning before and repeatedly said that he understood his constitutional rights. Sgt. Ahlquist reminded Martin that he was represented by counsel and explained that, if Martin said anything incriminating, Sgt. Ahlquist would be "obligated to report it." After these warnings, Martin spoke with Sgt. Ahlquist.

Martin contends that his waiver was equivocal because, after saying that he wanted to talk to Sgt. Ahlquist, he stated a desire to conduct controlled buys of marijuana in exchange for a reduced sentence. As an initial matter, Martin's offer to participate in controlled buys does not make Martin's waiver equivocal. Moreover, after a defendant expressly acknowledges an understanding of his constitutional rights, even an equivocal response to an officer's request to talk generally will not invalidate the defendant's waiver of those rights. *See State v. Nelson*, 257 N.W.2d 356, 359 (Minn. 1977) (finding waiver when officer asked defendant if he would answer questions and defendant replied, "[i]t all depends"); *see also State v. Blom*, 682 N.W.2d 578, 617 (Minn. 2004) (recognizing that "a waiver, even of a constitutional right, need not be explicit"). Without more, the desire to assist the police in exchange for a reduced sentence does not render the waiver invalid. Our careful review of the record establishes that Martin's waiver of his right to counsel was knowing and intelligent.

When determining whether a defendant has voluntarily waived the right to counsel, we evaluate the totality of the circumstances, including the nature and length of the interrogation and the defendant's age, maturity, intelligence, education, experience, ability to comprehend, lack of or adequacy of warnings, and access to counsel. *State v. Miller*, 573 N.W.2d 661, 672 (Minn. 1998). Martin initiated contact with Sgt. Ahlquist. Martin's waiver of the right to counsel occurred at the beginning of the questioning. Nothing in the record demonstrates that Sgt. Ahlquist obtained Martin's waiver through coercion. In addition, Martin was 21 years old when he was questioned, and he had prior

experience in the criminal justice system. In fact, when given the *Miranda* warning, Martin told Sgt. Ahlquist that he had heard it before.

Martin asserts that he thought he was negotiating a plea agreement with Sgt. Ahlquist. When deciding whether a defendant's statement to the police is voluntary, "[c]ourts look with disfavor on implied and express promises made by the police during interrogation[.]" *State v. Clark*, 738 N.W.2d 316, 333 (Minn. 2007). Promises—implied or express—do not automatically render a statement involuntary. *Id.* Here, after explaining to Martin his constitutional rights and confirming that Martin understood those rights, Sgt. Ahlquist told Martin, "I'm here to help you if I can but you're the one that has to make the decision [as] to whether or not you talk to me." Martin replied, "I wanna talk." Nothing in this exchange supports the claim that Martin's waiver was involuntary. Martin also offered to conduct controlled buys in exchange for reduced charges, to which Sgt. Ahlquist replied, "Okay." But this offer also occurred after Martin acknowledged understanding his constitutional rights and after he agreed to talk. Moreover, when Sgt. Ahlquist later advised Martin that he would not agree to reduce Martin's charges, Martin replied, "I didn't think you would." No aspect of the discussion between Sgt. Ahlquist and Martin renders Martin's waiver of his right to counsel involuntary.

Martin next argues that he was "deprived of access to counsel." But the record does not support this argument. Sgt. Ahlquist neither prevented Martin from contacting his counsel nor suggested that Martin could not contact his counsel. Sgt. Ahlquist repeatedly reminded Martin that he had counsel. But Martin never requested any

opportunity to consult his counsel. Moreover, the Minnesota Supreme Court has expressly declined to impose an affirmative duty on the police either to obtain consent from a represented defendant's counsel before speaking with the defendant or to refrain from communicating with the defendant until the prosecutor and defense counsel have discussed the defendant's request to speak with the police. *State v. Buckingham*, 772 N.W.2d 64, 70 (Minn. 2009). Martin's argument that he was improperly deprived of access to counsel lacks both factual and legal support.

In sum, the record before us establishes that Martin knowingly, intelligently, and voluntarily waived his constitutional right to counsel. Accordingly, the district court did not err by denying Martin's motion to suppress the recorded statement on this ground.

B.

1.

Martin alternatively argues that his statement should have been suppressed because it is the product of improper police contact after the appointment of counsel. Martin cites *State v. Lefthand*, 488 N.W.2d 799 (Minn. 1992), in support of his argument. In *Lefthand*, the Minnesota Supreme Court, in the exercise of its supervisory power, held that "in-custody interrogation of a formally accused person who is represented by counsel should not proceed prior to notification of counsel or the presence of counsel. Statements obtained without notice to or [in] the presence of counsel are subject to exclusion at trial." 488 N.W.2d at 801-02. Notwithstanding its decision in *Lefthand*, the Minnesota Supreme Court subsequently declined to impose this affirmative duty on the police. Under *Buckingham*, the police are not required to obtain consent from defense counsel

before speaking with the defendant nor must the police wait for the prosecutor and defense counsel to confer regarding a defendant's request to speak to the police before interviewing the defendant. 772 N.W.2d at 70. Indeed, *Buckingham* neither cites nor acknowledges the Minnesota Supreme Court's holding in *Lefthand*.

In *Buckingham*, the defendant contacted a police sergeant several times seeking to talk with him about the case. *Id.* The defendant also requested the presence of his counsel, who the police sergeant was unable to contact. *Id.* Eventually, the defendant agreed to speak to the police sergeant without defense counsel. *Id.* Affirming the district court's decision to admit in evidence the defendant's statements to the police sergeant, the *Buckingham* court held that the "[p]olice may speak with a defendant, even after appointment of counsel, so long as the defendant does not clearly assert a desire to deal with the police *only* through counsel." *Id.* (emphasis added); *accord State v. Mattson*, 357 N.W.2d 344, 345 (Minn. 1984) (decided eight years before *Lefthand* and citing *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S. Ct. 1880, 1884-85 (1981)). Because Martin did not clearly assert a desire to deal with the police only through counsel, Sgt. Ahlquist's contact with Martin was not improper. *See Buckingham*, 772 N.W.2d at 70.

2.

Rule 4.2, Minn. R. Prof. Conduct, imposes a stricter standard on attorneys than the standard imposed on the police. *Buckingham*, 772 N.W.2d at 70. "[O]nce a defendant is represented by an attorney, a prosecutor cannot interview the defendant without opposing counsel's presence or consent." *Id.*; *accord* Minn. R. Prof. Conduct 4.2. But police

contact with a represented defendant may be attributed to a prosecutor if "the prosecutor orders or ratifies the police contact[.]" *Clark*, 738 N.W.2d at 337-38. The record supports the district court's conclusion that rule 4.2 was not violated. Martin contends that Sgt. Ahlquist's conduct is attributable to the prosecutor because Sgt. Ahlquist testified that he had spoken on previous occasions with prosecutors "in general" about "hypothetical" situations in which a represented defendant asks to speak with an officer. We reject Martin's assertion that Sgt. Ahlquist's prior general discussions of hypothetical situations demonstrates that a prosecutor ordered or ratified Sgt. Ahlquist's interview with Martin. Sgt. Ahlquist testified that he had not spoken to the prosecutor about interviewing Martin and that he is "not aware of any policy" of the prosecutor that approves police interviews of represented defendants. In sum, the prosecutor neither ordered nor ratified Sgt. Ahlquist's interview of Martin.

Citing *Buckingham*, Martin asserts that, even absent a violation of rule 4.2, suppression of the challenged statement is required if Sgt. Ahlquist's contact with Martin was so egregious that it compromises the fair administration of justice. But the *Buckingham* court stated that "*where prosecutor violations of Rule 4.2 occur*, we take 'a case-by-case approach to determining whether the state's conduct is so egregious as to compromise the fair administration of justice.'" 772 N.W.2d at 70 (emphasis added) (quoting *Clark*, 738 N.W.2d at 340-41); *see also State v. Miller*, 600 N.W.2d 457, 467-69 (Minn. 1999) (affirming suppression of defendant's statements to police obtained *with authorization of prosecutor*). The *Buckingham* court did not hold that a rule 4.2 violation is unnecessary to support the suppression of evidence obtained by the police from a

represented defendant; rather, it held that a rule 4.2 violation is not necessarily *sufficient* to support the suppression of evidence in such circumstances absent egregious conduct. 772 N.W.2d at 70-71. Because a violation of rule 4.2 did not occur here, Martin's reliance on this egregiousness standard is misplaced.[1]

In sum, Martin did not clearly assert a desire to speak with the police only through his counsel. In addition, because the record does not demonstrate that the prosecutor ordered or ratified Sgt. Ahlquist's interview of Martin, rule 4.2 was not violated and an inquiry into the egregiousness of Sgt. Ahlquist's conduct is not warranted. Accordingly, the district court did not err by denying Martin's motion to suppress the statement he made to Sgt. Ahlquist.

II.

Martin argues that the district court erred by admitting his statement to Sgt. Ahlquist in evidence because it was made during plea negotiations. But Martin did not object at trial to the statement's admission on this ground. Ordinarily, an appellant's failure to do so forfeits the right to challenge the admission of the evidence on appeal. *State v. Bauer*, 598 N.W.2d 352, 363 (Minn. 1999). To overcome such forfeiture, an appellant must demonstrate that the district court committed a plain error that affects

[1] Martin also relies on *Finne v. State*, in which we held that the district court should have excluded from evidence statements that the represented defendant made to the police. 648 N.W.2d 732, 739 (Minn. App. 2002), *review denied* (Minn. Oct. 29, 2002). In *Finne*, we did not indicate whether the prosecutor was aware of or involved in the conduct of the police. Based on *Finne*'s limited factual presentation and in light of the Minnesota Supreme Court's more recent pronouncement in *Buckingham*, we observe that *Finne* is not inconsistent with *Buckingham*. We, therefore, cannot conclude that *Finne* compels a different result.

substantial rights. Minn. R. Crim. P. 31.02; *Bauer*, 598 N.W.2d at 363; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). When this standard is met, an appellant is entitled to relief if the error seriously affected the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740. Evidence of a guilty plea that is later withdrawn, an offer to plead guilty, or a statement made in connection with a guilty plea is inadmissible in a criminal trial. Minn. R. Evid. 410. Whether a statement to the police is inadmissible under rule 410 depends on (1) whether the defendant "exhibited an actual subjective expectation to negotiate a plea at the time of the discussion" and (2) whether the defendant's "expectation was reasonable given the totality of the objective circumstances." *State v. Smallwood*, 594 N.W.2d 144, 152 (Minn. 1999). Neither factor is present here.

Martin repeatedly stated to Sgt. Ahlquist that he did not commit the charged offenses and that he believed his friend J.P. committed them. These are pleas of innocence, not guilt. Martin subsequently offered to conduct controlled purchases of marijuana in exchange for reduced charges. But these offers were made while Martin continued to maintain his innocence. Martin did not even state that he had consensual sex with R.D. until *after* Sgt. Ahlquist told him, "We're not gonna make a deal," to which Martin replied, "I didn't think you would."[2] When Martin later renewed his offer in exchange for reduced charges, he concluded by stating, "I just needed a chance to tell my

[2] As the verdict demonstrates, the jury rejected Martin's claim of a consensual sexual encounter.

side." When considered together, Martin's statements fail to establish a subjective expectation to negotiate a guilty plea.

Moreover, Martin's claimed expectation was not reasonable under the totality of the circumstances. Sgt. Ahlquist refused to negotiate and stated that Martin would "be convicted of [the charges] or . . . vindicated of [the charges] . . . deals aren't gonna come into play." On these facts, Martin could not reasonably have concluded that he was negotiating a guilty-plea agreement.

Because the district court did not err by admitting the challenged statement in evidence, Martin is not entitled to relief on this ground.[3]

III.

The district court entered convictions on both the third- and fourth-degree criminal-sexual-conduct offenses. Because both offenses arose from a single criminal act, the district court erred by doing so.

A defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2008). An included offense is defined as any of the following:

> (1) A lesser degree of the same crime; or
> (2) [a]n attempt to commit the crime charged; or
> (3) [a]n attempt to commit a lesser degree of the same crime; or
> (4) [a] crime necessarily proved if the crime charged were proved; or
> (5) [a] petty misdemeanor necessarily proved if the misdemeanor charge were proved.

[3] In light of our conclusion, we need not reach the remaining elements of the plain-error test. *Griller*, 583 N.W.2d at 740.

Id. When a defendant is convicted of more than one charge for the same act, the district court must "adjudicate formally and impose [a] sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). We, therefore, reverse the adjudicated conviction of fourth-degree criminal sexual conduct, Minn. Stat. § 609.345, subd. 1(c), and remand to the district court with instructions to vacate that conviction.

Affirmed in part, reversed in part, and remanded.