



In the Missouri Court of Appeals Eastern District

DIVISION ONE

STATE OF MISSOURI,	)	No. ED108938
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	
	)	Honorable Michael K. Mullen
ANTONIO EDJUAN MULDREW,	)	
	)	
Appellant.	)	FILED: August 17, 2021

Introduction

Antonio Edjuan Muldrew (“Muldrew”) appeals the judgment following his conviction by a jury on one count of murder in the first degree, one count of assault in the first degree, one count of robbery in the first degree, and three associated counts of armed criminal action. Muldrew raises two points on appeal. Muldrew first argues the trial court violated his right against double jeopardy by entering separate convictions on both first-degree murder and first-degree assault because Muldrew’s multiple shooting of the victim was part of the same course of conduct, and therefore supports only the murder conviction. In his second point on appeal, Muldrew argues the trial court erred in admitting statements made to police after Muldrew had invoked his Miranda¹ right to silence. Because Muldrew had sufficient time to reconsider his

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

actions after he first wounded the victim by shooting him and before he later killed the victim by firing the second fatal shot, his convictions on both assault and murder do not constitute double jeopardy. Because Muldrew did not clearly and unambiguously invoke his right to silence, his Miranda rights were not violated. Accordingly, we affirm the judgment of the trial court.

Factual and Procedural History

The basic facts relevant to this appeal concerning the underlying crimes are not contested. Muldrew entered a convenience store armed with a gun. Once only Muldrew and the cashier (“Victim”) were in the store, Muldrew shot Victim three times. Victim fell to the floor. Muldrew then walked to the cash register and stole some money and lottery tickets. While behind the counter at the cash register, Muldrew sold a cigarillo to a woman who entered the store after he had shot Victim. When the woman left the store, Muldrew returned to the Victim, and shot Victim in the head using a gun Muldrew took from under the cash register.

Police arrested Muldrew when he reappeared outside the convenience store in the crowd that had gathered around the crime scene. Muldrew was taken into custody and questioned.

Muldrew signed a written Miranda waiver prior to questioning. Muldrew initially denied knowing about the robbery and murder at the convenience store, gave evasive answers about what happened, then asked the police officers if they had pictures of him at the store. Muldrew said that he would explain what happened if the police officers would show him a picture. When presented with a photograph from the store’s video surveillance, Muldrew admitted that it was him in the photograph holding a handgun because he wanted to rob Victim. Muldrew admitted he shot Victim and that, after shooting Victim, he went behind the counter and stepped over Victim to get to the register. Muldrew also admitted at some point that he took the gun that had been under the register and later put it in his house. Trying to obtain more details and put

together the order of events, the police officers asked Muldrew if their account was accurate. Muldrew tapped the photographs and said, “[t]hat’s what it is” and “[t]his is what it is, right here.” About twenty minutes into the interview, the police officers asked Muldrew if he wanted a jury to see the pictures or to explain what happened. The following exchange then took place:

Muldrew: Yeah. It is what it is, I ain’t going to say no more, man.²

Det. Raymond: That’s it? We’re done?

Muldrew: Yeah.

Det. Betts: You don’t have to. You don’t.

Muldrew: What do you want?

Det. Betts: You don’t have to say any—we didn’t even need to come in here and talk to you. We came in to talk to you to try to get your side of the story and try to understand it.

Muldrew: I’m going to jail.

Muldrew subsequently said he felt “real bad” because he was going to jail and because he took Victim’s life. Muldrew gave the police officers a more detailed version of the events. Muldrew said that Victim was still alive when Muldrew sold a customer cigarillos and that Victim pleaded for his life as a father of two children before Muldrew used Victim’s own gun to shoot him twice in the head at close range. Muldrew admitted he shot Victim in the head “because he was going to die anyway, and I wanted to make sure he was dead.” Muldrew explained that he shot Victim in the head so that he would not be caught.

