STATE OF MINNESOTA
IN COURT OF APPEALS
A11-908

State of Minnesota,
Respondent,

vs.

John Wesley Defatte, Sr.,
Appellant.

Filed June 4, 2012
Affirmed
Peterson, Judge

Hubbard County District Court
File No. 29-CR-09-840

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

Donovan D. Dearstyne, Hubbard County Attorney, Park Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

PETERSON, Judge

In this appeal from his convictions of first-degree burglary, third-degree assault, and domestic abuse - violation of an order for protection, appellant argues that the district court erred by (1) denying appellant's motion to suppress an incriminating statement he made in response to a deputy's question; (2) concluding that the deputy's question did not need to be recorded under *State v. Scales*, 518 N.W.2d 587 (Minn. 1994); and (3) refusing appellant's request for a jury instruction. We affirm.

FACTS

Appellant John Wesley Defatte, Sr. and his wife, D.D., were divorcing after 40 years of marriage. Appellant moved out of the marital home, and D.D. continued to live there. D.D. obtained an order for protection (OFP) that prohibited appellant from being within 1,000 feet of the marital home and prohibited contact with D.D.

When D.D. arrived home from work approximately one month after the OFP was issued, she found appellant inside the marital home, and he "had what . . . looked [to be] a bat in his hand." Appellant struck D.D. in the head with the object "[m]any, many times" and knocked her to the floor. Appellant stated that "if he was going to go to jail, he was going to do something worth going to jail for." Appellant repeatedly slammed D.D.'s head into the floor and "dropped his knee" with "his whole body weight in the middle of [her] back." D.D. was concerned that she would never walk again and "thought he broke [her] neck." During the assault, D.D. kept yelling that appellant was "going to kill [her]."

When the assault stopped, appellant apologized, wiped some blood off D.D.'s face, and told her that he would take her to the hospital. D.D. left by herself and went to a friend's house. The friend called police, and a Hubbard County sheriff's deputy responded. An ambulance took D.D. to the hospital. Her eye socket was fractured, her eye was swollen shut, and staples were needed to close a laceration on her head. The doctor also saw multiple bruises on her arm, back, face, and other parts of her body.

After leaving D.D. at the hospital, the deputy went to several residences looking for appellant. Later that night, appellant turned himself in at the sheriff's office in a neighboring county and was held in jail there. About an hour later, the deputy arrived at the jail in the neighboring county, put handcuffs on appellant, placed him in a squad car, and transported him to the Hubbard County jail. The deputy did not ask appellant any questions during the trip.

In the booking room at the jail, before advising appellant of his *Miranda*[1] rights, the deputy asked appellant if "he was going to be interested in giving [the deputy] a statement as to his side of what had taken place . . . that night." Appellant responded, "I went over there, and I just lost it." The deputy then told appellant that he would be taking a statement from him after he had a chance to advise him of his rights. During this exchange, recording equipment in the booking room was not activated.

Appellant was charged with one count each of second-degree assault, first-degree burglary, third-degree assault, domestic assault by strangulation, and violation of an OFP.

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

Appellant moved to suppress the statement he made to the deputy on the grounds that the statement was taken in violation of both *Miranda* and *Scales*. The district court denied the motion after determining that appellant's statement did not violate *Miranda* because appellant "was not asked a question likely to elicit an incriminating response and the statement was voluntary and spontaneous" and did not violate *Scales* because appellant "was not being interrogated and made a voluntary, spontaneous statement." Evidence of appellant's statement was admitted at trial.

Also at trial, appellant requested that the jury be instructed that

> circumstantial evidence is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis [that] the accused is guilty and inconsistent with any rational hypothesis except for that of guilt.

The district court denied the request.

Appellant was convicted of first-degree burglary, third-degree assault, and violation of an OFP and acquitted of second-degree assault and domestic assault by strangulation. The district court sentenced appellant to an executed sentence of 48 months for burglary and a stayed sentence of 12 months for assault. This appeal followed.

D E C I S I O N

I.

Appellate courts review de novo whether there has been a constitutional violation. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). Under the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

U.S. Const. amend. V. The United States Supreme Court has given concrete constitutional guidelines for law-enforcement agencies and courts to follow when applying this privilege against self-incrimination to in-custody interrogation. *Miranda v. Arizona*, 384 U.S. 436, 440-42, 86 S. Ct 1602, 1610-11 (1966). In *Miranda*, the Supreme Court held, in part:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement that he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Id. at 444, 86 S. Ct. at 1612 (footnote omitted).

There is no dispute that appellant was in custody when he made the statement in response to the deputy's question and appellant made the statement before he was warned that he has a right to remain silent. The dispute before us is whether the deputy's question was interrogation to which the procedural safeguards of *Miranda* apply.

With respect to the meaning of "interrogation," the Supreme Court has explained

> that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or

> its functional equivalent. That is to say, the term "interrogation" under *Miranda* 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. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 300-02, 100 S. Ct. 1682, 1689-90 (1980) (footnotes omitted).

In applying *Miranda* and *Innis*, the Minnesota Supreme Court concluded that its test

> for whether [a defendant] was subjected to the interrogation the Supreme Court sought to protect him from under *Miranda* is whether it was first, "questioning initiated by law enforcement officers," *Miranda*, 384 US. at 444, 86 S. Ct. 1602, and second, whether under a totality of circumstances it would be "reasonably likely to [elicit] an incriminating response," *Innis*, 466 U.S. at 301, 100 S. Ct. 1682.

State v. Tibiatowski, 590 N.W.2d 305, 310-11 (Minn. 1999).

The district court did not cite *Tibiatowski*, but its findings of fact and conclusions of law demonstrate that it determined that the second element of this test was not met.

The district court found that the deputy asked appellant "if he was [going to] be interested in giving [the deputy] a statement as to his side of what had taken place that night," and appellant stated, "I went over there, and just, I just lost it." Because appellant made his statement in response to the deputy's question, the first element of the test was met. But the district court concluded that appellant was not subjected to interrogation protected under *Miranda* because appellant "was not asked a question likely to elicit an incriminating response and the statement was voluntary and spontaneous."

We disagree with the district court's conclusion that the deputy's question was not likely to elicit an incriminating response. In reaching this conclusion, the district court reasoned that appellant "was simply asked whether he wanted to make a statement, not to make a statement at that time. Given how the officer asked the question, the Court finds that the response that was reasonably likely to be elicited was a 'yes' or 'no.'" Although it appears that the deputy may have intended to elicit just a "yes" or "no" answer, the focus of the analysis should be primarily upon appellant's perceptions, rather than on the deputy's intent.

When the deputy asked the question, appellant had been in custody for several hours after turning himself in at the sheriff's office in a neighboring county. He had been picked up by the deputy and transported in handcuffs to the county jail where he was being booked. During that process, the deputy asked appellant "if he was [going to] be interested in giving [the deputy] a statement as to his side of what had taken place that night." This question did not indicate whether the deputy intended to take appellant's statement right away or only intended to find out whether appellant wanted to give a

statement at some time. From appellant's perspective, the question was reasonably likely to elicit a statement as to his side of what had taken place that night, rather than just an answer to the narrow question whether he wanted to give a statement. Consequently, we conclude that appellant was subjected to the interrogation the Supreme Court sought to protect him from under *Miranda* and the district court erred in finding appellant's statement admissible.

Harmless Error

Appellant's conviction can stand only if the error in admitting the statement was harmless beyond a reasonable doubt. *State v. King*, 622 N.W.2d 800, 809 (Minn. 2001). An error is harmless if "the jury's verdict is surely unattributable to the [error]." *Id.* at 811 (quotation omitted). In evaluating whether an erroneously admitted statement is harmless, this court looks to the record as a whole and considers as an important factor whether the evidence of guilt was overwhelming. *State v. Juarez*, 572 N.W.2d 286, 291-92 (Minn. 1997).

At trial, appellant admitted that he went to the house, knowing that there was an OFP in place. He testified that he had a conversation with D.D. and was turning to leave when he was hit in the back with a stick. He tried to restrain D.D. by grabbing her wrists, and, as they fell to the floor, she hit her face on an end table and started to bleed. Appellant testified that he sustained bruising from being hit with the stick, and a defense witness testified that he saw a bruise on appellant's back.

D.D. testified in detail about the assault. Her trial testimony was consistent with statements she made on the night of the assault, and her account of the assault was

corroborated by a medical doctor who testified that D.D.'s injuries included a fractured eye socket, an eye that was swollen shut, and a laceration on the back of her head that required staples to close. The doctor also saw multiple bruises on her arm, back, face, and other parts of her body and testified that direct force, rather than a glancing blow, would be needed to cause the fractured eye socket. In addition, appellant's son-in-law testified that he spoke to appellant shortly after the incident and appellant admitted that he had "slapped [D.D.] around a little bit."

Because D.D. gave detailed testimony about the assault that was corroborated by her injuries and because appellant's description of the events that caused D.D.'s injuries is inherently implausible in that it does not explain how falling and hitting an end table could both fracture an eye socket and cause a serious laceration on the back of D.D.'s head, we conclude that the jury's verdict is surely unattributable to the erroneously admitted statement. Accordingly, the error in admitting the statement to the deputy was harmless beyond a reasonable doubt.

II.

The Minnesota Supreme Court has held "that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention." *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). "[S]uppression will be required of any statements obtained in violation of the recording requirement if the violation is deemed 'substantial.'" *Id.* "Whether an officer's failure to record a custodial interrogation is a substantial violation of the *Scales* recording requirement is a

legal question, subject to de novo review." *State v. Inman*, 692 N.W.2d 76, 79 (Minn. 2005).

The district court concluded that there was no *Scales* violation because appellant's answer to the deputy's question was a spontaneous, unsolicited statement that was not the product of custodial interrogation. Because, as we have already explained, appellant's answer to the deputy's question was the product of custodial interrogation, and it is undisputed that the interrogation occurred at a place of detention, the district court erred in concluding that there was no *Scales* violation. *See Inman*, 692 N.W.2d at 80 (stating that failure to record custodial interview at place of detention, by definition, violates *Scales* requirement).

But in determining whether a *Scales* violation is substantial, one of the factors to be used is whether the violation is prejudicial to the accused. *Id.* at 81. The supreme court imposed the *Scales* requirement in an effort to avoid factual disputes underlying an accused's claims that the police violated his constitutional rights. *Scales*, 518 N.W.2d at 591-92. There is no factual dispute about what occurred in the booking room. It is undisputed that appellant had not received a *Miranda* warning before he answered the deputy's question, and there is no dispute about what the deputy and appellant said. Because there is no factual dispute, the *Scales* violation was not prejudicial to appellant, and we, therefore, conclude that the violation was not substantial. *See Inman*, 692 N.W.2d at 81 (stating that *Scales* violation that does not raise factual dispute about existence and validity of *Miranda* waiver and was not asserted at omnibus hearing to be prejudicial is not substantial).

III.

Appellant argues that the district court erred by denying his request for a jury instruction stating that to convict on circumstantial evidence, that evidence must exclude every rational hypothesis except that of guilt. The decision whether to give a proposed jury instruction lies within the discretion of the district court. *State v. O'Hagan*, 474 N.W.2d 613, 620 (Minn. App. 1991), *review denied* (Minn. Sept. 25, 1991). "In reviewing a [district] court's jury instructions, [appellate courts] examine the record for abuse of discretion and errors of law." *State v. Lory*, 559 N.W.2d 425, 427 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997). A reviewing court will not find an abuse of discretion when jury instructions fairly and adequately state the applicable law. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011).

The district court instructed the jury that:

> A fact can be proved by either direct or circumstantial evidence, or by both. A fact is proved by direct evidence when that fact is proved directly, without any inferences being necessary. A fact is proved by circumstantial evidence when that fact can be inferred from other facts proved in the case. For example, the fact that "a person walked in the snow" can be proved by an eyewitness who testifies that he or she saw a person walking in the snow. This would be proof by direct evidence. The fact that "a person walked in the snow" can also be proved by circumstantial evidence of shoeprints in the snow, from which fact it can be inferred that a person had walked in the snow.
>
> You should consider both kinds of evidence. The law makes no distinction between the weight given to either direct or circumstantial evidence. It is up to you to decide how much weight to give any kind of evidence.

Appellant requested that the following language be added to this instruction:

> [C]ircumstantial evidence is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis [that] the accused is guilty and inconsistent with any rational hypothesis except for that of guilt.

The district court did not include the requested instruction, and appellant argues on appeal that the district court incorrectly determined that the "jury instructions were adequate in informing the jury [of] the standard of reasonable doubt and the weight to be given to circumstantial evidence."

The supreme court considered this same argument in *State v. Turnipseed*, 297 N.W.2d 308, 312 (Minn. 1980). In *Turnipseed*, the jury instructions "explained the differences between direct and circumstantial evidence and the degree of proof required to find defendant guilty, but did not state that all circumstances proved must be inconsistent with any other conclusion." *Id.* at 312. The supreme court held that if there is an adequate instruction on reasonable doubt, an instruction that does not instruct that circumstantial evidence must exclude every reasonable hypothesis other than guilt is adequate and proper. *Id.* at 313.

Appellant argues that some supreme court justices have suggested in *State v. Stein*, 776 N.W.2d 709, 723-24, 726 (Minn. 2010) (Meyer, J., concurring) and *State v. Tscheu*, 758 N.W.2d 849, 870-71 (Minn. 2008) (Meyer, J., concurring), that the jury instruction that the *Turnipseed* court held to be adequate and proper should be reconsidered. But appellant has not cited any authority that indicates that the supreme court has modified or overruled *Turnipseed*. Because the instructions given by the district court fairly and

adequately stated the applicable law, the district court did not abuse its discretion when it did not include appellant's requested instruction. *See In re Custody of J.J.S.*, 707 N.W.2d 706, 711 (Minn. App. 2006) (declining appellant's ivitation to adopt new legal presumption contrary to prevailing law because "[c]hanging [the] law is beyond our scope of review"), *review denied* (Minn. Mar. 14, 2006); *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998) (stating that it is not this court's role to review supreme court decisions); *see also Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.").

Affirmed.