DA 17-0611

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 171N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH JOHN MARTINEZ,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADC-14-462
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Robin Meguire, Attorney at Law, Great Falls, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Madison L. Mattioli, Assistant Attorney General, Helena, Montana

Joshua Racki, Cascade County Attorney, Kory V. Larson, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: May 29, 2019

Decided: July 23, 2019

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 A Cascade County jury found Joseph John Martinez guilty of sexual intercourse without consent, in violation of § 45-5-503, MCA. Martinez appeals his conviction, alleging that the Eighth Judicial District Court erred in precluding him from questioning the victim about a Facebook message she exchanged with a third party; that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights against self-incrimination; and that he received ineffective assistance of counsel. We affirm.

¶3 On October 23, 2014, 15-year-old C.H. and others were drinking at a party in Tristen Davidson's garage in Great Falls. C.H. remembers drinking spiced rum and vodka straight out of the bottle and chasing it with "strawberry soda." C.H. left the garage and went inside to use the restroom. The last thing that C.H. remembers about that night was coming out of the bathroom, laying down on the floor, and passing out. Davidson observed C.H. vomiting and then laying on the floor. He moved her up onto a mattress in his bedroom and placed a small garbage can next to the bed. When Davidson left C.H. in his room with the door open, she had all her clothes on and was "passed out."

¶4 Great Falls Police Officer Jeff Parks arrived at Davidson's home in response to a noise complaint at about one o'clock in the morning. Davidson advised Officer Parks that there were other people in the house and that "somebody was passed out" in a bedroom. When Officer Parks opened the door to the bedroom, Davidson saw C.H. "laying on the bed face down with her pants off, and Martinez trying to . . . hide behind her on the bed." Martinez was laying on the mattress with his pants down. Officer Parks told Martinez to stand up and witnessed Martinez "trying to hide an erection, and trying to get his pants buckled up right away." There appeared to be vomit on C.H., she was "limp," and she appeared to Officer Parks "to be incoherent." Officer Parks called for medical response as quickly as possible because he feared for C.H.'s life. The next thing that C.H. remembered was waking up at Benefis Hospital where she was being treated for alcohol poisoning.

¶5 After C.H. was placed in the ambulance, 18-year-old Martinez identified himself to Officer Parks. Officer Parks took Martinez to the police station to speak with him further. Once in the interview room, Officer Parks read Martinez a *Miranda* warning, and Martinez agreed to answer questions. Martinez provided a breath test, which was positive for alcohol. Martinez ultimately admitted to engaging in sexual relations with C.H., including penetration.

¶6 The following morning, Great Falls Police Officer Kevin Supalla transported Martinez to the hospital for a body search to be conducted pursuant to a search warrant. While waiting for the exam to begin, Martinez asked Officer Supalla some questions, told him that he hoped C.H. was at least 17 years old, and admitted to inserting his fingers into

C.H.'s vagina. Officer Supalla recorded the majority of his time with Martinez at the hospital on his digital audio recorder. Martinez was not reminded of his *Miranda* rights while at the hospital.

¶7 At trial, Martinez objected to his *Miranda* waiver form being admitted into evidence because whether he was capable of understanding and waiving his rights had not been established. The District Court overruled the objection, reasoning that Martinez could explore that issue because it "goes to the weight of the evidence." A video of the police station interview was admitted and played for the jury. Officer Parks testified that Martinez understood what he was saying to him and that he believed Martinez voluntarily waived his rights. Martinez also objected to the audio recording from the hospital being played for the jury because it was a surreptitious recording. The District Court overruled Martinez's objection, and the tape was played for the jury. Martinez's counsel renewed his objection after the tape was played. The District Court again overruled his objection.

¶8 On appeal, Martinez argues that the District Court erred in admitting the recorded interview from the police station because his intoxicated state at the time of the waiver, taken together with his age, education level, and intellectual capacity, invalidates his *Miranda* waiver. We review a district court's determination that a defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights to ensure its factual findings are supported by substantial credible evidence and its conclusions of law are correct. *State v. Nixon*, 2013 MT 81, ¶ 15, 369 Mont. 359, 298 P.3d 408.

¶9 The State "may not use statements that stem from a custodial interrogation of a defendant unless the defendant is warned, prior to questioning, that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *State v Olson*, 2003 MT 61, ¶ 13, 314 Mont. 402, 66 P.3d 297 (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966)). An individual apprised of his or her rights may waive them so long as the waiver is made "voluntarily, knowingly, and intelligently." *State v. Main*, 2011 MT 123, ¶ 21, 360 Mont. 470, 255 P.3d 1240. That inquiry has "two distinct dimensions":

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Main, ¶ 21 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986)).

¶10 The totality of the circumstances surrounding the interrogation presents substantial evidence to support the finding that Martinez voluntarily, knowingly, and intelligently waived his *Miranda* rights. Officer Parks testified that before Martinez signed the waiver, he "appeared intoxicated," but that Martinez was coherent and able to understand and follow instructions during the interview. Parks testified that Martinez "track[ed]" and responded appropriately to questions. Martinez understood why he was being questioned, as well as the consequences of the crime, as was evidenced by the changes in his story, his repeating that he hoped C.H. was over the legal age of consent, and his fear of going to

prison if he confessed to Officer Parks. The District Court did not err in admitting the video of Martinez's taped interview.

