STATE OF MINNESOTA
IN COURT OF APPEALS
A09-954

State of Minnesota,
Respondent,

vs.

Moises Aguilar Nieves,
Appellant.

Filed June 29, 2010
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-08-14396

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

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

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Shumaker, Judge; and Bjorkman, Judge.

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

LARKIN, Judge

On appeal from his conviction of second-degree murder, appellant argues that the district court erred by (1) determining that his *Miranda* waiver was valid, (2) failing to

suppress the statements that he made after he allegedly invoked his right to remain silent, and (3) communicating with the deliberating jury outside of his presence and without his consent. We affirm.

FACTS

On October 21, 2008, a body, later identified as S.E., was discovered near an intersection in Saint Paul. A medical examination revealed that S.E. had died from extensive trauma to his lower abdominal wall and upper thighs, including a laceration to the right inguinal region[1] that resulted in extensive bleeding. During the investigation of S.E.'s death, Saint Paul Police Sergeant John R. Wright interviewed S.E.'s ex-girlfriend, M.E., who lived near the scene of S.E.'s death. M.E. stated that S.E. had been struck by a car driven by appellant Moises Aguilar Nieves.

Sergeant Wright and Sergeant Tom Bergren, also of the Saint Paul Police Department, went to Nieves's home and asked him if he would speak to them. Nieves agreed to answer the officers' questions. He also agreed to accompany the officers to the police station for an interview. The officers denied Nieves's requests to be interviewed at his home and to drive his own vehicle to the station.

At the beginning of the ensuing interview at the police station, Sergeant Wright advised Nieves of his *Miranda* rights. Sergeant Wright read the *Miranda* warning to Nieves, in English, from a waiver form. Nieves initialed each of the rights on the form and signed it. Although Nieves spoke with a thick accent, Sergeant Wright did not offer,

[1] The inguinal region is the crease area where a person's legs and torso are joined.

and Nieves did not request, an interpreter. Nieves admitted that he struck S.E. with his vehicle, and he was arrested at the conclusion of the interview.

The state charged Nieves with one count of intentional second-degree murder under Minn. Stat. § 609.19, subd. 1(1) (2008), and one count of unintentional second-degree murder under Minn. Stat. § 609.19, subd. 2(1) (2008). Nieves moved to suppress his statement, claiming that his *Miranda* waiver was not knowing and intelligent, because it had been made without the benefit of an interpreter. Nieves also claimed that his statement was involuntary. The district court denied Nieves's motion, after concluding that Nieves was not disabled in communication and that his statement was "completely voluntary."[2]

The case was tried to a jury. At trial, Nieves testified that M.E., his friend and coworker, told him that S.E. had sexually assaulted her. On the night of S.E.'s death, M.E. asked Nieves to follow her home after work. While en route, Nieves witnessed S.E. approach M.E.'s vehicle, stand at the driver's door, and yell at M.E. Nieves testified that he drove his vehicle toward M.E.'s vehicle in an attempt to frighten S.E., but he lost control of the vehicle and struck M.E.'s vehicle, pinning S.E. between the two vehicles.

Pursuant to Nieves's request, the district court provided a jury instruction regarding the defense of others. During its deliberations, the jury submitted two written questions to the district court. The first question was: "Is 'election to defend' means the plaintiff intended action (as testified), or is it the plaintiff consequence of his action? Is

[2] The district court's conclusion that Nieves's statement was voluntary is not challenged on appeal.

'defendants' action his intended (as testified) action, or is it his action of consequence?" The district court responded in writing: "The questions seem to involve a mixture of law and fact. You are the exclusive finders of fact. I cannot in any way intrude upon your area of responsibility. Can you clarify or restate your questions so that my response does not influence your fact-finding consequences?" The jury then submitted a second question: "Please define what the term 'election to defend' means." The district court responded in writing: "The words 'election to defend' mean making a choice to protect from danger." The record indicates that Nieves was not notified of these questions, or the district court's responses, until after the jury returned its verdict.

The jury found Nieves guilty of unintentional second-degree murder, and the district court sentenced Nieves to serve 180 months in prison. This appeal follows.

D E C I S I O N

I.

Nieves claims that the district court erred by denying his motion to suppress his statement to the police, arguing that he did not validly waive his constitutional right against self-incrimination. The Fifth Amendment to the United States Constitution and Article I, Section 7 of the Minnesota Constitution protect individuals from compelled self-incrimination. Because of the coercion inherent in custodial interrogation, a criminal suspect must be advised of certain rights, in what is commonly referred to as a *Miranda* warning, before any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966).

A defendant may waive his rights, "provided the waiver is made voluntarily, knowingly and intelligently." *Id.* at 444, 86 S. Ct. at 1612. "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986) (quotation omitted). The state bears the burden of proving a valid waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 522 (1986); *State v. Farrah*, 735 N.W.2d 336, 341 (Minn. 2007). "[T]he state has carried its burden of proof if it shows that the [*Miranda*] warning was given and defendant stated that he understood his rights." *State v. Ngoc Van Vu*, 339 N.W.2d 892, 897 (Minn. 1983). But if there is other credible evidence indicating that the waiver was not knowing and intelligent, "the state must produce additional evidence and the [district] court must make a subjective factual inquiry to determine, on the basis of all the circumstances, whether the waiver was effective." *Id*. at 897-98. "Findings of fact surrounding a claimed *Miranda* waiver are reviewed for clear error; legal conclusions based on those facts are reviewed de novo." *Farrah*, 735 N.W.2d at 341.

Nieves's main contention is that his *Miranda* waiver was not knowing and intelligent because he does not understand English and the police did not provide him with an interpreter. "[T]he constitutional rights of persons disabled in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings." Minn. Stat. § 611.30 (2008). Pursuant to this policy, the legislature has "provide[d] a procedure for the appointment of interpreters to avoid injustice and assist

persons disabled in communication in their own defense." *Id.* The term "persons disabled in communication" includes a person who, "because of difficulty in speaking or comprehending the English language, cannot fully understand the proceedings or any charges made against the person, . . . or is incapable of presenting or assisting in the presentation of a defense." Minn. Stat. § 611.31 (2008). "Following the apprehension or arrest of a person disabled in communication for an alleged violation of a criminal law, the arresting officer . . . shall immediately make necessary contacts to obtain a qualified interpreter and shall obtain an interpreter at the earliest possible time at the place of detention." Minn. Stat. § 611.32, subd. 2 (2008).

While "[a] violation of the interpreter statutes does not necessarily require exclusion of a defendant's statements at trial," *State v. Marin*, 541 N.W.2d 370, 373 (Minn. App. 1996), *review denied* (Minn. Feb. 27, 1996), a defendant's language barrier may support a conclusion that the defendant's *Miranda* waiver was not valid. For example, in *State v. Al-Naseer*, the defendant's language barrier was a strong factor supporting a finding that he did not voluntarily, knowingly, and intelligently waive his constitutional rights. 678 N.W.2d 679, 691 (Minn. App. 2004), *rev'd on other grounds*, 690 N.W.2d 744 (Minn. 2005). A videotape of the defendant's police interview showed that he had difficulty understanding English; he said his English was "not very good"; he repeatedly stated that he did not understand; he asked for clarification several times; and he struggled with pronunciation. *Id*. In addition, the defendant had no prior convictions, and he stated that he was unfamiliar with the criminal-justice system. *Id*. We concluded

that under the totality of the circumstances, the defendant did not voluntarily, knowingly, and intelligently waive his constitutional rights. *Id.*

The facts of this case are readily distinguishable from those in *Al-Naseer*. After asking Nieves preliminary questions, such as his name, address, and date of birth, Sergeant Wright read Nieves the *Miranda* warning. After telling Nieves that he had the right to remain silent and could refuse to answer any questions, Sergeant Wright asked Nieves if he understood, and Nieves answered in the affirmative. Nieves also answered in the affirmative when Sergeant Wright asked him if he understood that he had the right to talk to an attorney, that an attorney would be appointed if he could not afford one, and that he could remain silent until he had talked to the lawyer. The only time that Nieves did not immediately confirm that he understood his rights was when Sergeant Wright advised him that anything he said could be used against him in court. However, Nieves did ultimately confirm that he understood this portion of the advisory. Nieves never indicted that he did not understand his rights. Instead, Nieves initialed each line on the *Miranda* waiver form to acknowledge that he understood his rights, and he signed the form.

At the suppression hearing, Sergeant Wright testified that, although the questioning was conducted entirely in English, he understood Nieves and Nieves appeared to understand him. Sergeant Bergren also testified that he understood Nieves and that Nieves seemed to understand him. Three additional witnesses testified for the state: Detective Eric Lammle of the Richfield Police Department, who had previously arrested Nieves on an unrelated incident; the manager of the manufacturing plant where

Nieves worked; and Nieves's shift supervisor at the plant. Each witness testified that he had previously communicated with Nieves in English without any difficulties.

The district court found that Nieves was not disabled in communication. As support for this finding, the district court noted that: (1) Nieves "required no intermediary to communicate with the plant manager . . . or with [his] immediate supervisor," (2) neither the plant manager nor Nieves's immediate supervisor "noticed that [Nieves] had any problem communicating in English, whether with each of them or with the other English-speaking employees," (3) Sergeant Wright "observed that [Nieves] had no problem speaking English," (4) the recording of the interview "disclosed that [Nieves] has a level of fluency in English which prevents him from being described as 'disabled,'" (5) while there were occasional, minor problems in communication during the interview, they were easily resolved, and (6) Nieves "had the ability and did ask questions at the appropriate times when he did not understand or needed clarification."

While Nieves testified at the suppression hearing that he did not understand his rights because he was disabled in communication, the district court's findings indicate that it did not credit his testimony. We defer to this credibility determination. *See State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) (stating that judging the credibility of witnesses and the weight to be given to their testimony rests within the province of the finder of fact). Nieves also testified that he never asked for an interpreter during the interview and that he previously had been read his rights when he was arrested for driving while impaired. Having reviewed the record, including the recording of the interview, we discern no clear error in the district court's finding that Nieves was not

disabled in communication. *See State v. Farrah*, 735 N.W.2d 336, 345 (Minn. 2007) (Gildea, J., concurring in part, dissenting in part) (explaining that under the clearly erroneous standard, the district court's factual finding will stand unless it "is not reasonably supported by the evidence as a whole" (quotation omitted)). We therefore reject Nieves's claim that his *Miranda* waiver was invalid due to language barriers.

Nieves offers three additional arguments in support of his claim that his *Miranda* waiver was invalid. He first argues that because the officers described the *Miranda* waiver form as a "standard procedure thing," it is "likely that the significance of the constitutional rights that [Nieves] was being asked to relinquish would not have been apparent to him." Because this argument is purely speculative and unsupported by legal argument, it is unavailing. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (stating that an assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection), *aff'd on other grounds*, 728 N.W.2d 243 (Minn. 2007). Nieves next argues that the police misled Nieves about the nature of the questioning when they originally told him that they wanted to speak to him about another traffic accident that he had been involved in.[3] But Nieves fails to offer legal argument or citation to support a conclusion that his explicit waiver was invalid as a result of the purported misrepresentation. Finally, Nieves argues that he twice indicated that he did not understand the waiver. But the recording reveals that when Nieves briefly indicated that he did not understand a portion of the

[3] After Nieves drove his vehicle into S.E., he was involved in a single-vehicle accident at another location. At trial, the state argued that Nieves staged this accident to cover up the damage to his vehicle.

advisory, Sergeant Wright clarified the information, and Nieves indicated that he understood. In conclusion, we are not persuaded that Nieves's waiver was invalid.

Because Nieves was advised of his *Miranda* rights and stated that he understood them, the state established that Nieves's *Miranda* waiver was knowing and intelligent. Appellant presented no credible evidence to the contrary. *See State v. Perez*, 404 N.W.2d 834, 839 (Minn. App. 1987) (concluding that there was no credible evidence that a waiver was not knowing and intelligent where a Hispanic defendant, during police questioning, did not in any way indicate that he did not understand English, did not ask for an interpreter, responded appropriately to questions, and stated that he understood his *Miranda* rights), *review denied* (Minn. May 20, 1987). We hold that Nieves's *Miranda* waiver was effective and that the district court did not err by denying his motion to suppress.[4]

II.

Nieves next claims that the district court erred by failing to suppress the statements that he made after he allegedly invoked his right to remain silent. When a suspect invokes the right to remain silent, "in any manner," custodial interrogation must cease. *Miranda*, 384 U.S. at 473-74, 86 S. Ct. at 1627. But an accused who wants to invoke his or her right to remain silent must do so unambiguously. *See Berghuis v.*

[4] The state offers an alternative argument in support of the district court's decision, arguing that Nieves was not in custody when he provided his statement and that a *Miranda* waiver was therefore not required. *See State v. Norberg*, 423 N.W.2d 733, 736 (Minn. App. 1988) ("*Miranda* warnings are not necessary when a suspect comes to the police station voluntarily and gives a statement."). Because we conclude that Nieves's *Miranda* waiver was effective, we do not consider this argument.

Thompkins, 78 U.S.L.W. 4479, 4482 (U.S. June 1, 2010) (No. 08-1470) (explaining the reasons why an invocation of *Miranda* rights must be unambiguous). "[N]othing short of an unambiguous or unequivocal invocation of the right to remain silent will be sufficient to implicate *Miranda's* protections." *State v. Williams*, 535 N.W.2d 277, 285 (Minn. 1995). When the invocation of the right is ambiguous or equivocal, "the interrogating officers are not required to confine their questioning to clarifying questions." *State v. Day*, 619 N.W.2d 745, 749 (Minn. 2000). "The [district] court makes a factual finding of whether in fact the right to silence was invoked. On review, [an appellate court] examines the whole record to make sure the finding was not erroneous." *State v. Johnson*, 463 N.W.2d 527, 532 (Minn. 1990). The proper inquiry is "whether the suspect articulated his desire to remain silent sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent." *Day*, 619 N.W.2d at 749.

The state argues that Nieves waived any claim related to his alleged invocation of the right to remain silent by not raising it in the district court. Generally, an appellate court will not consider matters that were not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Nieves briefly claimed that he invoked his right to remain silent in the fact section of his memoranda in support of his motion to suppress, which was filed in the district court after the suppression hearing. But at the beginning of the suppression hearing, Nieves informed the district court that the issue was whether his *Miranda* waiver was made "knowingly or voluntarily because he did not make his waiver with the presence of an interpreter." Nieves did not ask the

district court to determine whether he had invoked his right to remain silent. Nor did he assert that all statements made after the alleged invocation should be suppressed. Nieves's vague reference to the right to remain silent in his memorandum in support of his motion to suppress did not adequately raise this issue in the district court.

At our discretion, we may deviate from the waiver rule "when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Id.* But here, the district court did not determine whether Nieves had invoked his right to remain silent. Thus, Nieves invites us to "find that [his] invocation was . . . unequivocal and unambiguous." We are not a fact-finding court, and we cannot make this determination on appeal. *See State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002) (stating that appellate courts have no business finding facts). And without the necessary factual determination, there is nothing for us to review—appellate review requires a remand for further findings. We thus consider whether a remand for findings to enable appellate review in the interests of justice is appropriate.

Nieves argues that the following statements constitute an unambiguous invocation of his right to remain silent:

> OFFICER: . . . And you know what that shows? That shows a real man.
> [NIEVES]: I can't say nothing. No, no.
> OFFICER: Okay, let me, let me just tell ya—
> [NIEVES]: Any way, I talk, I not talk. You give me. You just, I thrown in jail.
> . . .
> OFFICER: Okay, so what happened?
> [NIEVES]: That why I, I can't, I can't. This is very hard to explain.
> OFFICER: I know.

[NIEVES]: It's very hard.
OFFICER: I know. We've got a lot of time. [G]o ahead.
[NIEVES]: Can I ask you a question?
OFFICER: Yep.
[NIEVES]: He died? Or not?
OFFICER: Yep. Yeah. That's why it's important, that's why it's important to hear your story okay? Alright?
[NIEVES]: Well. No. I don't know.

Nieves compares these statements to the invocation of the right to remain silent in *Day* and suggests that they are similar. In *Day*, the statement "I don't want to tell you guys anything to say about me in court" was held to be an invocation of the right to remain silent. 619 N.W.2d at 750. But Nieves's statements exhibit no resemblance to this statement. Because the record would not likely support a finding that Nieves invoked his right to remain silent, we do not remand this issue for further fact finding to enable appellate review in the interests of justice. *See, e.g.*, *Powers v. State*, 688 N.W.2d 559, 561 (Minn. 2004) (stating, in the context of the *Knaffla* procedural bar, "[c]laims decided in the interests of justice require that the claims have substantive merit.").

III.

Nieves's final claim is that the district court committed reversible error by communicating with the jury during its deliberations without his knowledge and by failing to make a contemporaneous record of the communications. "A defendant in a criminal proceeding has a Fourteenth Amendment due process right to be present at all critical stages of trial." *State v. Martin*, 723 N.W.2d 613, 619 (Minn. 2006) (quotation omitted). "[T]he general rule is that a [district] court judge should have no communication with the jury after deliberations begin unless that communication is in

open court and in the defendant's presence." *State v. Sessions*, 621 N.W.2d 751, 755-56 (Minn. 2001). Additionally, the Minnesota Rules of Criminal Procedure provide that "[t]he defendant shall be present . . . at every stage of the trial." Minn. R. Crim. P. 26.03, subd. 1(1).[5] "Responding to a deliberating jury's question is a stage of trial." *Sessions*, 621 N.W.2d at 755. A district court's decision to proceed with trial without the defendant present is reviewed for an abuse of discretion. *State v. Cassidy*, 567 N.W.2d 707, 709 (Minn. 1997)

The supreme court expects "the [district] court to convene counsel and the defendant in the courtroom and make a contemporaneous record of all communications with the jury, both those that are housekeeping and those that are not, so that the record for appeal is clear." *Martin*, 723 N.W.2d at 625-26. Here, the district court did not make a record of its communications with the jury as they occurred. Instead, the district court made a record of the communications after the jury returned its verdict. The district court explained that, after receiving the questions, "[it] had called each of the counsel and read the questions to each of the counsel, [and] asked each of the counsel to waive the right of the defendant to appear in court because neither of [the questions] had anything to do with the substantial rights of the defendant." After receiving each counsel's "agreement," the district court responded to the questions in writing. But there is no indication that defense counsel consulted with appellant regarding the waiver.

[5] The case was tried in January 2009. The Minnesota Rules of Criminal Procedure have since been amended, effective February 11, 2010. The new rules explicitly provide that a defendant must be present for every stage of trial, including "any jury questions dealing with evidence or law." Minn. R. Crim. P. 26.03, subd. 1(1)(f).

"[The] decision to waive [the right to be present] is a decision not for counsel to make but a personal decision for defendant to make after consultation with counsel." *State v. Ware*, 498 N.W.2d 454, 457 (Minn. 1993). Thus, defense counsel's waiver of Nieves's right to be present was ineffectual.[6] Because the district court responded to a jury question regarding the law outside of the courtroom, in Nieves's absence, and without his consent, the district court erred. *See Sessions*, 621 N.W.2d at 756 (holding that district court erred by "respond[ing] to the jury in writing outside of open court and in the absence of a waiver from [the defendant]").

We next consider whether the error requires a new trial. "Even if a defendant is wrongfully denied the right to be present at every stage of trial, a new trial is warranted only if the error was not harmless." *Id.* "When considering whether the erroneous exclusion of a defendant from judge-jury communications constitutes harmless error, we consider the strength of the evidence and substance of the [district court]'s response." *Id.* (citation omitted).

Nieves does not argue that his erroneous exclusion from the judge-jury communications was harmful. Nor does Nieves challenge the substance of the district court's responses or suggest that they negatively impacted the verdict. Instead, he asks us

[6] "While it is plainly the preferred practice, [the supreme court has] not required . . . a defendant to explicitly affirm to the district court his personal waiver of his right to be present." *Martin*, 723 N.W.2d at 619. Thus, in *Martin*, the defendant was found to have waived his right to be present for certain communications with the jury when the district court and counsel agreed that the defendant would not be present for those communications, the agreement was made in defendant's presence, and he did not object. *Id.* at 621. Unlike *Martin*¸ there is no indication that Nieves was aware of, or consented to, the district court's communications with the deliberating jury.

"to find reversible error in the interests of justice," which we interpret as a request that we exercise authority akin to the supreme court's "supervisory power." *See, e.g.*, *State v. Hunt*, 615 N.W.2d 294, 299 n.6 (Minn. 2000) (noting that the supreme court has granted a new trial in the interests of justice without a showing of prejudice in the exercise of its supervisory power over the district court).

Nieves correctly notes that the district courts have been warned several times that they are expected to convene counsel and the defendant in the courtroom and make a contemporaneous record of all communications with the jury. *See Martin*, 723 N.W.2d at 625-26 ("The better practice, and the practice we expect, is for the [district] court to convene counsel and the defendant in the courtroom and make a contemporaneous record of all communications with the jury, both those that are housekeeping and those that are not, so that the record for appeal is clear."); *Sessions*, 621 N.W.2d at 756 ("We caution district courts to make a contemporaneous record of each stage of trial, particularly a stage as delicate as communications with the jury and with counsel during deliberations."). But "[a]s an intermediate appellate court, we decline to exercise supervisory powers reserved to this state's supreme court." *State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995), *review denied* (Minn. Sept. 20, 1995). We simply do not have the supervisory authority that Nieves would like us to exercise. Because

Nieves does not claim that he was harmed as a result of his erroneous exclusion from the judge-jury communications, the error does not necessitate a new trial.

Affirmed.

Dated: _____

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Judge Michelle A. Larkin