

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 29, 2011

v

JUSTIN LEE FILE,

No. 299493
Jackson Circuit Court
LC No. 08-004955-FH

Defendant-Appellant.

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant, Justin Lee File, appeals as of right his conviction for arson of a dwelling house, MCL 750.72. Defendant was sentenced to 5 to 20 years' imprisonment. We affirm.

A. FACTS AND PROCEEDINGS

This case involves the burning of a hunting cabin located in Hanover, Michigan. The cabin was owned by Samuel William Costelli. On the date the cabin burned down, October 3, 2008, Kajen Thompson was renting a portion of the cabin from Costelli. Defendant was Thompson's ex-boyfriend, and they were no longer dating by October 3, 2008.

On the night of October 2, 2008, Thompson stopped for drinks at the Main Street Pub in Hanover, at approximately 10:00 p.m. Thompson met Justin Zieman at the pub, as Zieman and Thompson had started a relationship sometime shortly before the events of October 2 and 3, 2008. Thompson's cousin, Eli Brown, was also at the pub.

Shortly after Thompson arrived at the pub, defendant arrived with codefendant, Alisha Williams. Thompson believed Williams was defendant's new girlfriend. After entering, defendant and Williams sat at the bar next to Thompson and Zieman. According to Thompson, defendant and Williams were acting "bizarre" and alternating between friendly and rude behavior towards Thompson and Zieman. Whenever Thompson and Zieman attempted to move to another part of the bar, defendant and Williams followed them. During this interaction, defendant was visibly intoxicated. At some point, Williams asked Thompson to play some saved voicemail recordings that defendant had left for Thompson, wherein defendant was telling Thompson he wanted their relationship to work out. The voicemails upset Williams.

Before defendant and Williams left the pub, Williams asked Thompson if she would step outside the pub and look at pictures of Williams' children. As Thompson exited the pub, Williams hit Thompson in the face, so Thompson fought back. During the fight between Thompson and Williams, defendant was outside, approximately five feet away from the women.

Brown followed Thompson outside because he had a bad feeling about what was going to happen. Brown prevented defendant from intervening in the fight between Thompson and Williams, and eventually separated Thompson and Williams. After the fight, Thompson went inside the pub and called the police, and when defendant and Williams tried to reenter the pub, they were physically forced to leave by Brown and Zieman. Eventually, defendant left and was angry.

Before Thompson left the pub, Michigan State Police Trooper Gina Rae Gettel interviewed her about the assault at the pub. Because defendant was not at the pub, Trooper Gettel contacted him, but defendant denied knowing about any "incident." Defendant, at that time, refused to disclose his location.¹ During the investigation of the assault, Trooper Gettel was assisted by Trooper John Paul Richards, who is specially trained in fire investigations.

When Thompson and Zieman returned to the cabin they discovered that it was on fire. When Thompson approached the cabin, she noticed that a scarecrow Halloween decoration that had been hanging on the porch was missing. Thompson called 911 to report that her cabin was on fire. Later, in the early morning hours of October 3, 2008, Trooper Richards was called to the cabin fire. Trooper Richards realized it was Thompson's cabin and tried to make contact with defendant and Williams, but was initially unsuccessful.

Sometime later on October 3, 2008, Trooper Richards was able to make contact with defendant and Williams. Shortly after the fire, during an interview with defendant, Trooper Richards noticed defendant's hand was badly burned. Before the fire, no witness recollected seeing defendant's hand badly burned at the pub.

On December 8, 2008, Trooper Richards interviewed defendant at the Jackson County jail.² Trooper Richards told defendant that the reason for the interview was that Trooper Richards had been contacted by Williams about the fire, and Trooper Richards wanted to tell defendant what she said and then get defendant's side of the story. The interview lasted approximately 50 minutes, and at the commencement of the interview defendant was informed of his right to remain silent and to have an attorney present. Defendant signed the waiver form and indicated that he wanted to hear what Williams said, and then he and Trooper Richards engaged in a discussion about what crimes Williams had been charged with, that she had changed her story, and that she was now saying that defendant started the fire. At that point the following transpired:

¹ Williams had never been to the cabin Thompson rented, and between Williams and defendant, only defendant knew where Thompson lived.

² Defendant was already in jail having been arrested earlier that day in another matter.

TROOPER RICHARDS: Arson of a house, just arson.

JUSTIN: It is a felony? What's that, what kind of a felony is that?

TROOPER RICHARDS: Uh it's ... the maximum you mean?

JUSTIN: Yeah[.]