The State charged Muldrew with first-degree murder, first-degree assault, first-degree robbery, and three counts of armed criminal action. At trial, the State played security footage of

² The statement may be alternatively be transcribed as, “It is what it is, I don’t gotta say no more, man.”

the shooting from the convenience store and introduced evidence recovered from the scene and Muldrew's home linking him to the offense. The State also introduced into evidence a video recording of Muldrew's police interrogation, with some audio deletions due to exclusionary rulings by the trial court. The jury found Muldrew guilty on all counts. The trial court sentenced Muldrew to concurrent prison terms of life without parole on first-degree murder, life imprisonment on first-degree assault and robbery, and thirty years on each armed criminal action. Muldrew preserved his claims on appeal in a motion for new trial.³ This appeal follows.

Points on Appeal

In Point One, Muldrew argues that his right to be free of double jeopardy was violated by the convictions for first-degree murder and first-degree assault because both convictions arose out of a single course of conduct. In Point Two, Muldrew claims the trial court erred in admitting statements made to police after Muldrew had invoked his right to silence, which

³ The State contends Muldrew failed to preserve the constitutional question in Point One by not raising it at the earliest opportunity in a pre-trial motion. Double jeopardy implicates constitutional rights and is a personal defense that must be preserved in a motion for new trial. Rule 29.11(d); State v. Barnes, 245 S.W.3d 885, 892 (Mo. App. E.D. 2008) (internal citation omitted). "Although constitutional issues must generally be raised at the earliest opportunity to be preserved for appellate review, the right to be free from double jeopardy is a constitutional right that 'goes to the very power of the State to bring the defendant into court to answer the charge brought against him.'" State v. Bazell, 497 S.W.3d 263, 266 (Mo. banc 2016) (per curiam) (quoting State v. Liberty, 370 S.W.3d 537, 546 (Mo. banc 2012)), *superseded by statute on other grounds*. Thus, when a defendant fails to preserve a claim of double jeopardy in a motion for new trial, a Missouri court may review the claim for plain error "when it can determine from the face of the record that the trial court had no power to enter the conviction." *Id.*; *see, e.g., State v. DeRoy*, 623 S.W.3d 778, 787 (Mo. App. E.D. 2021); State v. Wright, 608 S.W.3d 790, 793–94 (Mo. App. E.D. 2020). Here, we find Muldrew adequately preserved the point for review by raising the claim at the trial court during the jury instructions conference and again in his motion for new trial. *See Bazell*, 497 S.W.3d at 266. While the State maintains the earliest opportunity to challenge the charges was in a pre-trial motion, we decline to find that Muldrew waived his double-jeopardy claim by raising it during the jury instruction conference after the presentation of the evidence made clear the State was pursuing multiple offenses relating to a series of related events. Further, to the extent that we find Muldrew cannot prevail on de novo review, his claim would likewise fail under the plain-error standard requested by the State.

statements were used to support the finding he had deliberated for purposes of committing first-degree murder.

Standard of Review

We review allegations of double jeopardy violations de novo without deference to the trial court. State v. Garnett, 298 S.W.3d 919, 922 (Mo. App. E.D. 2009) (internal citation omitted). Similarly, while we review the suppression of evidence for clear error, whether a defendant's Miranda rights were violated is a question of law, which we review de novo. State v. Holman, 502 S.W.3d 621, 624 (Mo. banc 2016) (citing State v. Lammers, 479 S.W.3d 624, 630 (Mo. banc 2016)). Further, "[t]his Court will indulge every reasonable presumption against waiver of fundamental constitutional rights." State v. Rice, 573 S.W.3d 53, 66 (Mo. banc 2019) (internal quotation omitted). "A properly preserved federal constitutional error in a criminal trial does not require reversal and remand for a new trial if the reviewing court determines the error was harmless beyond a reasonable doubt." Id. at 66–67 (quoting State v. Minner, 256 S.W.3d 92, 96 (Mo. banc 2008)).

Discussion

I. Point One—Muldrew was Not Improperly Subjected to Double Jeopardy

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. Amend. V. This prohibition against double jeopardy "protects defendants not only from successive prosecutions for the same offense after either an acquittal or a conviction, but also from multiple punishments for the same offense." State v. Liberty, 370 S.W.3d 537, 546 (Mo. banc 2012) (internal citation omitted). "Typically, to determine whether multiple charges constitute the same offense, courts consider whether each offense necessitates proof of a fact

which the other does not.” Id. (internal quotation omitted). However, “when a defendant’s conduct is continuous, involves more than one item or involves more than one victim, the test more appropriately is focused on the conduct the legislature intended to proscribe under the statute.” Id. (internal citation omitted). “Double jeopardy analysis regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature.” Id. at 546–47 (internal quotation omitted).

“To determine whether the legislature intended multiple punishments, [we] look[] first to the ‘unit of prosecution’ allowed by the statutes under which the defendant was charged.” Id. at 547 (internal quotation omitted). “The scope of conduct comprising one violation of a criminal statute defines the unit of prosecution.” State v. Brandon, 523 S.W.3d 476, 480 (Mo. App. E.D. 2016). “We ascertain the allowable unit of prosecution first by looking to the statute under which the defendant was convicted, and if that statute is silent, then by looking to the general cumulative punishment statute, Section 556.041.”⁴ Id. (internal citation omitted).

We are guided in this appeal by very clear case law holding that “[i]n assault cases, separate offenses can arise from a single set of facts each time the defendant forms an intent to attack the victim.” Garnett, 298 S.W.3d at 923 (internal citation omitted). “Thus, when a defendant has time to reconsider his actions, each assault separated by time constitutes a separate offense.” Id. (internal quotation omitted). “Factors such as time, place of commission, and the defendant’s intent, as evidenced by his conduct and utterances determine whether separate offenses should result from a single incident.” Id. (internal citation omitted); see also Brandon, 523 S.W.3d at 481 (noting Missouri courts have found separate offenses generally where the

⁴ All Section references are to RSMo (Supp. 2014), unless otherwise indicated.

conduct at issue is “separated in time”); Miller v. State, 478 S.W.3d 530, 535–36 (Mo. App. E.D. 2015) (finding two separate offenses in a post-conviction case where the defendant first punched and kicked the victim, interrupted the assault to retrieve a chair from another room, and then returned to hit the victim with the chair); State v. Tyler, 196 S.W.3d 638, 641 (Mo. App. W.D. 2006) (finding five counts of domestic assault for separate acts involving different forms of violence in distinct phases, including where the defendant punched the victim in the face, left the room and retrieved scissors, then returned to assault the victim with the scissors and punch her in the chest); State v. Barber, 37 S.W.3d 400, 404 (Mo. App. E.D. 2001) (finding a defendant clearly had time to reconsider his actions although only a few seconds separated the events where he displayed a knife at two victims, lowered the knife and moved the fight to the bathroom, then raised the knife to one of the victims a second time).

Muldrew maintains that his convictions for both first-degree murder and first-degree assault violated his right to be free of double jeopardy. Specifically, Muldrew reasons that he could not be convicted of both crimes under the applicable “unit of prosecution” approach because his two shootings of Victim were part of a single course of conduct occurring at the same time. See Liberty, 370 S.W.3d at 547. Importantly, Muldrew acknowledges that a defendant having time to reconsider his or her action after the initial conduct has ended may lawfully be convicted of two offenses. See Garnett, 298 S.W.3d at 923.

We categorically reject Muldrew’s proposition that his two shooting episodes of Victim occurred at the same time. The record before us contains ample evidence that Muldrew had time to reconsider his actions after he first shot Victim. See id. Muldrew shot Victim a total of five times. However, Muldrew engaged in the shooting episodes in distinct phases. See Miller, 478 S.W.3d at 536. Muldrew first shot Victim three times with the gun Muldrew brought with him

