STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1305

State of Minnesota,
Respondent,

vs.

Michael Whitelaw,
Appellant.

Filed July 25, 2011
Affirmed
Muehlberg, Judge*

Hennepin County District Court
File No. 27-CR-09-46600

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, 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 Connolly, Presiding Judge; Bjorkman, Judge; and Muehlberg, 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

MUEHLBERG, Judge

Appellant challenges his 2009 conviction of second-degree assault, claiming that the district court erred by refusing to suppress incriminating statements he made before he received a *Miranda* warning, while he was being transported in a police squad car. Appellant also filed a supplemental pro se brief and claims that the evidence of his intent to commit the crime was insufficient, that his use of force was justified, and that he received ineffective assistance of counsel. Because we conclude that even if the district court erred by admitting some of appellant's incriminating statements when appellant had not received a *Miranda* warning, any such error was harmless in light of other strong evidence of appellant's guilt, and we affirm. We also conclude that appellant's pro se arguments lack merit and affirm on that ground, as well.

FACTS

On September 12, 2009, appellant Michael Whitelaw was involved in a physical altercation in which he stabbed Leonel Duarte-Gutierrez in the chest. Appellant was charged with first-degree assault, Minn. Stat. § 609.221, subd. 1 (2008) (infliction of great bodily harm), and second-degree assault, Minn. Stat. § 609.222, subd. 2 (2008) (infliction of substantial bodily harm and use of dangerous weapon).

The attack occurred during the early evening, after appellant became upset with noise emanating from a children's piñata birthday party held in the backyard of his next door neighbor, Francisco Figueroa. After calling the police several times to complain about noise, appellant yelled out his second-floor window, demanding that the partygoers

be quiet. Appellant eventually went downstairs, and an angry verbal confrontation ensued between appellant, Gutierrez, and Figueroa, which escalated into a physical confrontation between Gutierrez and appellant. Gutierrez sustained a chest wound and a facial laceration that required stitches, and appellant sustained a minor cut on his hand and a bruised mouth.

When Minneapolis police arrived at the scene, Officer Jarrod Kunze put appellant in handcuffs and placed him in the back of a squad car after having him examined by paramedics. At 8:29 p.m., the squad car's recording device was activated, and Officer Kunze asked appellant his name, birth date, and address. After making statements about his injuries, appellant then spontaneously said, "When he came outside, he cut me. I tried to stop him when two of them came outside of that fence." Officer Kunze replied, "I feel you, but that's his stuff."

Appellant continued the conversation, supplying more details about what happened during the altercation, stating that two of the men from the party came inside the fence around his yard, one man hit him in the mouth, and "That's what tripped the whole situation." Officer Kunze then asked, "Who hit you?" and appellant replied, "The smaller guy. The smallest one of the two." Officer Kunze responded, "Did you see what he was wearing?" and appellant answered, "Light blue shirt and blue jeans. He hit me, and after that we started fighting." In recounting the moment of the attack, appellant said, "When you come around that fence and try to break me in any way, we use deadly force. And that's true." Officer Kunze then asked, "How did he threaten you?" Appellant replied, "Well, when he came around that fence." Appellant spoke for

approximately 23 minutes, and during the conversation Officer Kunze continued to ask follow-up questions to appellant's statements and made some verbal cues, like "okay" and "uh-huh," in response to appellant's statements.

Appellant made a pretrial motion to suppress the custodial statements because he had not received a *Miranda* warning before making the statements. The state conceded that appellant was in custody when he made the statements but argued that appellant was not being interrogated by police at that time. The district court denied the motion to suppress, ruling that appellant made the statements spontaneously and that they were not the result of police questioning.

During appellant's five-day jury trial, the jury heard testimony from the three principals involved in the fight, as well as several bystander witnesses, including Figueroa's wife, Laura Silvia, and appellant's landlord, Brian Ottenhoff, who lived on the first floor of appellant's apartment building. The arresting officers and Adam Stubson also testified. Stubson, a DNA analyst for the Hennepin County Sheriff's Office, conducted DNA testing on blood samples obtained from a knife found in appellant's kitchen sink.

Gutierrez and Figueroa testified that appellant was the aggressor in the altercation; Figueroa testified that he saw the stabbing; and Silvia testified that she saw appellant holding the knife in his hand following the stabbing. Appellant testified that Gutierrez was the aggressor in the attack and that Figueroa displayed a knife during their confrontation. Gutierrez and Figueroa admitted that another of the partygoers displayed a knife but testified that it was not Figueroa. Ottenhoff also testified that he saw one of the

males among the partygoers holding a knife, but that the man put the knife away when ordered to do so.

Stubson, the DNA analyst, testified that Gutierrez's DNA was present on the knife blade and sheath found in appellant's kitchen. Stubson testified to dropping some test tubes from a rack of tubes that included the samples for appellant's case, but he stated that as the seals on the tubes remained intact, he continued the testing process.

On this evidence, the jury found appellant guilty of second-degree assault. This appeal follows.

