**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-2074**

State of Minnesota,
Respondent,

vs.

Elbert Eugene Greene, Jr.,
Appellant.

**Filed December 30, 2013**
**Affirmed; motion granted**
**Stoneburner, Judge**

Scott County District Court
File No. 70CR0929371

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

Patrick Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Catherine Middlebrook, Interim Chief Appellate Public Defender, Rochelle R. Winn, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hooten, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

**STONEBURNER**, Judge

Appellant challenges his conviction of first-degree arson, arguing that the district court erred by denying his motion to suppress statements he made to law enforcement. In a pro se supplemental brief, appellant also asserts that the district court abused its discretion by excluding evidence of his co-defendant's acquittal and that he received ineffective assistance of counsel. Respondent state has moved to strike portions of appellant's pro se supplemental brief purporting to support the claim of ineffective assistance of counsel as based on facts not in the record. We grant the state's motion to strike and affirm.

## FACTS

In December 2004, a fire destroyed the Prior Lake home owned by appellant Elbert Greene, Jr.'s father. Following an investigation, the Prior Lake Police Department, Prior Lake Fire Department, and the State Fire Marshal determined that the likely cause of the fire was arson. In December 2009, a complaint and arrest warrant was issued for Greene, charging him with first degree arson. Greene's father was also charged in connection with the fire.

Prior Lake police detectives Chris Olson and Rick Denmark, accompanied by a state fire marshal, located and arrested Greene in an apartment building in St. Paul. They placed Greene, who was handcuffed, in the backseat of an unmarked SUV parked down the street from the apartment. Olson and Denmark sat in the front seats of the SUV, and the fire marshal sat in the back with Greene. There was no barrier between the front and

back seats. The entire conversation that occurred in the SUV was recorded and later transcribed.

Olson read the *Miranda* warning to Greene and confirmed that he understood the warning. Olson then asked Greene if he wanted to listen to what Olson had to say and then decide if he wanted to talk. Greene agreed. Olson explained why Greene was arrested and told Greene that his father had also been charged but they were coming to Greene first because "you stand more to gain than your father." Olson stated that the "first one here is probably gonna get the best deal." Greene responded: "I hear you completely." The interview continued:

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| OLSON: | . . . Tell me about the events uh that led to you getting involved with this thing. What the h--- was going on? |
| GREENE: | Well, I think I don't want to talk to you cuz I don't know what I'm, what you're asking for, honestly. |
| OLSON: | Well, I'm asking for the truth, all right. |
| GREENE: | Okay. |
| OLSON: | I'm asking. |
| GREENE: | Well then I don't know what happened as far as like the fire itself. |

Olson and Greene then discussed events that occurred on the night of the fire, and Olson explained that law enforcement knew that Greene was the last person in the house before the fire broke out. Olson mentioned another warrant on Greene from Michigan for a probation violation and told Greene: "you're in a heap of c---." Greene responded: "Well, help me get out of it." Olson indicated he would help Greene if Greene would help him and asked Greene what he wanted. Greene expressed that he did not want to go to jail and asked for the officers' help in avoiding jail.

Olson offered to call the prosecutor and, after additional conversation about what law enforcement knew about the fire and what trouble Greene and his father were in, Olson reminded Greene, "there's a h--- of a lot better chance of you staying out of the can for any significant time if you're the guy that turns. First one, first one here gets the deal. That's always been my rule." Greene then said he wanted Olson to talk to the prosecutor. When Olson got assistant Scott County attorney Neil Nelson on the speaker phone, Greene said he just wanted to know if he could stay out of jail on bond "till this is over." Officer Olson spoke privately to Nelson and then informed Greene that "in exchange for the truth, that's something [Nelson's] willing to do." He agreed that after Green was booked and fingerprinted, he would be released. Greene asked if that was a promise and Olson said it was, noting it was on the recording and had three witnesses. Greene then made a statement implicating himself and his brother-in-law in setting the fire. Greene gave an additional recorded statement at the police station and was released from custody.