TROOPER RICHARDS: The maximum is 20 years, but I've never seen anyone come even close. The thing on it, but you gotta understand the thing on the 20 years, nobody got hurt, um no firemen got hurt and the thing why it's 20 years, is if you have a fireman that gets hurt in a fire or someone hurt responding to the fire on the way there, they get in an accident or something, that's why it's so high. Because you got people coming, emergency respond. But nobody got hurt, there's no injuries. Only thing that was done was some damaged property which can all be replaced. They have insurance so the homeowner is not out anything. Kajen didn't have any renter's insurance, but the actual structure, the main part of the house had insurance by the landlord and is going to be repaired so that's the main thing there.

JUSTIN: *I guess I'll have to get a lawyer down here if she's sayin it's me.*

The conversation then turned to the circumstances of defendant leaving the pub, who was driving, how he suffered the burns, and some difficulties defendant was having with prior charges. Williams' current circumstances were also discussed, and then the conversation turned back to Trooper Richard's wanting to hear defendant's side of the story in light of what police already knew:

JUSTIN: Your saying..... So you put me right there, you're sayin I burnt myself there and everything.

TROOPER RICHARDS: Well, I say you burnt yourself there, but how you actually got the burn, what you were doing, I got two different theories of what could have happened. One is what she's sayin and then I have another possible one but I want to hear what your version was before, to see if maybe that is what happened. I mean there's different ways you could have got the burn on your hand.

JUSTIN: *I want to talk to a lawyer because I'm not sure, I love Alicia and I don't want her in trouble.*

TROOPER RICHARDS: Well, Alicia's, Alicia admitted responsibility for it. Whether she was just there, or if she was involved in it and did it and actually lit it, either way, it's called, it's called you guys are in on it together. You drover her there, she was involved, she admits some responsibility, she's gonna be charged with it as well. I mean if you want her to take the whole rap for it that's fine. I don't care, I mean I'm just here to give you the opportunity to give me your side

of it, you can uh, you can let her take all the rap for it. She's lookin at 30 years so if you want to go visit her every third...

The conversation then turned back to Williams' charges, what defendant did and his condition when he left the pub and when he was picked up on the probation violation. Then Trooper Richards and defendant discussed defendant's alcohol problems, Trooper Richards' own prior alcohol treatment, and then the following exchange took place:

JUSTIN: It was an accident.

TROOPER RICHARDS: I mean it's not that hard was it[?]

JUSTIN:

TROOPER RICHARDS: Ok. *Are you willing to talk to me then and tell me your side of it without any attorney?*

JUSTIN: I don't want her in trouble[.]

TROOPER RICHARDS: Ok, well then let's talk for a minute ok. *A couple of times you said you might want an attorney. Do you want an attorney? Do you want to talk to an attorney and admit it was an accident?*

JUSTIN: Well what happened.....I never[.]

TROOPER RICHARDS: *Well, first do you want an attorney?*

JUSTIN: *No*[.]

TROOPER RICHARDS: Ok.³ [Emphasis and footnote added.]

The issue of defendant's possible invocation of the right to counsel during his December 8, 2008, interview was addressed just before trial began. Defendant's two references to an attorney were played for the trial court. The trial court listened to each reference at least twice, and then ruled:

I think it's clearly [sic] -- there -- there is some uncertainty, there's some equivocation going on and -- and I think the trooper responsibly does what -- what a trooper should do in that situation. He then tried to clarify definitively for the defendant, now I want to try and clear this up because you kind of suggested to me a couple of times you think you need a lawyer or not. And then I think your client waives. So I -- I'm going to allow the statement in.

³ Defendant also signed a form waiving his right to counsel.

At the conclusion of the trial, defendant was found guilty of arson of a dwelling house and acquitted of arson – preparation to burn property.

II. ANALYSIS

Defendant first argues that the trial court erred in denying his motion to suppress. A trial court’s “ultimate determination on a motion to suppress” is reviewed de novo, while a trial court’s factual findings are reviewed for clear error. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008).

“[A] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and [] the police must explain this right to him before questioning begins.” *Davis v United States*, 512 US 452, 457; 114 S Ct 2350; 129 L Ed 2d 362 (1994). If a suspect requests an attorney, even after initially agreeing to speak with police, “he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.” *Id.* at 458. The determination of whether a defendant has “actually invoked his right to counsel” is “an objective inquiry.” *Id.* at 458-459. “Invocation of the *Miranda*⁴ right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.” *Id.* at 459 (Citations and quotations omitted. Footnote added.).