¶11 Martinez argues also that the recording from the hospital should not have been admitted because he was not informed of his *Miranda* rights a second time. The State argues that Martinez was not entitled to be informed of his *Miranda* rights at the hospital because he was not subject to an interrogation. A spontaneous or unsolicited remark, not made in response to interrogation, is admissible even without a *Miranda* warning. *State v. Braulick*, 2015 MT 147, ¶ 16, 379 Mont. 302, 349 P.3d 508. With respect to "interrogation" under *Miranda*, this term "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Munson*, 2007 MT 222, ¶ 25, 339 Mont. 68, 169 P.3d 364 (internal citations and quotations omitted). The primary focus in determining whether an incriminating response was reasonably likely to be elicited from the suspect is on the perceptions of the suspect, rather than on the intent of the police. *Munson*, ¶ 25.

¶12 Officer Supalla did not conduct any express questioning of Martinez at the hospital, nor did he use any words that were reasonably likely to elicit an incriminating response from Martinez. Officer Supalla testified that Martinez was "just spontaneously coming out with things" during the conversation at the hospital. Officer Supalla confirmed that he did not ask any questions regarding the events, but simply let him talk, answered Martinez's

questions, and occasionally asked for clarification when he could not understand Martinez. We agree with the State that Martinez was not subject to interrogation at the hospital because Officer Supalla did not act or speak in a way that he should have known would elicit an incriminating response. The District Court did not err in admitting the audio recording from the hospital.

¶13 Martinez argues that he was deprived of effective assistance of counsel when his trial counsel failed to file a motion to suppress the recording of the interview and the recording from the hospital. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and the deficient performance prejudiced him. *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d 746. Counsel did not perform deficiently when he failed to file a motion to suppress Martinez's statements because on the merits both the interview and the hospital statements were admissible. The outcome would have been the same if Martinez's counsel moved to suppress the statements. *See Heddings v. State*, 2011 MT 228, ¶ 33, 362 Mont. 90, 265 P.3d 600 (observing that "a claim of constitutionally ineffective assistance of counsel will not succeed when predicated upon counsel's failure to make motions or objections which, under the circumstances, would have been frivolous, which would have been, arguably, without procedural or substantive merit, or which, otherwise, would likely not have changed the outcome of the proceeding."). Martinez therefore was not denied effective assistance of counsel.

¶14 During defense counsel's cross-examination of C.H., he inquired if she recalled exchanging Facebook instant messages with her friend James Garwood the day after the party. The State objected, and the District Court sustained the inquiry based on the court's previous ruling that the Facebook Messenger statements constituted inadmissible hearsay and violated the Rape Shield Statute, § 45-5-511(2), MCA. The ongoing conversation between C.H. and Garwood, who did not testify at trial, details their plans to meet up and drink and smoke. The District Court asked whether the conversation "goes to [C.H's] state of mind in the sense that she went [to the party] that night wanting to have sex." Defense counsel responded, "She went there that night, I believe, in looking at her posting with Mr. Garwood, she's well aware of what's going on and who is there and participating in the activities that everybody was engaging in." In the exchange between C.H. and Garwood on October 23, 2014, while C.H. was still in the hospital, C.H. told Garwood that she did not remember anything about the previous night. She asked Garwood, "Oh did I sleep with anyone[?]" and "So will u tell me what happened I wasn't a slut was i[?]" After Garwood told C.H. that he found Martinez on top of her with his pants down and pulled him off of her when the cops showed up, C.H. responded, "Omg I'm such a slut I'm sorry about last night." The District Court held that the statements were inadmissible and nothing had been cited to indicate that any exception to the hearsay rule applied. The court added that the discussion was not relevant and went to the sexual conduct of C.H., which is precluded by the Rape Shield Statute.

¶15 District courts have broad discretion in determining the relevance and admissibility of evidence. *State v. Walker*, 2018 MT 312, ¶ 11, 394 Mont. 1, 422 P.3d 202. A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Walker*, ¶ 11. The Rape Shield Statute generally precludes any "[e]vidence concerning the sexual conduct of the victim." Section 45-5-511(2), MCA. Relevant evidence generally is admissible unless otherwise provided by the constitution, statute, the Montana Rules of Evidence, or other rules. M. R. Evid. 402. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401.

¶16 Martinez maintains that he was deprived of his constitutional right of confrontation when the District Court denied the admission of the Facebook messages authored by C.H. Martinez argues that C.H.'s indication that she thought she might have slept with someone or acted like "a slut" speaks "directly to the issue of consent." Martinez claimed that C.H. told him that she was a senior in high school. Martinez maintains that he wanted to question C.H. about the Facebook messages "to impeach [her] on the issue of consent." C.H. was not, however, lawfully able to consent. The District Court instructed the jury, in accordance with Montana law, that a victim is incapable of consent if she is less than sixteen years old. Section 45-5-501(1)(b)(iv), MCA. C.H. was fifteen years old the night of the party. These messages were not relevant to and not probative of her consent. *See* M. R. Evid. 401 and 402. The court's instruction also told the jury, "It is a defense for

the defendant to prove that he reasonably believed the victim to be 16 years or older." Martinez had ample opportunity to cross-examine C.H. about Martinez's claim that C.H. told him that she was a senior in high school, and did so at length. The Facebook messages said nothing about C.H.'s age. And, as the State aptly observes, the messages were consistent with how a sex-crime victim likely may respond—with shame and embarrassment. If anything, the messages showed that C.H. remembered nothing about her encounter with Martinez. The District Court did not abuse its discretion by excluding the Facebook messages.

¶17 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm.

/S/ BETH BAKER

We Concur:

/S/ DIRK M. SANDEFUR
/S/ JIM RICE
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON