STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0402

State of Minnesota,
Respondent,

vs.

James David Gertz, Jr.,
Appellant.

Filed March 31, 2014
Affirmed in part, reversed in part, and remanded
Johnson, Judge
Concurring in part, dissenting in part, Cleary, Chief Judge

Clay County District Court
File No. 14-CR-12-1641

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Johnson, Judge; and Rodenberg, Judge.

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

JOHNSON, Judge

A Clay County jury found James David Gertz, Jr., guilty of incest based on undisputed evidence that he engaged in sexual conduct with an adult woman who is his half-sister. His appeal properly raises two issues: whether the district court erred by denying his pre-trial motion to suppress a self-inculpatory statement he gave to an investigating police officer, and whether the district court erred in assigning a severity level of 6 to the offense of incest for the purpose of applying the sentencing guidelines. We conclude that the district court did not err by denying Gertz's pre-trial motion to suppress but did err in its analysis of the applicable severity level. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

The state introduced evidence at trial that Gertz engaged in sexual conduct with his half-sister, B.L.A. Gertz and B.L.A. share a biological mother but did not meet until each of them was an adult. The evidence indicates that, for a period of time, they developed and maintained a friendship and sought out each other's company on numerous occasions. But B.L.A. reported to police that, during the night of April 16-17, 2012, Gertz forced her to engage in sexual conduct to which she did not consent. B.L.A.'s report led to an investigation into suspected criminal sexual conduct. During that investigation, Gertz stated to a police officer that he and B.L.A. had had an ongoing consensual sexual relationship.

In May 2012, the state charged Gertz with two offenses: first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342 (2010), and incest, in violation of Minn. Stat. § 609.365 (2010). In June 2012, Gertz moved to suppress the statement in which he admitted to engaging in sexual conduct with B.L.A. The district court denied the motion.

The case was tried over two days in October 2012. The jury found Gertz not guilty of criminal sexual conduct but found him guilty of incest. The district court imposed a sentence of 54 months of imprisonment. Gertz appeals.

D E C I S I O N

I. Constitutionality of Statute

Gertz first argues that the statute criminalizing incest, section 609.365 of the Minnesota Statutes, is unconstitutional as applied to this case because the state did not prosecute B.L.A. for the same offense arising from the same incident. Gertz argues that the prosecution and his conviction violate his constitutional rights to due process and equal protection.

Gertz did not challenge the constitutionality of section 609.365 in the district court. As a general rule, this court does not consider an issue that is raised for the first time on appeal because an appellant did not preserve the issue by presenting it to the district court. *State v. Schleicher*, 672 N.W.2d 550, 555 (Minn. 2003). There are, however, limited exceptions to the general rule that may be invoked in particular circumstances. The supreme court has held in a criminal case that an issue may be considered for the first time on appeal if (1) the interests of justice require it and

(2) doing so would not work an unfair surprise on the other party. *State v. Henderson*, 706 N.W.2d 758, 759 (Minn. 2005). The first of those two requirements (the interests-of-justice requirement) is satisfied if the appellant (a) is relying on "a rule of law that was unknown at the time of trial" and (b) has identified a "fundamental unfairness to the defendant [that] needs to be addressed." *State v. Borg*, 806 N.W.2d 535, 547 (Minn. 2011) (quotation omitted) (alteration in original).

The first part of the interests-of-justice requirement (reliance on a previously unknown rule of law) is satisfied in this case. Gertz's constitutional challenge to section 609.365 is based primarily on *In re Welfare of B.A.H.*, 829 N.W.2d 431 (Minn. App. 2013), *review granted* (Minn. July 16, 2013), in which this court considered a statute that criminalizes sexual conduct in certain situations without regard to whether a person was an initiator or aggressor. *Id.* at 435-36 (citing Minn. Stat. § 609.342, subd. 1(g) (2010)). We held that the statute is unconstitutional as applied in that case because the statute allowed the appellant to be prosecuted while another participant was not prosecuted, thereby violating the appellant's rights to due process and equal protection. *Id.* at 438. Our opinion in *B.A.H.* was not available to Gertz during district-court proceedings in this case; we issued it after Gertz filed his notice of appeal. The specific rationale of *B.A.H.* had not previously been articulated by a Minnesota appellate court. *See id.* at 435-38. Thus, Gertz is relying on "a rule of law that was unknown at the time of trial." *See Borg*, 806 N.W.2d at 547.

We need not address the second part of the interests-of-justice requirement (fundamental unfairness) because Gertz cannot satisfy the second requirement for an

exception to the preservation rule, that considering an issue for the first time on appeal would not work an unfair surprise on the other party. *See Henderson*, 706 N.W.2d at 759. The state did not have an opportunity during district-court proceedings to make a record with respect to whether a prosecution and a conviction of Gertz, without any criminal proceedings against B.L.A., would violate Gertz's constitutional rights to due process and equal protection. For example, the state did not have occasion to explain its decisions to charge Gertz but not charge B.L.A. *Cf. B.A.H.*, 829 N.W.2d at 434-38. Also, the state did not have an opportunity to voluntarily dismiss the incest charge and focus its evidence and arguments on the charge of criminal sexual conduct. Furthermore, the state did not have an opportunity to actually charge and prosecute B.L.A. in addition to Gertz. Thus, if we were to consider the constitutionality of the statute for the first time on appeal, we would work an unfair surprise on the state. *See Henderson*, 706 N.W.2d at 759.

Therefore, consistent with the general rule, we decline to consider Gertz's constitutional arguments because he did not preserve them in the district court but, rather, has raised them for the first time on appeal.

II. Motion to Suppress

Gertz also argues that the district court erred by denying his motion to suppress a statement he gave to an investigating police officer. Gertz contends that the statement should have been suppressed because it was obtained after he had invoked his Fifth Amendment right to counsel.

Detective Joe Voxland of the Moorhead Police Department spoke with Gertz on two occasions shortly after B.L.A.'s report of criminal sexual conduct. Their first conversation occurred on April 30, 2012, when Detective Voxland conducted an in-custody interrogation of Gertz. Detective Voxland read Gertz his *Miranda* rights, and Gertz agreed to answer questions. In an interrogation lasting approximately 30 minutes, Gertz denied having any sexual contact with B.L.A. When Detective Voxland asked Gertz to voluntarily provide a DNA sample, Gertz invoked his Fifth Amendment right to counsel, and the interrogation was discontinued.

The second conversation between Detective Voxland and Gertz occurred on May 2, 2012. Detective Voxland had obtained a search warrant authorizing him to obtain a DNA sample from Gertz by swabbing the inside of his cheek. Gertz was in custody at the Clay County jail on an unrelated matter and was escorted to an interrogation room. Gertz apparently believed that he would be meeting with his attorney, although the record does not reveal the reason for that belief, and the district court did not make any findings on the issue. As Detective Voxland began to explain the purpose of the meeting, Gertz interrupted him and said that he had been thinking and praying and that he wanted to tell Detective Voxland what had been "going on" between him and B.L.A., despite the advice of his attorney to not do so. Gertz proceeded to tell Detective Voxland that he and B.L.A. had engaged in a sexual relationship over a period of approximately five or six years. After approximately ten minutes of conversation, Detective Voxland interrupted Gertz to remind him of his *Miranda* rights. Gertz responded quickly by saying that he "fully understood" those rights and nonetheless wished to give his story to the detective.

The conversation evolved into an interrogation that lasted approximately an hour, during which time Gertz provided the detective with additional general information about his sexual relationship with B.L.A. and specific information about the incident that was under investigation.

In July 2012, the district court conducted a hearing on Gertz's motion to suppress the second statement. Gertz argued that his second statement should be suppressed because, first, Detective Voxland re-initiated contact with him and, second, Detective Voxland failed to obtain from him a valid waiver of his Fifth Amendment right to counsel. The district court denied the motion to suppress on the grounds that Gertz re-initiated the conversation with Detective Voxland and that Gertz voluntarily, knowingly, and intelligently waived his Fifth Amendment right to counsel. Gertz renews both of his arguments on appeal.

