STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1485

State of Minnesota,
Respondent,

vs.

Choua Chee Lee,
Appellant.

Filed February 2, 2010
Affirmed in part, reversed in part, and remanded
Wright, Judge

Ramsey County District Court
File No. 62-K3-07-004020

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jessica Merz Godes, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

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

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

WRIGHT, Judge

Appellant challenges his conviction and sentence, arguing that the district court (1) committed reversible error by failing to suppress appellant's confession because it

was involuntary and (2) abused its discretion at sentencing by using an incorrect severity level under the Minnesota Sentencing Guidelines and imposing an improper conditional-release term. We affirm in part, reverse in part, and remand.

FACTS

In May 2007, 12-year-old Z.L. reported to her teacher that her father, appellant Choua Lee, had sexually abused her when she was in preschool. While pointing to her genital area, Z.L. stated that her father "was in her down there." Z.L. explained to her teacher that she was reporting the abuse because she was concerned about the safety of her younger sister, S.L. The teacher brought Z.L. to the school social worker, who contacted the police. In her statement to the responding officer, St. Paul Police Officer Douglas Whittaker, Z.L. reported that Lee started to "put his penis in her butt" when she was a younger girl and one of these incidents caused her to bleed. Z.L. told Officer Whittaker that she wore layers of clothing and a belt to bed because she thought it would keep her safe. Z.L. was unable to recall how many times Lee had abused her, but she reported that the abuse stopped when her mother's work hours changed. Officer Whittaker took Z.L. to Children's Hospital for a complete examination and placement in temporary care. Z.L. repeated the allegations to a nurse at Midwest Children's Resource Center two days later.

Sergeant Shannon Hutton investigated the allegations and met with Lee at the St. Paul Police Department headquarters. Although English is not Lee's primary language, he declined the interpreter services that were offered, and the interview was conducted in English. Lee admitted that he disciplined his children by using a belt, a hanger, a binder,

or his hands. He said he would be open to counseling "if it would get his family back together." But he repeatedly denied touching the children sexually, and he refused to discuss that issue further.

Ramsey County Child Protective Services (CPS) referred Lee to Project Pathfinder, a sex-offender treatment program. Lee first met with an intake coordinator to complete his paperwork. An interpreter was not present at the meeting. The record does not include all of the forms that Lee signed, but it does include signed copies of a form with a Tennessen warning,[1] a Notice of Privacy Practices, and a Disclosure Pursuant to a Contract. The form refers to attached information on limits to confidentiality, but that information is not included in the exhibit and the intake coordinator did not testify as to the specific information Lee was given about these limits. Although there are no signed disclosure forms in the record, it appears that the only signed disclosure form was for CPS.

In October 2007, Lee met with Deborah McDaniel-Dunn at Project Pathfinder for a psychosexual evaluation. Lee stated that he understood that he was there because of his daughter's allegations, and McDaniel-Dunn clarified that the evaluation was prompted by

[1] A Tennessen warning is given pursuant to Minn. Stat. § 13.04, subd. 2 (2008), which provides that

> [a]n individual asked to supply private or confidential data concerning the individual shall be informed of: (a) the purpose and intended use of the requested data . . . ; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from supplying or refusing to supply private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data.

CPS to determine whether Lee needed sex-offender treatment and whether he posed a risk if he had "contact with his children." When McDaniel-Dunn asked Lee if he wanted the services of an interpreter, Lee declined because he was concerned about rumors spreading through his community. Lee advised McDaniel-Dunn that he understood the nature of the interview and said he would ask questions if anything was unclear. Lee also reported that he had been in the United States for more than 20 years during which he had attended school in California and Minnesota and had earned a high school degree.

