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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0755

State of Minnesota,
Respondent,

vs.

Gary Tyrone Griffin, Jr.,
Appellant.

Filed May 13, 2013
Affirmed in part, reversed in part, and remanded
Worke, Judge

Hennepin County District Court
File No. 27-CR-11-2394

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

Michael O. Freeman, Hennepin County Attorney, Annsara Lovejoy Elasky, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Maren F. Grier, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant challenges his conviction of aiding and abetting second-degree murder and aiding and abetting attempted first-degree aggravated robbery, arguing that the

district court erred by (1) refusing to suppress custodial statements he made to police in violation of his *Miranda* rights, and (2) imposing a 480-month executed sentence, an upward durational departure from the presumptive sentence. We affirm the murder conviction and sentence, but we reverse and remand with instructions that the district court vacate the robbery sentence because it arose from the same behavioral incident as the murder conviction.

FACTS

On January 21, 2011, police found S.C.R. in his van in an alley, dead from gunshot wounds. Police found several discharged bullet casings leading to a duplex. Bystanders also directed police to the duplex, where people were seen entering immediately after the shooting.

Police detained the duplex occupants as potential witnesses to or suspects in the shooting. S.C.R.'s phone showed that the last call he made was to a cell phone belonging to E.W., an occupant of the duplex. The weapons used in the shooting were found hidden in the duplex, and forensic testing determined that the bullets found in the van were fired from those guns.

Through witness statements, police learned that S.C.R. died in an attempted robbery. Several witnesses identified seventeen-year-old Gary Tyrone Griffin, Jr., as one of the perpetrators. One witness, J.J., told police that appellant and Ladell Johnson rushed into the duplex after the shooting, carrying handguns, each accusing the other of shooting at Lordiss Stewart, their accomplice who was planted in the van to set up the robbery. E.W. told police that she was with Stewart at the duplex before the shooting,

and that Stewart used her phone before leaving and told E.W. "that she had a date and was going to get some money." E.W. and other witnesses saw Stewart get into the van. E.W. overheard either Johnson or appellant state after the shooting that they "f---ed up."

Stewart admitted that when she told appellant that S.C.R. sold crack, appellant suggested that they rob him. Stewart also stated that she directed S.C.R. where to drive and sent a text message to one of the duplex occupants just before the robbery that said, "Where's [appellant]?" She said that appellant and Johnson approached the van from either side. When S.C.R. lowered the van's window, appellant pointed a gun at him, and S.C.R. began to drive away. Stewart saw appellant fire twice at them and heard more shots as they drove forward. Stewart later pleaded guilty to attempted aggravated robbery.

Six days after the crime, appellant was told to report to his high school principal's office because police wanted to speak with him. Police handcuffed appellant and brought him to Minneapolis City Hall for questioning. During his interrogation, appellant claimed that he was picked up from the duplex just before the shooting; when police attempted to verify appellant's alibi, the person appellant had identified as the driver denied giving appellant a ride on the night of the shooting.

At the beginning of appellant's interrogation, a police officer began to give appellant an enhanced *Miranda* warning that explained the rights encompassed in the warning and asked appellant if he understood them. Appellant acknowledged that he knew what a *Miranda* warning was, but when the officer said that she was required to "inform [him] that [he has] the right to remain silent" and asked him what his

understanding of this right was, appellant answered, "I don't say nothing while y'all talk until y'all tell me to talk. Right?" The officer again repeated the right and asked appellant to explain his understanding of it, and appellant responded, "Like when they say that to me that's mean I be quiet until they done talking, until they tell me I can talk, right?" The officer responded, "It, yeah it means that you can talk to us or you don't have to talk to us" and "It's up to you, yeah." After explaining each of the *Miranda* rights, the officer asked appellant if he understood them, and appellant verified several times that he understood all of the rights. The district court denied appellant's pretrial motion to suppress the evidence obtained during his interrogation.

Appellant agreed to a stipulated-facts proceeding, following which the district court found appellant guilty of second-degree murder and attempted robbery. The district court imposed a 480-month sentence on the second-degree murder conviction, an 174-month upward durational departure from the 306-month presumptive sentence. The court also imposed a concurrent 24-month sentence on the robbery conviction.

D E C I S I O N

Miranda Waiver

Appellant challenges the voluntary and knowing nature of his *Miranda* waiver. The state can introduce custodial statements made by a defendant if the defendant knowingly, voluntarily, and intelligently waived his rights. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966); *State v. Fardan*, 773 N.W.2d 303, 312 (Minn. 2009). *Miranda* due-process rights apply to juveniles. *State v. Burrell*, 697 N.W.2d 579, 592 (Minn. 2005). "When a juvenile's *Miranda* waiver is at issue, we examine the

totality of the circumstances to determine whether the suspect understood his rights and the consequences that may arise if he waives them." *Id.* at 592-93. The totality-of-circumstances factors include the juvenile's age, intelligence, maturity, education, prior criminal experience, physical deprivations, length and legality of the detention, presence or absence of parents, adequacy of warnings, and nature of the interrogation. *Id.* at 595. An appellate court reviews factual findings regarding the validity of a *Miranda* waiver for clear error and legal conclusions based on those facts de novo. *State v. Farrah*, 735 N.W.2d 336, 341 (Minn. 2007).

In a pretrial order, the district court analyzed the totality of the circumstances surrounding appellant's *Miranda* warning and concluded that his waiver was knowing, voluntary, and intelligent. With regard to appellant's understanding of the right to remain silent, the court said that "[w]hile the best practice would have been for the sergeants to explain the meaning and have [appellant] restate his understanding; it was sufficient for the sergeants to clarify the implication of the right and insure [appellant] understood." We agree and conclude that appellant's waiver of the right to remain silent was valid under the totality-of-circumstances test, because nearly all other factors support upholding the warning. Appellant was near the age of majority, demonstrated intelligence during his interrogation, appeared mature, was receiving age-appropriate education, had prior criminal experience in the juvenile system[1] and could tell the

[1] At his *Rasmussen* hearing, appellant admitted that he had been stopped by police previously for possession of marijuana, a curfew violation, and for being a passenger in a stolen vehicle. He was given citations for the first two charges, which were both later dismissed, and he was arrested in the vehicle-theft case, handcuffed, placed in the back of

difference between juvenile and adult proceedings, did not suffer physical deprivation during his interrogation, was detained only for the duration of the ride to city hall and an additional 5-10 minutes before the less-than-one-hour interrogation began, received an "enhanced" warning, and was subjected to a standard police interrogation. Appellant's parents were not present during the interrogation, but he did not ask for them.

Although appellant asserts that he switched schools often because of failing grades, his statements during the police interrogation and his pretrial hearing testimony demonstrated that he was intelligent enough to understand his *Miranda* rights. *See Fardan*, 773 N.W.2d at 314-15 (upholding the *Miranda* waiver of a juvenile who claimed to have Fetal Alcohol Spectrum Disorder and low intellectual function but demonstrated no intimidation, confusion, or indecision during a reading of *Miranda* warning or custodial interrogation). To the extent that the district court made credibility determinations in deciding whether appellant understood his *Miranda* rights, this court will defer to the district court. *See State v. Jones*, 566 N.W.2d 317, 325 (Minn. 1997) (stating that in determining the adequacy of a juvenile's *Miranda* warning, an appellate court "shall give due regard to the [district] court's ability to ascertain the credibility of witnesses").

Appellant also claims that his *Miranda* warning was deficient because he was not specifically warned that his statement could be used in adult court. "[T]here is 'a heightened concern' that a juvenile suspect 'actually comprehends that [his] statements

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a squad car, and transported to a juvenile detention center. Charges were never filed against him in the vehicle-theft case.

can be used in adult court.'" *State v. Beecroft*, 813 N.W.2d 814, 850 (Minn. 2012) (quoting *Fardan*, 773 N.W.2d at 313). To satisfy this concern, the supreme court requires that police "'specifically warn the minor that [his] statement can be used in adult court, particularly when the juvenile might be misled by the protective, nonadversary environment that juvenile court fosters.'" *Id.* (quoting *Burrell*, 697 N.W.2d at 592); *but see State v. Thompson*, 788 N.W.2d 485, 493 (Minn. 2010) (stating that "[w]e have declined to adopt a requirement that a juvenile be specifically informed that any statement could be used against him in adult court"). The failure to give the warning is not dispositive: "'[T]he warning may still be adequate if a juvenile may be imputed with the knowledge of potential adult court prosecution.'" *Beecroft*, 813 N.W.2d at 851 (quoting *Fardan*, 773 N.W.2d at 313). "To determine whether imputation of this knowledge is appropriate, we examine 'whether the circumstances regarding the interrogation make it clear that the process is outside the realm of the juvenile court.'" *Id*. (quoting *Fardan*, 773 N.W.2d at 313).

Here, six days after the crime, appellant, who was seventeen years old at the time of the offense, was arrested in handcuffs at high school, transported to an interrogation room at Minneapolis City Hall, and given a standard police interrogation. He was specifically warned that his statements could be used against him, not that they could be used against him in adult court, but police "did not imply that the interrogation would be confidential or nonadversarial." *Id*. Appellant was not told that he was being investigated about a robbery/murder before he waived his *Miranda* rights, but he admitted that he was picked up by police regarding an assault. Even though appellant

was not warned that he could be tried in adult court, the circumstances of appellant's interrogation made it clear that the interrogation was "outside the realm of the juvenile court." *See id*. (permitting imputation of knowledge when juvenile was nearly the age of majority, parent was present, juvenile was aware of the meaning of "homicide" and "murder," and police did not imply that interrogation would be nonadversarial or confidential); *Fardan*, 773 N.W.2d at 313 (permitting imputation of knowledge when 15-year-old was arrested and brought to Minneapolis City Hall in handcuffs for questioning, was informed that police were investigating an "incident" (murder) that occurred on a specific date, and was served with a search warrant to obtain a DNA sample); *Burrell*, 697 N.W.2d at 592 (permitting imputation of knowledge when 16-year-old was handcuffed before being interrogated at police station and was informed that he was being questioned about a murder).

Finally, even if the district court erred by refusing to suppress appellant's custodial statement because of deficiencies in appellant's *Miranda* warning or waiver, any such error was harmless in light of the very strong evidence of appellant's guilt. Numerous witnesses identified appellant as one of two persons involved in the crime. These witnesses also stated that appellant was at the duplex before and after the shooting and that appellant ran into the duplex immediately after the shooting and made incriminating statements. Physical evidence at the scene supported these statements. Stewart, who was in the van with the victim when the shooting started, stated that appellant had planned the crime and that appellant started shooting at the van. Appellant's purported alibi witness denied his alibi. On these facts, the verdict "was surely unattributable to the error,"

which is the standard for determining whether an erroneous admission of evidence in violation of *Miranda* was harmless. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

Sentencing

Appellant also challenges the district court's imposition of an upward durational departure from the presumptive guidelines sentence for the aiding and abetting second-degree murder conviction, arguing that the district court improperly relied on facts related to the robbery to support the enhanced sentence on the murder conviction. The presumptive sentence for aiding and abetting second-degree murder, for an offender with a criminal history score of zero, is 306 months in prison. Minn. Sent. Guidelines. IV (2010). At sentencing, the district court judge indicated its intent to "impose a sentence of 40 years in prison on the charge of murder in the second degree, aiding and abetting." However, in the memorandum attached to its verdict, the district court gave grounds for deviating from the presumptive guidelines sentence for the robbery offense, one of which was that the crime was committed "as part of a group of three or more persons who all actively participated in the crime[.]"

"The Minnesota Sentencing Guidelines were created to promote uniformity, proportionality, rationality, and predictability in sentencing." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). Unless there are "substantial[] and compelling circumstances" to warrant a sentencing departure, the district court must impose the presumptive guidelines sentence. Minn. Sent. Guidelines II.D (2010). The decision to depart is discretionary, *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009), "but

sentencing departures are intended to be imposed in only "a small number of cases." *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002).

In *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008), the supreme court enumerated the limitations on enhancements, one of which was "conduct underlying one conviction cannot be relied on 'to support departure on a sentence for a separate conviction.'" (quoting *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000)). Minn. Stat. § 609.035, subd. 1 (2010), similarly provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." "The statute contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *Jones*, 745 N.W.2d at 850 (quotations omitted).

The two offenses of which appellant was found guilty arose from the same behavioral incident. *See State v. Hawkins*, 511 N.W.2d 9, 14 (Minn. 1994) (holding that when robbery and attempted murder occurred at about the same time and place and with the same criminal objective—"to complete the robbery and leave the scene without being harmed or apprehended"—the crimes were part of a single behavioral incident); *compare State v. Bookwalter*, 541 N.W.2d 290, 295-96 (Minn. 1995) (concluding that criminal sexual conduct and attempted murder were more than one behavioral incident when the crimes involve different intents and two criminal objectives). Although appellant did not raise this issue on appeal, to properly address the sentencing issue he did raise, we address the clear violation of section 609.035. Thus, the district court erred by

sentencing appellant to concurrent sentences and therefore remand is required for the district court to vacate appellant's sentence for the robbery conviction. *See State v. Grampe*, 766 N.W.2d 347, 354 (Minn. App. 2009) (requiring vacation of sentence on less-serious offense that arose out of same behavioral incident as more serious offense), *review denied* (Minn. Aug. 26, 2009); Minn. Sent. Guidelines IV (2010) (listing second-degree murder as severity-level-eleven offense and aggravated robbery as severity-level-eight offense).

The question remains whether the facts were sufficient to support an upward durational departure on the murder conviction. At sentencing, the district court expressed its intention to impose the statutory maximum sentence. While the district court erroneously referred to facts related to the robbery offense, some of those facts support the district court's sentencing decision on the murder conviction. When a district court bases its sentencing departure on an improper aggravating factor, but "the district court would have imposed the same sentence absent the improper aggravating factor," this court may affirm the sentence. *Stanke*, 764 N.W.2d at 828.

We agree with the state that one of the factors relied on by the district court supports an upward durational departure. This factor is that appellant "committed the crime as part of a group of three or more persons who all actively participated in the crime." Minn. Sent. Guidelines II.D.2.b(10)(2010). Appellant and Johnson both shot at S.C.R.'s vehicle. Although Stewart did not carry a weapon, she was actively involved in setting up the crime, and it was foreseeable that an attempted robbery with the use of firearms could lead to murder. Because this factor supports the district court's decision

to impose an upward durational departure on the murder conviction, we affirm the district court's sentencing decision.

Affirmed in part, reversed in part, and remanded.