If a suspect invokes his right to counsel, all interrogation must cease. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885 (1981). "Interrogation for Fifth Amendment purposes 'refers to not only 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.'" *State v. Munson*, 594 N.W.2d 128, 141 (Minn. 1999) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980)). The prohibition on further questioning extends for 14 days after a suspect's invocation of his right to counsel and the conclusion of the in-custody interrogation. *Maryland v. Shatzer*, 559 U.S. 98, 110, 130 S. Ct. 1213, 1223 (2010).

A suspect may, however, waive his previously invoked right to counsel by "initiat[ing] further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 485, 101 S. Ct. at 1885. A court must employ a three-step analysis to determine whether a law-enforcement officer obtained a statement from a defendant in violation of his Fifth Amendment right to counsel:

> First, we determine whether [the suspect] invoked his right to counsel before the police attempted to take the statement. Second, if he invoked his right to counsel, we examine whether [the suspect] reinitiated conversation with police. Third, if he reinitiated conversation with police, we consider whether he properly waived his invoked right to counsel before the police proceeded to take the statement.

State v. Staats, 658 N.W.2d 207, 213 (Minn. 2003) (citations omitted). The state has the burden of proving, by a preponderance of the evidence, that the suspect re-initiated conversation with the police and that the suspect properly waived his right to counsel. *Munson*, 594 N.W.2d at 141; *see also State v. Earl*, 702 N.W.2d 711, 718 (Minn. 2005). On appeal, this court applies a clear-error standard of review to a district court's findings of fact concerning the circumstances of the statement. *State v. Williams*, 535 N.W.2d 277, 286 (Minn. 1995). If the district court's findings of fact are not clearly erroneous, we then "independently apply a totality of the circumstances test to the facts as found by the trial court to determine whether the state has met its burden" to prove that a suspect re-initiated a conversation with an officer and whether the suspect waived his right to counsel. *Munson*, 594 N.W.2d at 141.

A. Re-initiation

Gertz argues that he did not re-initiate the conversation on May 2 because Detective Voxland did so when he arranged for Gertz to be brought to an interrogation room for execution of a search warrant. The district court resolved this issue as follows:

> It is clear that the Defendant initiated the second conversation with the detective on May 2. Detective Voxland initiated contact with the Defendant, but he did not initiate any questioning. The detective was not there to question the Defendant; he was there to obtain a DNA sample pursuant to a search warrant. The Defendant began talking on his own and informed the detective he wished to tell him what happened. The Defendant then proceeded to explain his side of the story to Detective Voxland. The detective did not ask any questions to solicit this; the Defendant chose to speak of his own free will.

Gertz asserts three reasons why the district court erred in finding that he re-initiated the second conversation.

First, Gertz contends that the district court erred because Detective Voxland re-initiated "contact" with him, which he contends is prohibited by the supreme court's opinion in *State v. Warndahl*, 436 N.W.2d 770 (Minn. 1989). In that case, the supreme court suppressed a statement because, in part, "There is no question that [the investigator] initiated the *contact* which led to [this] . . . statement by defendant." *Id.* at 775 (emphasis added). In *Warndahl*, the only reason for the second contact between the officer and the suspect was for the officer to conduct another interrogation. *Id.* at 773. For that reason, we do not interpret *Warndahl* to say that an officer may not make any "contact" with a suspect for any reason after the suspect has invoked his right to counsel. In subsequent cases, the supreme court has focused on whether the officer or the suspect re-initiated

"conversation." *See, e.g., Earl*, 702 N.W.2d at 720; *Staats*, 658 N.W.2d at 213-14; *Munson*, 594 N.W.2d at 140. In addition, the United States Supreme Court has stated that "there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S. Ct. 2830, 2835 (1983). In this case, Detective Voxland made contact with Gertz on May 2, 2012, for the purpose of executing a search warrant. Detective Voxland was obligated to execute the warrant, which was, in essence, a court order directing law enforcement to obtain a DNA sample. If we were to adopt Gertz's argument, we would foreclose more investigative techniques than are protected by the Fifth Amendment right to counsel.

Second, Gertz contends that the evidence shows that Detective Voxland intended to do more than merely execute the warrant because he intended to re-initiate the interrogation that Gertz had terminated two days earlier. Gertz notes that Detective Voxland recorded the meeting with Gertz, even though an audio-recording is not required by law when an officer obtains a DNA sample. But Detective Voxland informed Gertz that he records all conversations with suspects, and Detective Voxland testified at the motion hearing that it is his "practice to record any conversations or contacts with suspects or most everybody that I talk with." Similarly, Gertz notes that Detective Voxland began the audio-recording by saying, "This is gonna' be a recorded interview with James David Gertz at the Clay County Jail." But the transcript shows that Detective Voxland immediately corrected himself by stating, "This is going to be an execution (inaudible) search warrant for DNA." Furthermore, Detective Voxland's mistaken

description of the purpose of the meeting occurred before Gertz had even entered the room and, thus, had no impact on Gertz's understanding of the reasons for his contact with Detective Voxland.

Third, Gertz contends that the district court erred by focusing on Detective Voxland's intent and motivation rather than his words and actions. It is true that law-enforcement officers "are forbidden to conduct action that they should know is reasonably likely to evoke an incriminating response from a suspect." *Munson*, 594 N.W.2d at 142 (quotation omitted). "In determining whether police tactics were likely to elicit an incriminating response, we must focus our inquiry on the perceptions of the suspect rather than on the intent of the police, and must consider the totality of the circumstances surrounding the suspect's custody." *Earl*, 702 N.W.2d at 719. "[T]he central question becomes whether the evidence in the record shows that the officers should have known that their conversation was reasonably likely to elicit an incriminating response . . . ." *Munson*, 594 N.W.2d at 142. The purpose of the caselaw is to prohibit any attempt, "explicit or subtle, deliberate or unintentional," to persuade the accused to incriminate himself. *Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 494 (1984). Nonetheless, a district court may find that a suspect re-initiated an interrogation with a police officer if the evidence reveals "a desire on the part of [the suspect] to open up a more generalized discussion relating directly or indirectly to the investigation." *State v. Ortega*, 813 N.W.2d 86, 95 (Minn. 2012) (alteration in original) (quoting *Bradshaw*, 462 U.S. at 1045, 103 S. Ct. at 2835). In this case, the district court's order reveals that it was appropriately focused on an objective interpretation of Detective Voxland's words and

actions. The district court was provided with both an audio-recording of the May 2, 2012 interrogation and a printed transcript of the interrogation. We have listened to the audio-recording and reviewed the transcript, and we agree with the district court's description of the conversation between Gertz and Detective Voxland. Based on all the facts and circumstances, the district court correctly concluded that Gertz's second statement was voluntary and unprovoked either by Detective Voxland's mere presence or by his statements and actions.

Thus, we conclude that the state satisfied its burden of proving that Gertz, not Detective Voxland, re-initiated their conversation on May 2, 2012.

B. Waiver

Gertz argues that he did not make a valid waiver of his Fifth Amendment right to counsel on May 2, 2012. The district court resolved this issue by finding that Gertz was given a full *Miranda* warning two days earlier; that he had been in custody since then with access to his attorney; that his age, maturity, intelligence, education, experience, and ability to comprehend "all appear to be normal"; that Detective Voxland did not use coercive tactics in his interaction with Gertz; and that Gertz said he "fully" understood his rights, had been thinking and praying about the matter, and wished to talk to the detective despite his attorney's advice to not do so. The district court concluded, "Under the totality of the circumstances, the Court finds that there was a knowing, intelligent and voluntary waiver" of Gertz's previously invoked right to counsel.

Gertz contends that the evidence is insufficient to justify a valid waiver of his Fifth Amendment right to counsel after his prior invocation. Gertz contends that the caselaw

requires that he "affirmatively acknowledge[]" that he was "revoking a previously invoked right to counsel." *Staats*, 658 N.W.2d at 214. He contends that this test is not satisfied because Detective Voxland did not reread him the *Miranda* warning and because he himself did not specifically refer to the *Miranda* warning. The district court noted, "It would have been better practice for police to simply reread the full *Miranda* warning." But the district court properly reasoned that the absence of a rereading does not preclude a finding of waiver.

In fact, there is no caselaw providing that a law-enforcement officer is required to reread the *Miranda* warning. Rather, the caselaw requires a multi-factor analysis, taking into account "the defendant's age, maturity, intelligence, education, experience, ability to comprehend, lack of or adequacy of warnings, length and legality of detention, nature of the interrogation, physical deprivations, and access to counsel and friends." *State v. Miller*, 573 N.W.2d 661, 672 (Minn. 1998). The overriding goal is to ensure that a waiver is made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986).

In this case, the voluntariness of Gertz's waiver is demonstrated by his unprompted decision to tell his story to law enforcement. As Detective Voxland began to explain the purpose of the meeting, Gertz interrupted him and volunteered that he had met with his attorney and that he wanted to talk to Detective Voxland despite his attorney's advice to not do so. Detective Voxland listened as Gertz provided him with background information about his relationship with B.L.A. At the time, Gertz was a

suspect in a criminal-sexual-conduct investigation; Detective Voxland gave no indication during the early part of this conversation that he was investigating a report of incest. Detective Voxland reminded Gertz of the *Miranda* warning and Gertz's prior invocation of his right to counsel only when Gertz began to ask questions about the incident that B.L.A. had reported to police. After Detective Voxland's reminder, Gertz was clear and emphatic in indicating his understanding of his Fifth Amendment rights, his attorney's advice, and his desire to talk to Detective Voxland: "I understand that. I fully understand that, and like I said . . . , I feel like I'm going . . . against my legal counsel's . . . opinion [because] he said not to talk to you." Gertz's statements at the outset of the conversation and his unequivocal response to Detective Voxland's *Miranda* reminder show that Gertz had "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

This case is distinguishable from *State v. Fossen*, 312 Minn. 414, 255 N.W.2d 357 (1977), in which the supreme court affirmed a district court's suppression of a defendant's statements because the statements were obtained in violation of his Fifth Amendment rights. *Id.* at 424, 255 N.W.2d at 362. In *Fossen*, law-enforcement officers never informed the defendant of his *Miranda* rights at any time during three separate interrogations. *Id.* at 417-18, 255 N.W.2d at 359. The state argued that the interrogations were not unlawful because an officer subsequently executed a written statement that "he asked defendant if he 'fully understood his rights in respect to talking to me without an attorney present.'" *Id.* at 420, 255 N.W. at 360-61. In this case, a law-enforcement officer gave Gertz a *Miranda* warning two days before he provided his second statement,

and Gertz volunteered, without prompting, that he "fully understood" his *Miranda* rights and nonetheless wished to tell his story to a law-enforcement officer.

Thus, we conclude that the state satisfied its burden of proving that Gertz validly waived his right to counsel. Accordingly, the district court did not err by denying Gertz's motion to suppress evidence.

III. Sentencing

Gertz last argues that the district court erred at sentencing by assigning a severity level of 6 to the offense of incest, which is not ranked by the sentencing guidelines.

Under the Minnesota Sentencing Guidelines, the presumptive sentence for an offender is determined by locating the appropriate cell on a sentencing grid on which the vertical axis represents the severity level of the offense and the horizontal axis represents the offender's criminal history. *See* Minn. Sent. Guidelines 2, 4 (Supp. 2011). The sentencing guidelines assign most offenses a severity level of between 1 and 11. *See* Minn. Sent. Guidelines 5. But certain offenses are not ranked "because prosecutions for these offenses are rarely initiated, because the offense covers a wide range of underlying conduct, or because the offense is new and the severity of a typical offense cannot yet be determined." Minn. Sent. Guidelines cmt. 2.A.04. The offense of which Gertz was convicted, incest, is an unranked offense. *See* Minn. Sent. Guidelines 5.

If a district court must impose a sentence for an unranked offense, the court "shall exercise [its] discretion by assigning an appropriate severity level for that offense and specify on the record the reasons a particular level was assigned." Minn. Sent.

Guidelines 2.A. The supreme court has articulated four factors that a district court should consider when assigning a severity level to an unranked offense:

> [1] the gravity of the specific conduct underlying the unranked offense; [2] the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense; [3] the conduct of and severity level assigned to other offenders for the same unranked offense; and [4] the severity level assigned to other offenders who engaged in similar conduct.

State v. Kenard, 606 N.W.2d 440, 443 (Minn. 2000); *see also* Minn. Sent. Guidelines cmt. 2.A.04 (identifying factors). "No single factor is controlling nor is the list of factors meant to be exhaustive." *Kenard*, 606 N.W.2d at 443. Accordingly, this court applies an abuse-of-discretion standard of review to a sentencing court's assignment of a severity level to an unranked offense. *See id*. at 442.

In this case, the state urged the district court to assign a severity level of 6 and to impose an executed sentence of 45 months of imprisonment, which is the mid-point of the guidelines sentencing range, given a severity level of 6 and a criminal-history score of 4. Gertz urged the district court to assign a severity level of 4. The district court assigned a severity level of 6 for the following reasons: (1) Gertz lied in his pre-sentencing sex-offender evaluation by saying that he is not related to B.L.A.; (2) the evaluator found that Gertz is a moderate to high risk to reoffend; (3) Gertz has a previous conviction for criminal sexual conduct; and (4) in other incest prosecutions between 1981 and 2011, incest was ranked at severity level of 6 more often than any other severity level. The district court imposed a maximum presumptive (i.e. "top-of-the-box") sentence of 54 months. The district court used the standard sentencing guidelines grid,

not the sex offender grid; neither party has objected to the district court's use of the sentencing guidelines grid, either in the district court or in this court. *See* Minn. Sent. Guidelines 4.

Gertz contends that the district court erred in its analysis for multiple reasons. First, Gertz contends that the district court failed to apply the first *Kenard* factor, the gravity of the specific conduct underlying his incest conviction. He contends that he did not use force or coercion and did not cause personal injury, which typically is true of the offenses ranked at severity level 6. Second, Gertz contends that the district court failed to apply the second *Kenard* factor, the severity level assigned to any ranked offense whose elements are similar. Gertz contends that the elements of incest are most similar to the elements of fifth-degree criminal sexual conduct, which is ranked at a severity level that would give rise to a lower presumptive sentence. *See id.* Third, Gertz contends that the district court misapplied the fourth *Kenard* factor, the severity levels assigned in other incest cases. Gertz accurately states that the information supplied to the district court shows that the severity level most frequently assigned in incest cases over a 30-year period is 5, not 6. *See* Minn. Sent. Guidelines Comm'n, *Frequency and Severity of Unranked Offenses: Sentenced 1981-2011* 3 (2012). Fourth, Gertz contends that the district court misapprehended the facts relevant to an additional factor, whether Gertz has any prior convictions of criminal sexual conduct. The district court stated that he had such a prior conviction, which Gertz denied on the record at the sentencing hearing. The pre-sentence investigation report appears to support Gertz's denial.

In response, the state concedes that the district court erred but argues that the error is harmless. We agree with both parties that the district court erred, for the reasons identified by Gertz. In addition, the error is not harmless. The district court could not have imposed a 54-month sentence if it had assigned a severity level of 5 and imposed a presumptive sentence. Furthermore, it is uncertain whether a full and accurate assessment of all relevant facts might have caused the district court to impose a sentence that was not at the top of the applicable guidelines range. Accordingly, we reverse and remand for the district court to reconsider the *Kenard* factors and any other relevant factors, to reassign a severity level to Gertz's incest offense, and to again impose a sentence within the applicable guidelines range.

Affirmed in part, reversed in part, and remanded.

CLEARY, Chief Judge (concurring in part and dissenting in part)

I concur in the majority's decision to decline to consider appellant's arguments on the issue of the constitutionality of the incest statute given that he raised them for the first time on appeal, and to reverse and remand on the sentencing issue. But I respectfully dissent on the issue of the admission of appellant's second in-custody statement. After an accused has invoked the right to counsel, "a court may admit responses to further questioning only by finding that the accused 1) initiated further discussions with police and 2) knowingly and intelligently waived the right invoked." *State v. Warndahl*, 436 N.W.2d 770, 775 (Minn. 1989) (citing *Smith v. Illinois*, 469 U.S. 91, 95, 105 S. Ct. 490, 493 (1984)). Appellant did not initiate the conversation with the detective in which he gave his statement, nor did he knowingly and intelligently waive the right to counsel that he had previously invoked. Thus, the district court's decision to admit the statement, and the resulting conviction for incest, should be reversed and the case remanded on that basis.

The police must "cease interrogation after a suspect invokes his right to counsel 'unless the [suspect] himself initiates further communication, exchanges, or conversations with the police.'" *State v. Munson*, 594 N.W.2d 128, 140 (Minn. 1999) (alteration in original) (quoting *Edwards v. Arizona*, 415 U.S. 477, 484–85, 101 S. Ct. 1880, 1885 (1981)). "Interrogation for Fifth Amendment purposes 'refers to not only 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.'" *Munson*, 594

N.W.2d at 141 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689–90 (1980)); *see also Warndahl*, 436 N.W.2d at 775 (holding that a police investigator made improper contact with a suspect when he went to the jail to speak with the suspect, read him the *Miranda* warning, and asked if he had any questions); *State v. Fossen*, 312 Minn. 414, 422, 255 N.W.2d 357, 362 (1977) (holding that a suspect's statements were the product of custodial interrogation when the suspect's incriminating conversation with a police investigator was initiated by law enforcement for the ostensible purpose of obtaining bail information). A court looks at the totality of the circumstances to determine whether a suspect initiated communication with the police, and the state has the burden of proving that the suspect did initiate the communication. *State v. Staats*, 658 N.W.2d 207, 214 (Minn. 2003).

In this case, appellant was apparently told that he would be meeting with his attorney, but was instead taken to meet with a police detective. This meeting was initiated by law enforcement, not by appellant. The detective initially stated that "a recorded interview" was about to take place before clarifying that he would be executing a search warrant for DNA. But the detective continued to record the meeting with appellant, which was unnecessary if the detective intended to merely take a DNA swab. These words and actions on the part of the police were calculated to obtain a statement from a represented defendant without notice to his attorney and were reasonably likely to elicit an incriminating response from appellant. Given the totality of the circumstances, the state has not proved that appellant initiated the contact with the police.

A valid waiver of a *Miranda* right must be "'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Farrah*, 735 N.W.2d 336, 341 (Minn. 2007) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986)); *see also Fossen*, 312 Minn. at 420, 255 N.W.2d at 360–61 (holding that a suspect's statement that he "fully understood his rights" was insufficient to demonstrate knowledge of the *Miranda* rights when they had not been recited to him). The state has the burden of proving that a suspect knowingly and intelligently waived the previously invoked right to counsel. *Staats*, 658 N.W.2d at 214–15 (stating further that "[t]he state cannot rely solely on the *Miranda* warning to establish waiver," but must show that the suspect "affirmatively acknowledge[d]" that he was revoking the previously invoked right).

The police detective in this case asked whether appellant remembered the rights that had been told to him during their previous meeting. The detective stated that the rights still applied and asked whether appellant had any questions about them. But the detective did not re-state the *Miranda* rights, describe the consequences of a waiver of the right to counsel, or ask whether appellant wished to revoke the right to counsel that had previously been invoked. Appellant's statement that he understood that his rights still applied was wholly insufficient to demonstrate that appellant knowingly and intelligently waived his right to counsel. Additionally, the brief statements regarding appellant's rights came only after appellant had already made several incriminating statements and after the detective had asked several questions meant to elicit incriminating responses and clarify appellant's admissions. For example, appellant had already stated that he and

B.L.A. had been having sex for a number of years, that their relationship had been consensual, that they had been caught by others having sex, and that B.L.A. had told him that she may have miscarried his child. The detective had already asked whether appellant and B.L.A. had sex, whether they had been caught having sex, and when these events had occurred. The detective had also stated that "what I'm hoping to get is the truth" and that he wanted to "hear [appellant's] side of what happened." The state has not proved that appellant knowingly and intelligently waived his right to counsel.

Because appellant did not initiate the communication with the police or knowingly and voluntarily waive his right to counsel, the district court erred by admitting appellant's second in-custody statement during trial. The state concedes that, if this statement was erroneously admitted, the error was not harmless. Therefore, I would reverse the district court's decision to admit the statement, reverse appellant's conviction for incest, and remand the case to district court for further proceedings.