A review of recent Michigan case law shows that the trial court did not err in holding that defendant did not unequivocally request counsel. Our Michigan Supreme Court has held that a defendant’s statement that “he would ‘just as soon wait’ until he had an attorney before talking to police, followed immediately by his statement that he was willing to discuss the ‘circumstances,’ was not an unequivocal assertion of the right to counsel.” *People v McKinney*, 488 Mich 1054; 794 NW2d 614 (2011). And, we have previously held that the statements, “[m]aybe I should talk to an attorney,” and “I might want to talk to an attorney” were not “sufficient to invoke ... [the] right to counsel.” *People v Tierney*, 266 Mich App 687, 711; 703 NW2d 204 (2005). Likewise, we determined that the statement, “[c]an I talk to him [a lawyer] right now?” was not an unequivocal invocation of the right to counsel because the defendant was inquiring when he could have an attorney “if he wanted to do so.” *People v Adams*, 245 Mich App 226, 238; 627 NW2d 623 (2001) (Emphasis in the original.). Finally, the Court in *Davis*, 512 US at 462, concluded that the statement, “[m]aybe I should talk to a lawyer” was not an unequivocal request for counsel. These cases establish that a statement by a defendant that merely expresses an interest in obtaining an attorney at some indefinite point in the future, or that somehow expresses uncertainty about the situation, is insufficient to invoke the right to counsel.⁵

⁴ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

⁵ Though not entirely uniform, the majority of courts in our sister states have held that similar statements by a defendant that he “thinks” or he “maybe” wants to talk to an attorney are not an

In light of these cases, we hold that defendant's statements, "I guess I'll have to get a lawyer if she is saying it's me," and "I want to talk to a lawyer because I am not sure, I love Alisha and I don't want her in trouble," were not unequivocal invocations of the right to counsel as "a reasonable officer in light of the circumstances" would not have understood defendant's comments to be an unequivocal invocation of counsel. See *Davis*, 512 US at 459. Indeed, the first statement, with its equivocating beginning of "*I guess I'll have to get a lawyer if...*" is almost identical to what we held to be ambiguous in *Tierney* and what the Supreme Court held to be insufficient in *Davis*. And, although the second statement is somewhat less equivocal, defendant still expresses doubt and uncertainty about whether he actually wants an attorney at the time by saying "because I am not sure" and that he loves Alisha and does not want to get her in trouble. A reasonable understanding of this could have been that defendant may or may not actually have wanted counsel, depending on what would happen to Alisha. This uncertainty certainly afforded Trooper Richards the opportunity to engage in "good police practice" by clarifying whether defendant actually wanted an attorney. *Davis*, 512 US at 461. Once Trooper Richards explicitly asked defendant if he wanted an attorney present, defendant unequivocally waived his right to counsel by affirmatively stating "no."⁶

Alternatively, defendant argues his trial counsel was ineffective in failing to file a motion to suppress earlier and in failing to call defendant to clarify his statements. We find that neither argument has any merit. "The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citations omitted). To prove ineffective assistance of counsel defendant must demonstrate: (1) his counsel's performance fell below an objective standard of reasonableness; (2) it is reasonably probable that the results of the proceeding would have been different but for counsel's alleged error; and (3) the result was fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Because no *Ginther*⁷ hearing was held, "review of the defendant's claim of ineffective assistance of counsel is limited

unequivocal invocation of the right to counsel such that further questioning had to be cut-off. See, e.g., *People v Roquemore*, 131 Cal App 4th 11, 24-25; 31 Cal Rptr 3d 214 (2005) (collecting cases); *State v Goodwin*, 278 Neb 945, 959; 774 NW2d 733 (2009) ("Statements such as 'maybe I should talk to a lawyer' or 'I probably should have an attorney' do not meet this standard."); *Davis v State*, 313 SW3d 317, 339-340 (Tex Crim App, 2010) (collecting cases that held that statements like "I think I better talk to a lawyer first" and "I feel as though I should have an attorney...because how ugly this looks on me" were not unequivocal requests for counsel.); *Cothren v State*, 705 So2d 861, 864-866 (Ala, 1997).

⁶ There is also no assertion, nor is there any evidence to support one, that defendant was acting under any infirmity, that he did not understand his rights, or was under pressure of coercion or compulsion. See *People v Williams*, 470 Mich 634; 683 NW2d 597 (2004). The audio of the questioning reveals a very even keeled and matter-of-fact discussion between Trooper Richards and defendant.

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

to mistakes that are apparent on the record.” *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

There is nothing in the record to suggest the performance of defendant’s trial counsel was deficient. Merely because the motion to suppress was not argued until the morning of trial has no bearing on defendant’s trial counsel’s performance. Additionally, defendant has failed to identify any beneficial statement that his trial counsel could have elicited had defendant been called to clarify the statements he made during the interview. Consequently, defendant has failed to demonstrate that his counsel’s performance fell below an objective standard of reasonableness. *Frazier*, 478 Mich at 243. We decline defendant’s request for a *Ginther* hearing because defendant has failed to demonstrate any basis for a one, and we previously denied defendant’s initial motion for remand.

Affirmed.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio