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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1127**

State of Minnesota,
Respondent,

vs.

Santana Martinez Valdez,
Appellant.

**Filed May 27, 2014**
**Affirmed in part, reversed in part, and remanded**
**Worke, Judge**

Ramsey County District Court
File No. 62-CR-12-2423

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

**WORKE**, Judge

Appellant challenges his criminal conviction and sentence for second-degree intentional murder, arguing that the district court abused its discretion by denying his motion to suppress inculpatory statements he made after an invalid waiver of his *Miranda* rights and after he invoked his right to counsel, and by imposing an upward durational departure at sentencing without having the jury properly determine the facts supporting the departure. We affirm in part, reverse in part, and remand.

## FACTS

A.B. was murdered on March 18, 2012, after appellant Santa Martinez Valdez and two others attacked A.B. with various weapons, resulting in his death from blood loss. Valdez was a middleman in a methamphetamine operation and had initiated the attack in an attempt to collect money owed to his boss.

Valdez was arrested six days after the murder, and St. Paul police investigators Bryant Gaden and Rich Oesterreich interviewed Valdez, who speaks only Spanish, with the assistance of a Spanish interpreter. Valdez was read and provided with a Spanish version of the *Miranda* warning. Gaden asked Valdez if he understood each of the rights encompassed in the warning and directed Valdez to initial that he understood them. Gaden then said to Valdez, "Well, with your rights in mind, you can choose to talk to us right now, or not," and asked, "What do you want to do?" Valdez replied, "Whatever you want." Valdez then gave an affirmative response to Gaden's statement, "I'd like to ask you some questions, if that's okay."

During the interrogation that followed, Valdez made incriminating statements that placed him at the crime scene, including admitting that he sprayed the victim in the eyes with hairspray and searched his house for money. Later in the interview, Valdez was asked whether he wanted to give a DNA sample, and he said, "Well, when my attorney comes here, so he can explain everything to me. I said I was gonna answer the questions I could answer to, for you right now." Gaden clarified, "So you're saying you would like an attorney before you give your DNA?," and Valdez said again, "Well, he can explain to me." After listening to Gaden's definition of DNA and being asked whether he "would . . . be willing to give a voluntary sample," Valdez said, "Yes. I can do that, I mean I, I don't know but, what that is but yes, no problem," and, "That's fine, I mean if you explain to me things clearly then I can cooperate with you, but if I'm all confused then I don't know what to say." Gaden asked, "So now that you understand DNA, you do not want an attorney here for the DNA acquisition?" Valdez replied, "No, I'll spit right now and then I'll ask my attorney . . . ." At that point, Gaden decided to seek a search warrant to obtain Valdez's saliva for DNA testing.

Valdez was charged with intentional second-degree murder. Before trial, the district court denied Valdez's motion to suppress the statements that Valdez made during his interrogation, ruling that Valdez understood the *Miranda* warning and had validly waived those rights. The district court also ruled that Valdez's reference to his attorney during the interrogation was ambiguous and not an invocation of his right to counsel. On September 21, 2012, the state gave notice of intent to seek an upward durational sentencing departure upon Valdez's conviction.

The district court did not bifurcate the trial for the purpose of having the jury determine whether aggravated facts warranted the imposition of an upward durational sentencing departure. After the jury found Valdez guilty, a special verdict form was submitted to the jury that asked them to answer three questions: (1) whether Valdez's "motivation in the murder of [A.B. was] in connection with a drug trafficking organization," (2) whether Valdez "and his accomplice use[d] particular cruelty in killing [A.B.]," and (3) whether "the murder of [A.B. was] committed in his home." The jury answered all of the questions affirmatively, and the district court used the first two grounds for imposing a 387-month executed sentence, a 20-month upward durational departure. This appeal followed.

## D E C I S I O N

### *Miranda warni*ng

Valdez argues that he did not intelligently waive his *Miranda* rights. "A suspect may waive [his] *Miranda* rights as long as [he] does so knowingly, intelligently, and voluntarily." *State v. Beecroft*, 813 N.W.2d 814, 851 (Minn. 2012) (citation omitted). The state must establish that a defendant waived his rights by a preponderance of the evidence. *State v. Anderson*, 789 N.W.2d 227, 233 (Minn. 2010). The state meets this burden by showing that the "*Miranda* warnings were given and that the individual stated that he or she understood those rights and then gave a statement." *Id.* (quotation omitted).

> Where an appellant claims that there is credible evidence that a waiver was invalid, we make a subjective factual inquiry, look at the totality of the circumstances, and consider factors

> such as the defendant's age, maturity, intelligence, education, experience, ability to comprehend, lack of or adequacy of warnings, the length and legality of the detention, the nature of the interrogation, any physical deprivations, and limits on access to counsel and friends.

*Id*. at 233-34. This court reviews a district court's factual findings on the validity of a *Miranda* waiver for clear error. *State v. Farrah*, 735 N.W.2d 336, 341 (Minn. 2007).

We conclude that the district court properly upheld the validity of Valdez's *Miranda* waiver. Valdez was read each of the rights in his own language, given a written version of the rights in his own language, and initialed each of the rights. After receiving this information, Valdez was told that he could "choose to talk to [police] right now, or not," and when asked what he wanted to do, replied, "Whatever you want." Valdez then responded affirmatively to Gaden's statement, "I'd like to ask you some questions, if that's okay," and Valdez continued to answer Gaden's questions. While Valdez's initial "[w]hatever you want" response could be viewed as mere acquiescence to waiving the rights, his affirmative response to Galen's statement that he would like to ask Valdez some questions is a clear waiver. Further, although Valdez had only a ninth grade education and stated he had never been in custody before, he was 35 years old, was assigned an interpreter, showed no inability to comprehend questions, had been in custody only a short time, and had not suffered deprivations or been subjected to coercive questioning by police. Valdez argues that the circumstances show that he was "merely agreeing to speak with the police because he thought he had to," but his quick and appropriate responses to questions demonstrate his willingness to talk with police. The

district court did not clearly err in concluding that Valdez validly waived his *Miranda* rights.

***Invocation of Right to Counsel***

Valdez next argues that police violated his rights by "failing to terminate the interrogation after [he] made a clear invocation of his right to counsel." To protect a suspect's constitutional right against self-incrimination, once a suspect "clearly assert[s] his right to counsel, questioning must immediately cease until an attorney is present." *State v. Chavarria-Cruz*, 784 N.W.2d 355, 360 (Minn. 2010) (quotation omitted). If the suspect's invocation of the right to counsel is "equivocal or ambiguous," it is "subject to a construction that the accused is requesting counsel, [and] all further questioning must stop except that narrow questions designed to 'clarify' the accused's true desires respecting counsel may continue." *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988). Because invocation of the right to counsel is a mixed question of law and fact, this court reviews the factual findings for clear error and applies a de novo standard of review to determine whether those facts establish that the suspect invoked the right to counsel. *Chavarria-Cruz*, 784 N.W.2d at 363-64.

Valdez referred to "when my attorney comes here" after Gaden asked him whether he would provide a DNA sample. This reference was ambiguous. But Gaden acted properly by clarifying whether Valdez was requesting an attorney, by responding, "So you're saying you would like an attorney before you give your DNA?" The conversation that followed indicated that Valdez was not really requesting an attorney, but wanted an explanation of DNA. Once he understood Gaden's explanation of the purpose of DNA

testing, Valdez answered "[n]o" to the question of whether he still wanted an attorney. As noted by the supreme court in *State v. Ortega*, "police must . . . be allowed to encourage suspects to talk where the suspect has not clearly refused." 798 N.W.2d 59, 72 n.9 (Minn. 2011) (quotation omitted). In *Ortega*, the supreme court held that, when a law enforcement officer clarified a custodial suspect's ambiguous request for counsel, the district court did not err by denying the defendant's motion to suppress the suspect's statements to law enforcement. 798 N.W.2d at 73. The district court properly concluded that Valdez did not invoke his right to counsel during his custodial interrogation.[1]

***Sentencing***

The sentencing guidelines contain a nonexclusive list of aggravating factors that may justify a sentencing departure. Minn. Sent. Guidelines 2.D.3.b (2012). "Generally, appellate courts review sentences that depart from the presumptive guidelines range for an abuse of discretion." *Dillon v. State*, 781 N.W.2d 588, 594 (Minn. App. 2010) (citation omitted), *review denied* (Minn. July 20, 2010). But "a sentencing court has no discretion to depart from the sentencing guidelines unless aggravating . . . factors are present." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999) (citation omitted). And "the rule announced in *Blakely* [*v. Washington*, 542 U.S. 296, 124 S Ct. 2531 (2004)] requires that the facts of the case be found by a jury," including facts that support reasons for a sentencing departure. *State v. Rourke*, 773 N.W.2d 913, 920-21 (Minn. 2009). "Whether

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[1] We note that Valdez's reliance on *State v. Ray* 659 N.W.2d 736 (2003), is misplaced. There, the suspect made an unequivocal request for an attorney, and in response police did not stop questioning the suspect and attempted to persuade the suspect to revoke his request. *Id.* at 742. The facts here do not involve a clear invocation of the right.

a particular reason for an upward departure is permissible is a question of law, which is subject to a de novo standard of review." *State v. Yaritz*, 791 N.W.2d 138, 143 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. Feb. 23, 2011).

Valdez challenges his upward durational sentencing departure of 20 months on several grounds. As an initial matter, Valdez asserts that the state failed to give notice of intent to seek a sentencing departure at least seven days before the omnibus hearing, as required by Minn. R. Crim. P. 7.03, and merely gave notice of intent to depart five days before sentencing. But the district court record shows that the state filed a notice of intent to depart on September 21, 2012, over four months before trial began. Thus, notice of the intent to depart was adequate.

After the jury reached a guilty verdict, the district court submitted the special verdict form to the jury over Valdez's objection to the phrasing of the questions. The state concedes that the aggravating-factor interrogatories submitted to the jury were improper because they seek only legal conclusions. We agree. In *Rourke*, the supreme court ruled that the aggravating sentencing factor of particular cruelty must be comprised of facts found by a jury in a *Blakely* proceeding and the district court's determination of whether those facts provide a proper reason for departure. 773 N.W.2d 913, 920-22. There, the supreme court addressed a sentencing departure that was imposed after a *Blakely* proceeding in which the jury was asked only the conclusory question of whether the defendant treated the victim with particular cruelty. *Id.* at 917. The supreme court reversed the sentence and remanded, directing that "if another *Blakely* trial is held on remand, the district court should submit to the *Blakely* jury one or more special

interrogatories that ask whether the state has proven, beyond a reasonable doubt, a *factual circumstance* which the state alleges would provide the district court a substantial and compelling reason (i.e., particular cruelty) to depart from the presumptive guideline sentence." *Id.* at 923 (emphasis added). *Carse v. State* applied the holding of *Rourke* to the aggravating factor of particular vulnerability, holding that, because the sentencing jury's special verdict responded only to the question of whether the victim was treated with particular cruelty and not the "specific facts that would support a conclusion," the sentence must be reversed and remanded for further proceedings. 778 N.W.2d 361, 373 (Minn. App. 2010). We therefore reverse Valdez's sentence and remand for further proceedings.

**Affirmed in part, reversed in part, and remanded**.