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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1954**

State of Minnesota,
Respondent,

vs.

Michael Christopher Barta,
Appellant.

**Filed October 21, 2013
Affirmed
Worke, Judge**

Rice County District Court
File No. 66-CR-11-3484

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

G. Paul Beaumaster, Rice County Attorney, Faribault, Minnesota (for respondent)

Brock J. Specht, Special Assistant Public Defender, Mitha V. Rao, Special Assistant Public Defender, Robins, Kaplan, Miller & Ciresi, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his convictions of first-degree burglary and stalking, arguing that his convictions should be reversed because his custodial interrogation was not recorded in violation of *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). We affirm.

FACTS

Appellant Michael Christopher Barta and M.M. dated for several months in 2011. When M.M. broke up with appellant, she told him that she did not want any further contact with him. When appellant persisted in sending M.M. “really insulting and threatening” text messages, she blocked his number on her cell phone. Despite M.M.’s efforts to avoid him, appellant was waiting for M.M. when she and her twelve-year-old son, D.M., arrived at her apartment on December 20, 2011. Appellant asked M.M. why she would not talk to him, and she told him she did not want to talk to him and that he should leave.

Appellant next appeared at M.M.’s residence at about 8:30 or 9:00 p.m. on December 23. D.M. first saw appellant’s arm punch through a duct-taped broken window in the front door of the apartment, and D.M., realizing that someone was trying to break in, ran to his mother’s bedroom. M.M. put D.M. behind her and quickly locked and latched the bedroom door. Appellant pounded on the bedroom door and asked what was going on in the bedroom, and M.M. told him to go away. Appellant then broke down the bedroom door and entered the room.

M.M. repeatedly asked appellant to leave and gestured that she was going to call police. As appellant was almost out the front door, he stuck his boot in the door to keep M.M. from closing the door, but he finally left. During the incident, appellant repeatedly accused M.M. of cheating on him. M.M. testified that the incident was “scary” and caused her to be “terrified.” D.M. testified that he was “panicking” as the incident occurred.

Appellant was arrested and interrogated for about ten minutes by Faribault police officer Erik Prink. Prink attempted to record the interrogation but no recording resulted, so Prink summarized the interrogation in a report.

Appellant was charged with first-degree burglary and felony stalking. Appellant moved to exclude evidence of the interrogation. At a pretrial hearing, Prink testified that he used a hand-held “voice recording system” that worked by “[t]ak[ing] it off hold[,] [p]ress[ing] the power button. . . . and then . . . hit[ting] the record[] button.” According to Prink, the recording device was supposed to have an automatic save function. Prink also testified that he had used the device 20 to 30 times, and that problems had occurred a “[s]mall percentage of the time.” Those problems included that he “hit the wrong button, forgot to hit record when [he] turned it on, plugging it into the computer and accidentally deleting things.” Prink said that the problems were due to both equipment malfunctions and operator error. Prink also testified that he gave appellant a *Miranda* warning before the interrogation. Appellant testified that he received no *Miranda* warning from Prink. The district court denied appellant’s motion to suppress evidence of appellant’s custodial interrogation.

Appellant testified at trial that on the night of the offense he went to M.M.'s apartment earlier than they had agreed upon, walked into her bedroom, and discovered her with a man. But he admitted that when he initially spoke to police, he twice lied about what occurred on the night of the offense and concocted a story about being home in bed. He also testified that he spoke with an "Officer Gliem," in January and admitted to him that he was at M.M.'s apartment on the night of the offense. Further, appellant denied startling M.M. and D.M. on December 20 and testified that he had been working on M.M.'s car on that date. During cross-examination, appellant admitted to having been convicted of four prior felonies.

Appellant was convicted of both charges, and this appeal followed.

D E C I S I O N

In Minnesota, "all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention." *Scales*, 518 N.W.2d at 592. A violation of the recording requirement mandates suppression of any statements obtained during the interrogation if the violation is determined to be "substantial." *Id.* The reviewing court determines whether *Scales* applies to the facts of a case and then determines whether a *Scales* violation was substantial, which is a legal question subject to de novo review. *State v. Inman*, 692 N.W.2d 76, 79-80 (Minn. 2005). "Findings of historical fact by the . . . district courts . . . are subject to a clearly erroneous standard of review." *Id.* And "[o]n appeal, a defendant has the burden of proving not only that the district court abused its discretion in admitting the evidence in question, but

also that he was prejudiced by the admission of the evidence.” *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009).

A *Scales* violation occurred in this case because appellant was subjected to a non-recorded custodial interrogation, and there is a factual dispute about whether appellant received a *Miranda* warning. But as the district court noted, the real question is “the degree of the violation.” As to whether the violation was substantial, a district court “consider[s] all relevant circumstances bearing on substantiality, including those set forth in . . . the Model Code of Pre-Arrest Procedure[,]” which mentions willfulness and “the extent to which the violation prejudiced the defendant’s ability to support his motion, or to defend himself in the proceeding in which the statement is sought to be offered in evidence against him.” *Scales*, 518 N.W.2d at 592, 592 n.5.

Appellant asserts that the violation was willful and therefore substantial because Officer Prink admitted that he had problems with the recording device, even though Prink said that he had used the device 20 to 30 times and problems occurred only a “[s]mall percentage of the time,” and because the recording problem reflects a pattern of conduct by the Faribault police. The district court order stated:

Officer Prink testified that he pushed the button with the intention to record the conversation when he entered the interrogation room. The interrogation was very short, ten minutes in length, which would make it more likely that Officer Prink was able to recall the interrogation with accuracy. All of these actions, along with Officer Prink’s testimony, which the [c]ourt finds credible, convince the [c]ourt that the violation was not willful. Because the violation was not willful, suppression would not discourage unlawful police conduct. There is also no evidence of a pattern of failed recordings in custodial interrogations.

The district court's finding that Prink's testimony does not establish a willful violation is supported by the record, and appellant offered no evidence to establish any pattern of conduct by the Faribault police. *Cf. State v. Johnson*, 773 N.W.2d 81, 86 (Minn. 2009) (stating for purposes of defining a crime that includes an element of a pattern of conduct, that "a lone prior act does not and cannot constitute a pattern"). The district court's factual determinations are supported by the record and show that this *Scales* violation was not substantial.

Appellant also argues that the failure to record his custodial statements prejudiced him. "A violation can be considered prejudicial to the accused if the accused alleges, contrary to the prosecution's assertions, that no *Miranda* warning was given." *Inman*, 692 N.W.2d at 81. In *State v. Williams*, 535 N.W.2d 277, 289 (Minn. 1995), the supreme court stated that "the rationale underlying the recording requirement is to avoid factual disputes underlying an accused's claims that the police violated his constitutional rights." But the prejudice factor also includes consideration of whether the unrecorded statements affected the defendant's ability to defend himself at trial. *Scales*, 518 N.W.2d at 592 n.5.

Here, the evidence against appellant was strong, because two eyewitnesses identified him and testified consistently about appellant's conduct, appellant admits that he gave multiple and contradictory versions of his whereabouts and conduct at the time of the crimes, and appellant's versions of the events were not borne out by the physical evidence at M.M.'s apartment, which included evidence of a re-broken window on the front door and a broken door lock and latch on M.M.'s bedroom door. In addition,

appellant was impeached with evidence of his criminal record. For all of these reasons, we conclude that the *Scales* violation was not substantial, and the district court did not abuse its discretion by admitting the evidence of the interrogation.

Finally, even if the *Scales* violation was substantial, it would be subject to the rule of harmless error. Appellant argues that the statements he made in the unrecorded interrogation were central to the state's case "because of their impact on [his] credibility," and therefore require reversal of his conviction under *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). *Post* does not apply here because it did not involve a *Scales* violation and set forth the harmless-error test for erroneous *exclusion* of evidence. 512 N.W.2d at 102.

The harmless-error standards applicable to two types of *Scales* violations are set forth in *Sanders*: for constitutional errors "a new trial is required unless the State can show beyond a reasonable doubt that the error was harmless[.]" and "[w]hen the error does not implicate a constitutional right, a new trial is required only when the error substantially influenced the jury's verdict." 775 N.W.2d at 887. The supreme court has specifically declined to delineate which harmless-error analysis applies to evidentiary rulings involving *Scales* violations. *Id.* at 888. *Scales* was decided under the supreme court's supervisory powers "to insure the fair administration of justice." 518 N.W.2d at 592. But in *Sanders* and in *Scales*, the court concluded that any error in admission of the unrecorded-statement evidence was harmless because the verdicts would have been the same even if the statements had been suppressed. 775 N.W.2d at 887; 518 N.W.2d at

593. Under either standard, the admission of appellant's unrecorded statements was harmless.

Affirmed.