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NO. COA14-529
NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

STATE OF NORTH CAROLINA

v.

Alamance County
No. 09 CRS 55360

THOMAS CLAY FRIDAY

Appeal by defendant from order entered 3 May 2012 by Judge W. Osmond Smith III in Alamance County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

CALABRIA, Judge.

Thomas Clay Friday ("defendant") appeals from the trial court's order denying his motion to suppress his confession. We affirm.

I. Background

On 28 November 2007, defendant and Matthew Fields ("Fields") entered the home of Sarah Dixon ("Ms. Dixon"). At

defendant's direction, Fields went into Ms. Dixon's bedroom, where she was asleep, and shot her twice in the head. Defendant had orchestrated the murder at the behest of Ms. Dixon's stepson, Dennis Dixon. Defendant was paid \$3,500 for carrying out the murder.

On 7 July 2009, defendant was taken into custody by the Alamance County Sheriff's Office ("ACSO") for questioning regarding the murder. Defendant executed a written waiver of his *Miranda* rights prior to his interrogation. He was then questioned by Captain Robert Wilborn ("Captain Wilborn") and Sergeant Curtis Morris ("Sergeant Morris") of the ACSO. At some point during the interview, defendant stated, "Well then, let's exercise the right and let's do what we gotta do." Captain Wilborn asked defendant to clarify which right he wished to exercise, but defendant failed to answer. Instead, defendant stated, "If I can't get in, in contact with my daughter, then, yeah, I'm go [sic] ahead and exercise my right, cause I need to get my daughter home." The officers questioning defendant then left the room, and Alamance County Sheriff Terry Johnson ("Sheriff Johnson") entered.

Sheriff Johnson briefly continued to interview defendant, and then escorted defendant to the processing area of the

Alamance County Jail. While he was being escorted, defendant told Sheriff Johnson, "If you give me something good, I'll give you something real good." After processing was completed, defendant requested to speak further with Sheriff Johnson.

The next day, 8 July 2009, defendant again waived his rights and was interviewed twice by Sheriff Johnson and other ACSO officers. During his interviews, defendant implicated himself in Ms. Dixon's murder. Defendant was subsequently indicted for first degree murder, first degree burglary, and conspiracy to commit first degree murder.

Prior to trial, defendant filed a motion to suppress his confession in Alamance County Superior Court. Defendant contended that Captain Wilborn and Sheriff Johnson's continued questioning after he stated "let's exercise the right" violated defendant's right to remain silent and his right to counsel pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). After a hearing, the trial court denied his motion. Defendant then entered into a plea arrangement by which defendant would plead guilty to first degree murder and sentenced to life imprisonment without the possibility of parole. As part of the agreement, defendant reserved his right to appeal the denial of the motion to suppress. Defendant pled

guilty on 1 May 2012, and the trial court imposed a sentence of life imprisonment without parole. Defendant appeals.

II. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Miranda Rights

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress his confession. We disagree.

"[A] criminal defendant who has been advised of and has waived his rights has the right to terminate a custodial interrogation by indicating 'in any manner, [and] at any time prior to or during questioning, that he wishes to remain silent.'" *State v. Murphy*, 342 N.C. 813, 823, 467 S.E.2d 428, 433-34 (1996) (quoting *Miranda*, 384 U.S. at 473-74, 16 L. Ed. 2d

at 723). Likewise, “[i]t is well settled that, during custodial interrogation, once a suspect invokes his right to counsel, all questioning must cease until an attorney is present or the suspect initiates further communication with the police.” *State v. Dix*, 194 N.C. App. 151, 155, 669 S.E.2d 25, 28 (2008). However, our Courts have made clear that invocation of both the right to remain silent and the right to counsel must be unambiguous. See *State v. Forte*, 360 N.C. 427, 438, 629 S.E.2d 137, 145 (2006) (“Although custodial interrogation must cease when a suspect unequivocally invokes his right to silence, an ambiguous invocation does not require police to cease interrogation immediately.”); *Dix*, 194 N.C. App. at 155, 669 S.E.2d at 28 (“[I]f the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.” (internal quotations and citation omitted)). “[I]f the person being interrogated makes an ambiguous or equivocal statement as to whether he waives his *Miranda* rights, it has been held that the interrogator may ask questions to clarify the answer.” *State v. McKoy*, 332 N.C. 639, 643, 422 S.E.2d 713, 715 (1992).

In the instant case, the trial court made the following findings of fact regarding defendant's interrogation on 7 July 2009:

14. The defendant was advised of his Fifth Amendment rights prior to questioning by Captain Robert Wilborn and Sergeant Curtis Morris. The defendant responded affirmatively when asked if he understood each right, and he then signed the rights form and voluntarily agreed to speak with the investigators without invoking his right to counsel or his right to remain silent.

15. During the interview the defendant made the statement, "Well then, let's exercise the right and let's do what we gotta do."

16. Captain Wilborn asked the defendant to clarify the right to which he was referring, and the defendant responded with statements about calling his daughter. He did not answer Wilborn's question.

17. Wilborn asked the defendant again which right he was exercising, and the defendant responded that "If I can't get in, in contact with my daughter, then, yeah, I'm go [sic] ahead and exercise my right, cause I need to get my daughter home."

18. Sheriff Terry Johnson entered the interview room shortly after this statement was made, and the interview continued.

Defendant does not challenge these findings, and therefore, they are binding on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Based upon these unchallenged findings,

the trial court concluded that defendant "did not unambiguously or unequivocally invoke either his right to counsel or his right to remain silent during his interviews with the Alamance County Sheriff's investigators."

Defendant contends that the trial court's conclusion was erroneous because defendant's exercise of "the right" necessarily referred to either the right to remain silent or the right to have counsel present. Since invocation of either right requires law enforcement to cease questioning a suspect, defendant argues that Captain Wilborn and Sheriff Johnson's subsequent questions violated defendant's constitutional rights.

While defendant is correct that his statement, "let's exercise the right," most likely referred to either the right to remain silent or the right to counsel, his argument fails to appreciate the difference in the consequences of exercising the different rights. If defendant was invoking his right to remain silent, law enforcement officers are permitted to later reattempt to interrogate a suspect, so long as a reasonable time has passed and the suspect's initial "right to cut off questioning was scrupulously honored." *State v. Murphy*, 342 N.C. 813, 823, 467 S.E.2d 428, 434 (1996) (internal quotations and citation omitted). In contrast, "once an accused has invoked

his right to have counsel present, the police may not resume the interrogation until counsel has been made available or until the accused himself initiates further communications with the police and waives his right to counsel." *Id.* n.1. Thus, in order to clarify the protections defendant was seeking, Captain Wilborn properly asked defendant to clarify his ambiguous statement. See *McKoy*, 332 N.C. at 643, 422 S.E.2d at 715. Captain Wilborn did not ask further investigatory questions, and his questions did not attempt to intimidate defendant or otherwise dissuade defendant from invoking his *Miranda* rights.

Once Captain Wilborn asked permissible clarifying questions, defendant responded with the conditional statement, "[i]f I can't get in, in contact with my daughter, then, yeah, I'm go [sic] ahead and exercise my right" This conditional statement injected further ambiguity into defendant's prior statement and reasonably called into question whether defendant had ever actually intended to exercise any of his rights. See *State v. Boggess*, 358 N.C. 676, 687, 600 S.E.2d 453, 460 (2004) (holding that the "[d]efendant's conditional statement was not an actual and unambiguous request."). Thus, reviewing all of his statements in context, defendant never made a definitive and unambiguous statement that he wished to

exercise either the right to remain silent or the right to counsel. Defendant failed to respond to Captain Wilborn's clarifying questions, and instead inserted further ambiguity into whether he wished to invoke his *Miranda* rights. Consequently, the trial court properly concluded that defendant never invoked his *Miranda* rights. This argument is overruled.

IV. Conclusion

The trial court's unchallenged findings of fact supported its conclusion that defendant never unambiguously asserted his *Miranda* rights. Accordingly, the trial court properly denied defendant's motion to suppress his confession. The trial court's order is affirmed.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).