STATE OF MINNESOTA
IN COURT OF APPEALS
A09-932

State of Minnesota,
Respondent,

vs.

Percy Jones,
Appellant.

Filed June 8, 2010
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Ramsey County District Court
File No. 62-K7-07-3145

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Halbrooks, Judge.

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

SCHELLHAS, Judge

Following his convictions of first-degree aggravated robbery, second-degree assault, and terroristic threats, appellant argues that the district court erred by: (1) denying his motion to suppress evidence based on an invalid *Miranda* waiver;

(2) convicting him of both first-degree aggravated robbery and terroristic threats, arguing that terroristic threats is a lesser-included offense of first-degree aggravated robbery; (3) improperly sentencing him for second-degree assault because it arose out of the same behavioral incident as first-degree aggravated robbery; and (4) sentencing him for first-degree aggravated robbery based on a criminal-history score that included a criminal-history point for second-degree assault. We affirm in part, reverse in part, and remand for resentencing.

FACTS

Appellant Percy Jones met N.S. in the summer of 2007. In mid-August, he moved into N.S.'s residence, where N.S. lived with her infant daughter. On the evening of September 1, appellant accused N.S. of sleeping with other men, punched her, and pulled her hair. He then awoke N.S.'s daughter, brought her into the living room to join N.S., and threatened to kill both N.S. and her daughter unless N.S. gave him $500. After N.S. gave him money, appellant pulled a knife from his pocket, held it to N.S.'s throat, and stated that he would kill her because she had not given him enough money. Appellant cut N.S.'s throat with the tip of the knife and chased her through the apartment. N.S. escaped to a neighbor's apartment where she had the neighbor call 911.

St. Paul Police Officer Dominic Dzik arrived at N.S.'s apartment soon after the 911 call. According to Dzik, N.S. was "trembling" and "shaking." N.S. reported appellant's conduct to Dzik, who then found appellant in the apartment building sitting in a stairwell. Appellant had $311 in cash on him. A police investigator observed a cut on

N.S.'s throat and found a knife in the second-floor stairwell. N.S. identified the knife as the one appellant had used that evening.

St. Paul Police Sergeant Michael Wortman interviewed appellant at the law enforcement center a few hours after his arrest. Appellant admitted that he and N.S. had argued but claimed it was because N.S. had taken his wallet and refused to return it. Appellant denied assaulting or robbing N.S. and claimed that he and N.S. had recently been threatened by N.S.'s former boyfriend.

Respondent State of Minnesota charged appellant with first-degree aggravated robbery, second-degree assault, and terroristic threats. On September 18, 2007, three weeks after the incident, the district court ordered a competency evaluation of appellant under Minn. R. Crim. P. 20.01. On October 2, 2007, the court found appellant incompetent to stand trial and referred him for commitment proceedings. On August 5, 2008, the court found appellant competent to stand trial. On October 27, 2008, the court ordered an updated competency evaluation under rule 20.01 and a criminal-responsibility evaluation under rule 20.02. On November 14, 2008, the court found appellant competent and ordered resumption of the criminal proceedings. Appellant moved to suppress his custodial statement given to Sergeant Wortman, and the court denied his motion, ruling that appellant voluntarily and intelligently waived his *Miranda* rights. Appellant waived his right to a jury trial.

At trial, N.S.'s neighbor, C.M., testified that, between 1:00 a.m. and 2:00 a.m. on September 2, N.S. knocked on her apartment door and appeared scared, shaken-up, and on the verge of crying. N.S. told C.M. that she needed help because her boyfriend was

threatening her. C.M. dialed 911, spoke to the 911 operator for a few minutes, and handed the phone to N.S.

Sergeant Wortman testified that he recorded his interview of appellant and he testified about appellant's statements. Appellant told Sergeant Wortman that he was at N.S.'s apartment with her and her baby and that N.S. received a call on her cell phone. Appellant said that he became upset with the call and what was said, claiming that the caller first threatened him and then threatened N.S. Appellant told Sergeant Wortman that the caller was named Otis and that Otis was N.S.'s ex-boyfriend. Sergeant Wortman also testified that appellant gave him "several different versions of the actions of that night."

The district court found appellant guilty of all charges and sentenced appellant concurrently to 46 months executed on his conviction of second-degree assault and 105 months executed on his conviction of first-degree aggravated robbery. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court erred by not suppressing his statement to Sergeant Wortman because his waiver of his constitutional rights was not voluntary, knowing, and intelligent. He claims that "the state did not prove a valid waiver" of his *Miranda* rights.

The federal and Minnesota constitutions protect individuals against compelled self-incrimination. U.S. Const. amend. V; Minn. Const. art. I, § 7. "A state may not

introduce a defendant's in-custody statements absent the defendant's voluntary, knowing, and intelligent waiver of his constitutional rights." *State v. Morales-Mulato*, 744 N.W.2d 679, 686 (Minn. App. 2008) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 86 S. Ct. 1602, 1612 (1966)), *review denied* (Minn. Apr. 29, 2008). "Generally, the state is deemed to have met its burden under *Miranda v. Arizona* if it can show that the *Miranda* warning was given and the defendant stated that he understood the rights." *Morales-Mulato*, 744 N.W.2d at 686 (citing *State v. Linder*, 268 N.W.2d 734, 735 (Minn. 1978)). "We independently review whether the state has established by a preponderance of the evidence that a defendant validly waived his constitutional rights." *Morales-Mulato*, 744 N.W.2d at 686 (citing *State v. Williams*, 535 N.W.2d 277, 286 (Minn. 1995)). We consider the totality of the circumstances surrounding the interrogation to determine whether a suspect understood his rights and the consequences that may arise if he waives them. *State v. Farnsworth*, 738 N.W.2d 364, 373 (Minn. 2007). Factors commonly considered include age, intelligence and education, familiarity with the criminal justice system, physical and mental condition, and language barriers. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997). Other relevant factors include the lack of or adequacy of warnings, the length of the detention, the nature of the interrogation, any physical deprivations, and limits on access to counsel and friends. *Linder*, 268 N.W.2d at 735.

In *Morales-Mulato*, the defendant claimed that his *Miranda* waiver was invalid because he did not understand his rights. 744 N.W.2d at 686. This court rejected the argument, noting that the defendant had the assistance of an interpreter, that he did not

express any lack of understanding or misunderstanding of his rights, and that he "affirmatively stated that he understood each right as it was read to him." *Id.*

Here, Sergeant Wortman testified at the suppression hearing that, when he interviewed appellant, he reviewed appellant's *Miranda* rights with him by using a *Miranda* form. Sergeant Wortman explained that he started by asking appellant for preliminary information required on the top of the form (date, time of interview, name, age, date of birth) and then turned the form around so that appellant could read along with him as he read and explained the rights described on the form. Sergeant Wortman gave appellant a pen, read each paragraph to appellant, and asked him if he understood and to initial the paragraph if he did. Sergeant Wortman testified at the suppression hearing that as he read each of four paragraphs regarding appellant's rights, appellant both indicated that he understood the paragraph and initialed next to the paragraph. In addition, appellant signed at the bottom of the form that he had "received a copy of [the] form." The *Miranda* form that appellant initialed and signed was introduced at the suppression hearing as Exhibit 1.

On cross-examination at the suppression hearing, Sergeant Wortman acknowledged that although appellant initialed each paragraph and signed the *Miranda* form, appellant did not provide any verbal confirmation.

Appellant argues that Sergeant Wortman coerced his waiver because Sergeant Wortman "told him" to initial each paragraph on the form. We disagree. For a waiver to be considered involuntary there must be "a substantial element of coercive police conduct." *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 520 (1986). "The

test of voluntariness is whether the actions of the police, 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. Jones*, 566 N.W.2d 317, 326 (Minn. 1997) (quotations omitted).

Here, the district court stated:

> The record should reflect that at the time of the interview on September 2nd, 2007 defendant was asked regarding certain personal identification information including his name, his age, his date of birth, . . . his marital status, his telephone number, whether or not he was employed, the education last completed and the school that he completed. There is nothing in the evidence to suggest that he was unable to communicate—to understand the information that was requested of him or that he was unable to formulate and communicate an appropriate response.

The record here supports the conclusion that appellant was capable of understanding and knowingly and intelligently waiving his *Miranda* rights during his custodial interview. Like in *Morales-Mulato*, appellant did not express any lack of understanding or misunderstanding about any of his rights and affirmatively indicated that he understood each right as it was read to him by initialing each paragraph on the *Miranda* form.

Appellant argues that although he signed the *Miranda* form, stating that he understood his rights, the form did not ask whether he wished to waive them. But appellant placed his signature on a line at the bottom of the form following a statement which reads: "The above rights have been read to me. I have initialed each paragraph to show that I understand each of my rights." After he signed the form, Sergeant Wortman

asked him several times whether he wished to talk with a lawyer or talk with him and that he needed an answer. Appellant did not answer the question but without hesitation asked, "What did I do?" Appellant argues that his question indicates that he "did not in fact understand what [Sergeant] Wortman was asking him." We disagree. "[A] waiver, even of a constitutional right, need not be explicit," and "[a] court may imply a waiver from a defendant's conduct." *State v. Blom*, 682 N.W.2d 578, 617 (Minn. 2004). A defendant's voluntary statement is sufficient evidence of a waiver if the defendant understands the rights at issue. *State v. Ganpat*, 732 N.W.2d 232, 240 (Minn. 2007). Appellant's question to Sergeant Wortman indicated a willingness to talk. We conclude that appellant's conduct constituted a waiver of his *Miranda* rights.

Appellant also argues that the fact that three weeks after he gave his custodial statement to Sergeant Wortman, a court-appointed rule-20 examiner concluded that he was "grossly psychotic" is proof that his mental status impaired his ability to intelligently waive his rights. Minnesota case law addressing whether an appellant has the requisite mental capacity to waive his Fifth Amendment rights defines "capacity" fairly broadly. *See, e.g.*, *Camacho*, 561 N.W.2d at 169 (holding that the defendant's below-average mental functioning was not sufficient to vitiate waiver when he was able to understand the meaning and effect of his confessions); *Wold v. State*, 430 N.W.2d 171, 177 (Minn. 1988) (holding that "neither alone, nor in combination, did appellant's reduced intellectual capacity and/or his degree of intoxication vitiate appellant's waiver of his Fifth Amendment rights" because he was clear and reasonable in an audio recording of interrogation); *State v. Hoffman*, 328 N.W.2d 709, 714 (Minn. 1982) (stating that

defendant who had been diagnosed as a delusional psychotic, but was described by police officers as coherent and responsive, had the capacity to waive his rights).

The district court noted that when the officer asked appellant about his particular constitutional rights, he was able to answer questions regarding personal information, was able to understand what was taking place, and was able to communicate. The court concluded that the fact that appellant was ultimately found to be incompetent for a period of time did not undercut a conclusion that he was competent when he was interviewed. The record supports the court's determination that appellant was able to understand and communicate with Sergeant Wortman.

Based on our careful review of the record and on the totality of the circumstances, we conclude that the district court's pretrial conclusion that "[e]verything in the record that has been presented to this Court indicates that [appellant] understood his rights, was intelligent enough to waive those rights, and did so freely and voluntarily," was correct. The court did not err by admitting appellant's custodial statements. And even if the court had erred by admitting appellant's custodial statements, the error would be harmless because the effect the testimony had on the trier of fact would be minimal, *see Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002), and the court's decision was "surely unattributable to the error," *see State v. Farrah*, 735 N.W.2d 336, 343 (Minn. 2007). In this case, appellant's statement did not contain admissions of criminal conduct to which the guilty verdict could be attributed.

II

Appellant argues that his conviction for terroristic threats should be vacated because terroristic threats is a lesser-included offense of first-degree aggravated robbery. "Minnesota Statutes § 609.04 prohibits a conviction for both the crime charged and an included offense." *State v. Holmes*, 778 N.W.2d 336, 340 (Minn. 2010). "This statute generally forbids two convictions of the same offense or of one offense and a lesser included offense on the basis of the same conduct." *Id.* (quotation omitted). "An included offense includes '[a] crime necessarily proved if the crime charged were proved.'" *Id.* (quoting Minn. Stat. § 609.04, subd. 1(4) (2008)). To determine if an offense is an included offense, "a court examines the elements of the offense instead of the facts of the particular case." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). "An offense is 'necessarily included' in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *Id.*

The elements of first-degree aggravated robbery include:

> Whoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree. . . .

Minn. Stat. § 609.245, subd. 1 (2006). The elements for terroristic threats include:

> Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, vehicle or facility of public transportation or otherwise to cause serious public inconvenience, or in a reckless disregard of the risk of causing such terror or inconvenience may be sentenced to

> imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minn. Stat. § 609.713, subd. 1 (2006).

The offense of terroristic threats includes an element not shared with the offense of first-degree aggravated robbery: the purpose to terrorize another. A perpetrator can commit first-degree aggravated robbery without having the purpose of terrorizing the victim and therefore can commit first-degree aggravated robbery without also committing the offense of terroristic threats. Because it is possible to commit the greater offense, first-degree aggravated robbery, without also committing the lesser offense of terroristic threats, terroristic threats is not a lesser-included offense of first-degree aggravated robbery. The district court therefore did not err by convicting appellant of terroristic threats.

III

Appellant argues that his 46-month sentence for second-degree assault should be vacated under Minn. Stat. § 609.035, subd. 1 (Supp. 2007) because the assault was committed as part of the same behavioral incident underlying his first-degree robbery conviction. The state agrees. "[S]ection 609.035 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." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). We agree that appellant's 46-month sentence should be vacated. We therefore vacate appellant's 46-month sentence for second-degree assault.

IV

Appellant argues that his 105-month sentence for first-degree aggravated robbery is erroneous because it is based on a criminal-history score that includes a point for a conviction of second-degree assault. The state agrees, and we agree that appellant should be resentenced for his first-degree aggravated robbery conviction based on a criminal-history score calculated with one fewer criminal-history point. *See* Minn. Sent. Guidelines II.B.1 (2006) (criminal history points accumulate for every prior felony conviction for which a felony sentence was imposed). We therefore vacate appellant's 105-month sentence for first-degree aggravated robbery and remand to the district court for resentencing. On remand, appellant's criminal-history score shall be calculated with one fewer criminal-history point.

Affirmed in part, reversed in part, and remanded.