D E C I S I O N

Miranda Warning

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing-or not suppressing-the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999); *see State v. Lussier*, 770 N.W.2d 581, 586 (Minn. App. 2009) (stating, on review of pretrial suppression orders, "we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo"), *review denied* (Minn. Nov. 17, 2009).

"In *Miranda v. Arizona*, the United States Supreme Court held that a criminal suspect has the right to counsel during custodial interrogations. 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)." *State v. Paul*, 716 N.W.2d 329, 335 (Minn. 2006). A *Miranda* warning is required "whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-301,

100 S. Ct. 1682, 1689 (1980); *State v. Edrozo*, 578 N.W.2d 719, 724 (Minn. 1998). "The 'functional equivalent' of interrogation for purposes of *Miranda* means '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.'" *Id.* (quoting *Innis*, 446 U.S. at 301, 100 S. Ct. at 1689-90"); *see State v. Munson*, 594 N.W.2d 128, 141 (Minn. 1999). And this police conduct "'must reflect a measure of compulsion above and beyond that inherent in custody itself.'" *Id.* (quoting *Innis*, 446 U.S. at 300, 100 S. Ct. at 1689). However, "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478, 86 S. Ct. at 1630; *Collins v. State*, 385 N.W.2d 52, 54 (Minn. App. 1986), *review denied* (Minn. May 29, 1986).

The initial questions posed to appellant by police were permissible as threshold investigatory police questions related to his arrest: he was asked his name, address, and other identifying information. Police were not required to give a *Miranda* warning to appellant before asking these types of questions, and we find no error in the admission of this evidence at trial. *See State v. Whitehead*, 458 N.W.2d 145, 149 (Minn. App. 1990) (stating "questions needed to properly record . . . identification" are routine and not covered by *Miranda*), *review denied* (Minn. Sept. 14, 1990).

However, the admissibility of some of appellant's other statements is a closer question. In particular, appellant's incriminating statement that he would "use deadly force" if someone "came around that fence" is of concern. While this statement appeared to be made spontaneously, it occurred during a 20-minute informal discussion in which

appellant apparently intended to convince police that he was not the aggressor in the assault and during which police asked follow-up questions and made verbal cues that had the effect of encouraging appellant to continue talking about the assault. This sort of innocuous dialogue may develop into impermissible questioning, which police could have easily avoided here by giving appellant a *Miranda* warning at the time of his arrest, rather than when appellant was booked. *See State v. Tibiatowski*, 590 N.W.2d 305, 309 (Minn. 1999) (prohibiting the use of "express or implied" questioning that is reasonably likely to produce an incriminating response); *State v. Lynch*, 477 N.W.2d 743, 746 (Minn. App. 1991) (suppressing evidence obtained when defendant stopped for traffic violation was asked by police about his "side of the story" about prostitution offense); *but see Collins v. State*, 385 N.W.2d 52, 53-54 (Minn. App. 1986) (declining to suppress voluntary statement made by defendant while he was placed in squad car that he was not guilty of burglary because "you guys didn't see me come out of the house"), *review denied* (Minn. May 29, 1986).

Even if some of appellant's statements were admitted erroneously at trial, however, we must consider whether any such error was harmless in relation to all of the evidence received at trial. *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009) (applying harmless error analysis to admission of defendant's statement in violation of his *Miranda* rights). "An error is harmless if the verdict rendered is surely unattributable to the error." *Id.* (quotation omitted). Here, appellant was admittedly the only person involved in a physical altercation with Gutierrez; Gutierrez received a life-threatening knife wound during the attack; one witness saw appellant assault Gutierrez with a knife, and another

witness saw appellant holding a knife; and a knife with Gutierrez's blood was found in appellant's kitchen. While appellant emphasizes inconsistencies in the testimony of the state's witnesses, such inconsistencies were minor, and the testimony of the eyewitnesses regarding the essential elements of the assault was consistent. Under these circumstances, the verdict reached by the jury was surely not attributable to any error in the district court's admission of appellant's custodial statements at trial, and the harmless-error test is satisfied.

Pro Se Issues

Appellant's pro se brief appears to include an argument that he lacked intent to commit assault and apparently attempts to point out that other evidence showed that he was not the aggressor in the assault. He also appears to claim that his use of force was justified by the circumstances. Finally, he claims that his attorney's representation was inadequate because the attorney should have asked to suppress the evidence obtained by the police in the squad car recording.

We decline to specifically address these claims because appellant's supplemental pro se brief fails to cite any legal authority and makes only abbreviated, unintelligible arguments. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (stating appellate court "will not consider pro se arguments on appeal that are unsupported by either arguments or citations to legal authority"), *cert. denied*, 129 S. Ct. 1624 (2009); *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) ("The [pro se supplemental] brief contains no argument or citation to legal authority in support of the allegations and we therefore deem them waived"). Further, the record does not support appellant's first two pro se claims because

they are contrary to the evidence received at trial and the jury's verdict. As to appellant's claim of ineffective assistance of counsel, it is completely without merit because, contrary to appellant's assertion, his attorney did move to suppress the videotape recording from the squad car. For these reasons, we conclude that appellant's pro se arguments are without merit.

Affirmed.