When first asked about the sexual abuse, Lee expressed surprise that his daughter would make such allegations. McDaniel-Dunn reviewed each of Z.L.'s allegations and challenged Lee when he stated that he could not recall sexually abusing his daughter. After pausing for approximately one minute, Lee stated, "I did it." When asked to clarify his statement, Lee admitted that he had abused his daughter by placing his penis in either her vagina or anus. He stated that, because he was not looking at her body when the abuse occurred, he was not certain which opening was penetrated. Lee described another occasion when he "tried to do her again, but she . . . ran away from him" and hit her face on the wall. As a result, he abandoned his attempt and helped Z.L. clean herself. After the interview, McDaniel-Dunn assessed Lee as an untreated sex offender and recommended completion of sex-offender treatment and supervision of any visits between Lee and his children. Lee later testified that he responded to McDaniel-Dunn's questions as he did "[b]ecause that's what they want to hear from me so that they can offer the help for me."

In November 2007, Z.L.'s younger sister, 10-year-old S.L., reported to the school social worker that "[b]ad things were happening" and that they were "the same things that happened to her sister Z.L." S.L. later disclosed to an examining nurse that Lee picked her up and carried her to his bedroom where he put "his nut in her butt." She reported that this abuse had been occurring since she was six years old. S.L. clarified that the word "nut" referred to her father's penis.

Lee was charged with two counts of first-degree criminal sexual conduct, a violation of Minn. Stat. § 609.342, subd. 1(a) (2006).[2] Following Lee's arrest, he was given a *Miranda*[3] warning and he declined to speak with the investigating officers.

During a pretrial hearing, Lee challenged the admissibility of his confession to McDaniel-Dunn on the ground that it was not voluntary. The district court denied the motion to suppress the statement, finding that the state had "met its burden by a preponderance of the evidence that the statement made by [Lee] was in fact voluntarily, knowingly, [and] intelligently made."

Following a jury trial, Lee was found guilty of first-degree criminal sexual conduct against Z.L. and not guilty of first-degree criminal sexual conduct against S.L. At the sentencing hearing, the parties agreed that the presumptive guidelines sentence for the offense of conviction was 86 months' imprisonment, a 10-year conditional-release

[2] The charges alleged that Lee committed sexual abuse between January 1998 and December 2006. Minn. Stat. § 609.342, subd. 1(a), remained unchanged throughout that period.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

term, and registration as a predatory offender. The district court imposed that sentence. This appeal followed.

D E C I S I O N

I.

Lee argues that the district court's denial of his motion to suppress his confession was erroneous because the confession was involuntary. The due-process clause of the Fourteenth Amendment requires that a confession be admitted only if it is voluntary. *State v. Gard*, 358 N.W.2d 463, 467 (Minn. App. 1984). In a pretrial hearing at which the defendant seeks suppression of a confession on the ground that it was involuntary, it is the state's burden to prove voluntariness by a fair preponderance of the evidence. *State v. Thaggard*, 527 N.W.2d 804, 807 (Minn. 1995). When evaluating the merits of the suppression motion, a district court must make a subjective factual inquiry into the totality of the circumstances in which the statement was given. *State v. Hardimon*, 310 N.W.2d 564, 567 (Minn. 1981). On appeal, we independently determine, based on all factual findings that are not clearly erroneous, whether the confession was voluntary. *Thaggard*, 527 N.W.2d at 807. The focus of our inquiry is whether the defendant's will was overborne when the confession was made. *State v. Farnsworth*, 738 N.W.2d 364, 373 (Minn. 2007). We examine many relevant factors to determine whether a confession was voluntary, including (1) the age, maturity, intelligence, education, and experience of the defendant and the ability of the defendant to comprehend; (2) whether any warnings were given; (3) the nature of the interrogation; and (4) whether the defendant was deprived of physical needs or access to friends or relatives. *Gard*, 358 N.W.2d at 467.

The district court found that (1) Lee is a 36-year-old man who has been in the country for a minimum of 20 years, who was educated in the United States, and who understands and comprehends English; (2) there is no evidence that Lee was not alert or responsive; (3) Lee "possesses the sufficient maturity, intelligence, education, [ ] experience, and ability to comprehend the Tennessen warning"; (4) Lee did not demonstrate any hesitancy in asking questions during his examination; (5) Lee signed the Tennessen form after being thoroughly advised of his rights; and (6) the 28-day delay between signing the waiver form and making the statement provided Lee "an opportunity to rethink his position regarding the Tennessen warning, if in fact he was concerned that he didn't understand it."

Lee does not contend that his age, maturity, intelligence, education, experience, and ability to comprehend affected the voluntariness of the confession. Indeed, Lee concedes that the district court's finding that Lee grasps the English language "might not be clearly erroneous." Lee also does not contend that he was deprived of physical needs or denied access to friends. Rather, Lee's challenge to the voluntariness of his confession focuses on the nature of the investigation and the lack of sufficient warnings.

Lee first argues that the confession was induced by his belief that he would be reunified with his children if he confessed. But for our constitutional analysis, if the government actor was not responsible for or aware of Lee's belief, then his confession need not be suppressed as involuntary. *State v. Anderson*, 396 N.W.2d 564, 565 (Minn. 1986) (*Anderson I*). The question, therefore, is not whether Lee held the subjective belief that he must admit committing criminal sexual conduct; rather, it is "whether [the

government actor] made oral representations that could reasonably be construed as promises to induce a confession." *Gard*, 358 N.W.2d at 468; *see also Farnsworth*, 738 N.W.2d at 375 (concluding that "[the officer's] statements contained no explicit or implied promises that [the defendant] would not be prosecuted if he confessed . . . [and] nothing in [the officer's] statement . . . indicated that if [the defendant] did not confess he would certainly lose custody of his children, whereas if he did confess, he would be able to retain custody"); *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991) (stating that "our inquiry examines whether [police] actions, together with other circumstances surrounding the interrogation, were so coercive, so manipulative, so overpowering that [the defendant] was deprived of his ability to make an unconstrained and wholly autonomous decision to speak as he did"); *State v. Biron*, 266 Minn. 272, 275-76, 123 N.W.2d 392, 395 (1963) (concluding that officers' "questions and statements were calculated" to get the defendant to confess and that they "held out to" the defendant the possibility of a lesser charge or juvenile proceeding).

Lee concedes that, when he confessed, he had not been told by law-enforcement officials, CPS, or McDaniel-Dunn that a confession would result in reunification with his children. Lee argues, however, that the purpose of the interview, the provision of results to CPS, and the notice that he would not be provided services if he failed to give sufficient information supported his understanding that his confession was necessary to be reunited with his children. But there is no evidence that government actors created those circumstances as part of an implicit promise that confessing the sexual abuse would result in reunification. Nor is it objectively reasonable to construe those circumstances to

imply that Lee's best course of action was to confess that he sexually abused his daughter. Even if it could be argued that Lee was unaware before the investigation that his commission of the sexual abuse could result in the loss of access to his children, a credible argument of such lack of knowledge cannot be made on this record after the investigation began. That Lee would be best served by confessing to sexual abuse that he did not commit so that he could qualify for treatment defies logic, particularly in the absence of any evidence that Lee received such an implicit or explicit message from any of the professionals involved in his case.

Lee next argues that, "even where a *Miranda* warning is not required because interrogation was non-custodial, lack of [a] *Miranda* warning weighs against the state," citing *Gard*, 358 N.W.2d at 467-68 and *State v. Anderson*, 404 N.W.2d 856, 858 (Minn. App. 1987) (*Anderson II*), *review denied* (Minn. June 25, 1987). Indeed, the *Gard* court observed that, "while the failure to give a *Miranda* warning [in a noncustodial setting] is not in itself coercive, a failure to warn is relevant only in establishing a setting in which actual coercion might have been exerted." 358 N.W.2d at 467 (quotation omitted). But rather than basing its analysis solely on the omission of a *Miranda* warning, the *Gard* court considered the *totality* of the circumstances to determine whether the confession was voluntary. *Id*. That the defendant in *Anderson II* had not been advised of his constitutional rights was one of many factors supporting our conclusion that the defendant had been "induced by promises of county funded treatment to make a statement." 404 N.W.2d at 858. Thus, as in *Gard*, the lack of a *Miranda* warning was one factor among many used to determine whether there had been government

inducement; but this factor did not, in and of itself, render the statement involuntary. Based on the totality of the circumstances in the record before us, any weight given to the lack of a *Miranda* warning here is slight.

Finally, Lee argues that the Tennessen warning weighs in favor of concluding that his confession was involuntary because (1) it advised him that the failure to provide information may result in the program being unable to provide services, (2) it said nothing about disclosures to law enforcement, and (3) the form advised that Lee would be asked to sign a release-of-information form before any information would be disclosed to law enforcement. The Tennessen warning that was given stated, in relevant part:

> [T]he information you provide . . . will be used to determine your eligibility to participate in Project Pathfinder, Inc. programs, to design and implement a treatment plan, or to assess other matters relevant to your circumstances. In most cases, you are not required to provide the information that your therapist requests; if you choose not to provide the information, however, Project Pathfinder, Inc. may be unable to provide appropriate services to you.

The form on which the Tennessen warning is provided states that information provided to the therapist is confidential, but that "[t]here are a number of exceptions to this general right of privacy; some of these exceptions are unique to your situation, while other exceptions are mandated by law and apply to all recipients of health services." The form also includes a separate section informing the client that certain identifying information would be disclosed to county or state agencies pursuant to contracts and that releases of information may be requested to permit disclosure to county personnel, including law enforcement.

The form makes clear that information may be disclosed as mandated by law but it later implies that Lee would be asked to sign a release-of-information form before the information would be shared with law enforcement. Given this apparent conflict, Lee may have been confused about the circumstances under which law enforcement would gain access to the information he provided. But the Tennessen warning informed Lee that he was not required to provide any requested information and that there were circumstances in which confidentiality may not be maintained. *See State v. Wilkens*, 671 N.W.2d 752, 756 (Minn. App. 2003) (holding that appellant had read and signed Tennessen warning that "informed appellant that he need not answer and that information he provided was not confidential"). Lee also knew that information would be shared with CPS, and he signed a release-of-information form to that effect. Thus, there is no evidence that Lee believed that information received by CPS would be confidential. And any confusion that Lee may have had regarding law enforcement's access to the information is insufficient to support a determination of coercion here. Lee's arguments that the relevant factors weigh in favor of a conclusion that his confession was involuntary are unpersuasive.

In *Farnsworth*, the Minnesota Supreme Court held that a confession was voluntarily made when an officer encouraged the defendant to talk with him so that the defendant could regain custody of his children and told the defendant, "[I am] not trying to put [you] away. I'm trying to get you the best help I can so you can have your kids still." 738 N.W.2d at 367. A confession also was held to be voluntary when an officer advised the defendant that, "[b]y being drug related, you probably would be referred to

treatment" when the officer did not indicate that treatment would be in lieu of prosecution. *Thaggard*, 527 N.W.2d at 807, 811. A confession was not voluntary when officers implied that the defendant would be charged with a lesser offense or tried as a juvenile if he confessed. *Biron*, 266 Minn. at 282, 123 N.W.2d at 399; *see also Gard*, 358 N.W.2d at 465 (holding that confession was involuntary when officer explained to defendant that several options were open and that "just because he talks to me doesn't necessarily mean he is going to face jail . . . if charges are brought, counseling could be a part of the court's disposition").

Unlike the circumstances in *Biron* and *Gard*, Lee was not promised that the consequences would be less severe if he confessed or that any treatment he received would be in lieu of criminal prosecution. Indeed, the circumstances here make a stronger showing of voluntariness than those described in *Farnsworth* and *Thaggard*, in which the confessions were found to be voluntary even when the officers commented on the potential consequences of cooperating with law enforcement. Here, there is no evidence that officers, CPS, or McDaniel-Dunn expressly or implicitly indicated to Lee that a confession would result in reunification with his children or a decision to forgo prosecution. On this record, we conclude that the district court did not err by declining to suppress his statements to McDaniel-Dunn because Lee's confession was voluntary.

II.

Lee next challenges the sentence imposed by the district court. A district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied*

(Minn. Aug. 20, 2002). Under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), a jury must determine any fact issue, including the date of the offense, that bears on which presumptive sentence applies. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006). The right to have a jury determine the date of the offense may not be waived by a defendant's failure to request such a determination. *Id*. at 903-04. Any doubt as to whether a criminal-sexual-conduct offense occurred before or after the effective date of revised sentencing guidelines must be resolved in favor of the defendant. *State v. Goldenstein*, 505 N.W.2d 332, 348 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993).

Lee was convicted of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (sexual contact with a person under 13 years of age). The district court imposed a presumptive sentence based on the assessment that the offense had a severity level of eight. The offense dates for which Lee was charged and convicted are January 1, 1998 through December 31, 2005.

In 2000, the sentencing guidelines were revised to increase the severity level from seven to eight for first-degree criminal sexual conduct involving a victim under the age of 13. *Compare* Minn. Sent. Guidelines V (1998) (listing the offense at a severity level of seven), *with* Minn. Sent. Guidelines V (2000) (listing the offense at a severity level of eight). Because specific findings as to the date of Lee's offense were not made by the jury, and it is undisputed that Z.L. testified that the abuse began when she was in preschool in 1998, the parties jointly assert on appeal that the 1998 sentencing guidelines apply. We agree. This conclusion comports with the requirement that a jury must make

factual findings that affect which presumptive sentence applies, *DeRosier*, 719 N.W.2d at 903, and with the principle that any doubt as to the applicable guidelines must be resolved in the defendant's favor, *Goldenstein*, 505 N.W.2d at 348. The presumptive guidelines sentence for first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a), committed in 1998 is 48 months' imprisonment. Thus, the district court's imposition of the presumptive sentence of 86 months' imprisonment was an abuse of discretion.

The district court also imposed a ten-year conditional-release term. But for offenses committed prior to August 1, 2005, the statutory conditional-release term is five years. *See* Minn. Stat. § 609.3455, subd. 6 (Supp. 2005) (requiring a ten-year conditional-release term); Minn. Stat. § 609.109, subd. 7(a) (1998) (requiring a five-year conditional-release term). Again, there are no jury findings here that Lee committed the offense for which he was convicted after August 1, 2005. Thus, the five-year conditional-release term in effect in 1998 applies. In light of our decision, we reverse the sentence imposed and remand to the district court for imposition of the presumptive guidelines sentence and the proper conditional-release term for first-degree criminal sexual conduct committed in 1998.

III.

Lee presents several pro se arguments challenging his conviction. Pro se litigants generally are held to the same standards as attorneys. *Liptak v. State*, 340 N.W.2d 366, 367 (Minn. App. 1983). "An assignment of error based on mere assertion, not supported by argument or authority and not raised in the district court, cannot be considered on

appeal." *State v. Wilson*, 594 N.W.2d 268, 271 (Minn. App. 1999) (citations omitted). And we ordinarily will not consider matters raised for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Lee argues that (1) evidence of his confession should have been suppressed because it violated constitutional protections against unlawful searches and seizures; (2) he was subjected to multiple prosecutions for conduct involving a single behavioral incident against multiple victims in violation of the constitutional protections against double jeopardy; (3) he was denied the right to cross-examine Z.L. and S.L.; (4) the evidence is insufficient to sustain the jury's verdict; and (5) he received ineffective assistance of counsel. Lee does not support the assertions of error by argument or authority; and he failed to raise those claims that could have been raised before the district court. As such, we decline to address them here.

Affirmed in part, reversed in part, and remanded.