Prior to trial, Greene moved to have both statements suppressed on the grounds that they were made involuntarily and were taken in violation of his constitutional rights. The arresting officers, the fire marshal who was present in the SUV, and Greene testified at the suppression hearing.

Olson described the arrest, stating that weapons were not drawn when they entered the apartment, in part because they were not sure that they were at the apartment where Greene was located. Olson testified that the questioning of Greene in the SUV was "a back and forth conversation," which lasted a total of an hour and a half to two hours,

including the drive back to Prior Lake. Olson testified that he had hoped that his promise to have Greene released on his own recognizance would result in Greene giving a statement. Olson stated that the purpose of the interview after Greene was booked was to follow up on the first interview.

Detective Denmark corroborated most of Olson's testimony. He stated that he did not have a weapon drawn in the apartment but could not recall whether Olson did. The fire marshal testified that the tone of the SUV conversation was "normal," meaning no one raised his voice or argued and that Greene laughed and acted "comfortable" during the interview.

Greene testified that he knew before his arrest that police were looking for him and that he had been "freaking out" since he heard from both his father and his neighbor that, a few days prior to the arrest, Greene's house had been surrounded by police officers who were looking to arrest him for arson. Greene testified that on the day he was arrested, Olson entered the apartment with his gun raised and pointed at him. But Greene's description of Olson's gun was contradicted by Olson's rebuttal testimony. Greene testified, in response to a leading question, that when he said, "I think I don't want to talk to you cuz I don't know what I'm, what you're asking for, honestly," he had intended to stop the interview. Greene testified that he was "a little freaked out" during the SUV interview, that it was uncomfortable and stressful, and that he felt intimidated by the situation. He testified that he had been interrogated by law enforcement prior to this interrogation, but that this situation was unlike what he had previously experienced. Greene testified that he relied on Olson's promise that he would be released from jail,

which was the entire basis for him admitting involvement in the fire. Greene also said that he gave the second statement only because he was afraid that the officers would renege on their promise to release him if he did not give an additional statement.

The district court denied Greene's motion to suppress, finding that (1) Greene's credibility was "entirely destroyed" by his incorrect description of Olson's gun; (2) Greene's alleged assertion of his right to remain silent was equivocal on its face; and (3) Greene voluntarily continued talking with the officers. The district court also found that the circumstances of the interview were unusual and more coercive than the standard interview environment but noted that Greene did not incriminate himself until after the officers promised to release him on his own recognizance. The district court concluded that what occurred was a negotiation that did not overbear Greene's will.

Before trial, the state moved to exclude evidence that Greene's co-defendant (his father) had been acquitted by a jury of the arson charges against him. The district court excluded the evidence as irrelevant to the issues in Greene's trial. The recordings of Greene's statements were played for the jury, with redactions agreed to by the parties. The jury found Greene guilty of first-degree arson, and the district court sentenced him to 75 months in prison.

This appeal followed. The state has moved to strike pages two through five of Greene's pro se supplemental brief because they contain assertions of facts not in the record.

## D E C I S I O N

### I. Denial of suppression motion

#### A. Standard of review

"When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

Greene argues that the district court's findings that his invocation of the right to remain silent was equivocal and that his statements were voluntary are clearly erroneous. He asserts that use of a promise to induce his first statement, which he alleges was taken under extremely coercive circumstances, made both of his statements involuntary.

#### B. Right to remain silent

"The validity of a suspect's invocation of his right to remain silent presents a mixed question of fact and law." *State v. Ortega*, 798 N.W.2d 59, 67 (Minn. 2011). "A suspect must state his intention to remain silent 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent.'" *Id.* (quoting *State v. Day*, 619 N.W.2d 745, 749 (Minn. 2000)). Factual issues about the sufficiency of the invocation are reviewed for clear error. *Id.* The application of the reasonable-officer standard to those facts is reviewed de novo. *Id.*; *see State v. Williams*, 535 N.W.2d 277, 285 (Minn. 1995) (declining to extend the "stop and clarify" rule applied in right-to-counsel invocations to invocations of the right to remain silent). When a suspect clearly and unequivocally invokes the right to

remain silent, the interrogation must cease, scrupulously honoring the defendant's right to remain silent. *Day*, 619 N.W.2d at 749.

In *Day*, the supreme court determined that Day unambiguously and unequivocally invoked his right to remain silent when he told officers, "Said I don't want to tell you guys anything to say about me in court." *Id.* at 750. The supreme court emphasized that Day's statement was in direct response to having been read the *Miranda* warning, which includes the statement "[a]nything you say can and will be used against you in a court of law," and pointed out that Day said he did not want to talk about anything instead of just setting parameters for the discussion. *Id.* Greene relies on *Day* to argue that because he did not merely set parameters or conditions that had to be met before he would speak to the officers, his statement, "I think I don't want to talk to you cuz I don't know . . . what you're asking for, honestly," was a clear invocation of his right to remain silent. We disagree.

In *Ortega*, the supreme court considered Ortega's statement to police: "I ain't got nothing else to say man. That's it. I'm through. I told you." *Ortega*, 798 N.W.2d at 68. The court concluded that the district court did not clearly err by finding this statement equivocal because the statement could reasonably be interpreted to relate only to a topic that the interrogators had exhausted through repeated questions and did not demonstrate an unwillingness to answer other questions. *Ortega*, 798 N.W.2d at 69-70. In reaching that conclusion, the supreme court was "guided by [its] analysis" in *State v. Williams*. *Ortega*, 789 N.W.2d at 69. In *Williams*, the supreme court concluded that Williams did not invoke his right to remain silent when he stated: "I don't have to take any more of

your bulls---" and left the interrogation room, having lost his composure after being accused of lying. 535 N.W.2d at 288 (finding that Williams's "desire with respect to his right to remain silent was ambiguous or equivocal at best," and noting that Williams never said he wanted to stop answering questions or refused to answer any questions).

Similarly, the context and circumstances of Greene's statement yields the reasonable conclusion that Greene was requesting only a clarification of what the detectives were asking and was not an invocation of his right to remain silent. When Olson responded that he was "asking for the truth," Greene said "okay," and the conversation continued with no objection from Greene. The district court's finding that Greene did not unequivocally and unambiguously invoke his right to remain silent is not clearly erroneous. Greene failed to invoke his right to remain silent in such a way that a reasonable police officer would understand that it was his intention to do so.

**C. Voluntariness of statements**

Only a voluntary confession is admissible against a criminal defendant at trial. *State v. Gard*, 358 N.W.2d 463, 467 (Minn. App. 1984). Where evidence suggests that a defendant's custodial statement may be involuntary and should be suppressed, a district court should make specific factual findings at the omnibus hearing. *State v. Buchanan*, 431 N.W.2d 542, 551 (Minn. 1988). A reviewing court will not reverse those factual findings unless they are clearly erroneous but independently reviews whether a statement was given voluntarily. *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010). In determining whether a confession or statement was involuntary or coerced, a reviewing court considers all relevant factors including age, maturity, intelligence, education,

experience, ability to comprehend, lack or adequacy of warnings, length and legality of detention, nature of interrogation, physical deprivations, and limits on access to counsel, family, and friends. *State v. Blom*, 682 N.W.2d 578, 614 (Minn. 2004). "In addition to the consideration of other factors, a [statement] is not involuntary unless there is evidence that the suspect's will was overborne by coercive police conduct." *State v. Edwards*, 589 N.W.2d 807, 813 (Minn. App. 1999), *review denied* (Minn. May 18, 1999).

The district court found that Greene is an adult of average intelligence and maturity who has substantial experience with the criminal justice system and was, at the time he gave these statements, aware of his rights, having successfully invoked his right to silence and his right to counsel in the past. The district court noted the unusual circumstances of the SUV interview: Greene was alone with the officers in the SUV without access to a bathroom, sustenance, or other people, making the environment more coercive than a standard interview environment. But the district court found that the interview was not otherwise intimidating, in part, because the tone of questioning was even and calm. The court also found that Greene did not incriminate himself until he successfully negotiated the promise of pre-trial release on personal recognizance. Greene does not argue that the district court's factual findings were erroneous, only that the court erred by determining that Greene's statements were voluntary.

In *State v. Anderson*, the supreme court discouraged the use of promises in exchange for confessions, but stated that "courts do not mechanically hold confessions involuntary just because a promise has been involved. Rather, we must look to the totality of the circumstances, considering all the factors bearing on voluntariness." 298

N.W.2d 63, 65 (Minn. 1980) (citations omitted). Greene relies on an unrelated *State v. Anderson* case to argue that a confession in exchange for a promise of benefit is not voluntary. 404 N.W.2d 856, 858 (Minn. App. 1987) (stating that "[a] confession induced by a promise to the accused which holds hope of a benefit is not a voluntary confession."), *review denied* (Minn. June 25, 1987). But the facts of the later *Anderson* case are distinguishable from Greene's circumstances. In the 1987 *Anderson* case, Anderson's interrogator knew that Anderson, who had not been advised of his constitutional rights, was under the misbelief that he had to confess in order to get drug treatment and that the treatment would be in lieu of prosecution. *Id.* In contrast, Greene was advised of, and acknowledged that he understood, his constitutional rights, and Greene actively negotiated pre-trial release before he agreed to give a statement. Greene was fully aware that his cooperation with law enforcement was not premised on a promise that he would not be prosecuted, or that, if convicted, he would not go to prison.

The circumstances surrounding Greene's confession parallel those in *State v. Jungbauer*, where the supreme court determined that Jungbauer's confession was voluntary even though it was elicited with a promise of pre-trial release on personal recognizance with a clear understanding that he would not be immune from prosecution. 348 N.W.2d 344, 346 (Minn. 1984). The supreme court considered the totality of the circumstances in reaching this conclusion, including the facts that

> [Jungbauer] had two prior felony convictions; that he had been advised of his rights and had previously exercised his right to silence; that he was not subjected to any kind of prolonged interrogation or threats; and that the promise was

> not the sort of promise that might tempt an innocent person to confess.

*Id.* at 346-47. Greene attempts to distinguish the facts of his case by implying that he was threatened by police and by stating that he was subjected to prolonged questioning. But the district court made the undisputed findings that there was no physical intimidation, threatening tone of voice, or strongly confrontational questioning used in the interrogation of Greene. The district court found that (1) Greene negotiated his release on personal recognizance in exchange for a confession; (2) his confession was made about 26 minutes into the interview; (3) there was no indication that Greene's physical needs were not met; and (4) the environment was not intimidating. The district court's findings are supported by the record, and the findings support the conclusion that Greene's confession was voluntary.

**II. Exclusion of evidence of co-defendant's acquittal**

In his pro se supplemental brief, Greene argues that the district court erred by excluding evidence of his father's acquittal. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

The district court granted the state's motion in limine to prevent mention of Greene's co-defendant's acquittal, because "the acquittal is not relevant." "[G]enerally evidence of a plea of guilty, conviction or acquittal of an accomplice of the accused is not

admissible to prove the guilt or lack of guilt of the accused." *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985).

Greene asserts that by suppressing this evidence, the district court prevented him from presenting a complete defense. But it is not plain from the record, and Greene does not explain, how exclusion of this evidence prevented Greene from presenting a complete defense. Additionally, this argument was not presented to the district court and is therefore waived on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). The district court's decision to exclude this evidence as irrelevant is consistent with case law and was not an abuse of discretion.

## III. Motion to strike granted

In his pro se supplemental brief, Greene also argues that he received ineffective assistance of counsel, but he supports the argument with factual assertions that are outside the record on appeal. The state has moved to strike those factual assertions, and we grant the motion, striking pages two through five of Greene's pro se supplemental brief. The record does not otherwise support Greene's assertions of ineffective assistance of counsel.

**Affirmed; motion granted.**