to commit the robbery. The first shooting merely wounded Victim. Muldrew later shot Victim twice in the head with a gun he had taken from under the cash register. Having already accomplished his robbery, Muldrew shot Victim two times in the head for the distinct purpose of killing Victim. In between the two shootings, Muldrew had time to sell a cigarillo to a customer who had entered the store, an action entirely unrelated to the two shooting incidents. We find it reasonable that if Muldrew had time to sell the cigarillo to the customer and wait for the customer to exit the store before he shot Victim twice in the head, Muldrew had the requisite time to reconsider his actions. See Garnett, 298 S.W.3d at 923. Put in the opposite light, we reject Muldrew’s argument that he could not have reconsidered his actions and course of conduct during that approximately fifteen-minute window of time. The record before us reveals the absolute lack of merit to Muldrew’s argument. Whether or not Muldrew reconsidered his actions after first shooting Victim is not the test for analyzing the double jeopardy implications of the separate charges for assault and murder. Our analysis is guided by evidence of whether Muldrew *could have* reconsidered his conduct, not whether he factually did so. See id.

Because the legislature intended multiple punishments to be allowed under the facts of this case, Muldrew’s right to be free of double jeopardy was not violated. See Liberty, 370 S.W.3d at 546–47; Garnett, 298 S.W.3d at 923. Accordingly, the trial court appropriately and lawfully entered judgment on both the counts of first-degree murder and first-degree assault. See id. at 922. Point One is denied.

II. Point Two—Muldrew’s Right to Silence was Not Violated

“Miranda rights inform a criminal defendant of his constitutional rights during the interrogation process.” Holman, 502 S.W.3d at 624 (quoting State v. Collings, 450 S.W.3d 741, 753 (Mo. banc 2014)). “Once a suspect is given Miranda warnings, and if that suspect ‘indicates

in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease.” Id. at 625 (alteration in original) (quoting Miranda, 384 U.S. at 473–74). “The accused’s Fifth Amendment right to cease police questioning ‘must be scrupulously honored.’” Rice, 573 S.W.3d at 67 (quoting State v. Simmons, 944 S.W.2d 165, 173 (Mo. banc 1997)).

To invoke the right to silence against self-incrimination, the defendant “must give a clear, consistent expression of a desire to remain silent.” Id. (quoting Simmons, 944 S.W.2d at 173–74). “A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent.” State v. Wolf, 91 S.W.3d 636, 643 (Mo. App. W.D. 2002) (internal quotation omitted). “If the invocation is ambiguous or equivocal, the police are not required to end the interrogation and are not required to ask questions to clarify whether the accused is invoking his right to silence.” Rice, 573 S.W.3d at 67 (internal citation omitted).

We consider the full context of a particular statement in order to determine whether a defendant clearly and unambiguously invoked his right to silence. State v. O’Neal, 392 S.W.3d 556, 569 (Mo. App. W.D. 2013) (citing State v. Clemons, 946 S.W.2d 206, 219 (Mo. banc 1997)); see also State v. Howland, 576 S.W.3d 619, 623 (Mo. App. S.D. 2019) (internal quotation omitted) (“To determine whether an individual has unambiguously invoked his right to remain silent, the individual’s statements are viewed in their entirety.”); Wolf, 91 S.W.3d at 643 (internal citation omitted) (“We consider the defendant’s statements as a whole in determining whether they indicate an unequivocal decision to invoke the right to remain silent.”). However, we will not use a defendant’s statements *after* his invocation of his right to remain silent as a way to cast retrospective doubt on the clarity of the initial request. O’Neal, 392 S.W.3d at 569,

571 (holding the defendant's isolated statement in his third interview that "I still don't feel like talking" did not clearly and unambiguously invoke his right to remain silent in the context where the defendant had indicated he was willing to talk to clear up inconsistencies between his own account of the events and that of the police officers and added the qualifying "but, [I] feel terrible"). Additionally, a defendant does not clearly and unambiguously invoke his right to silence when he agrees to speak with police officers in exchange for certain assurances.

Howland, 576 S.W.3d at 624.

Here, there is no dispute that Muldrew was read his Miranda rights prior to questioning, that he initially waived his right to remain silent, and that he agreed to speak with the police officers. Muldrew maintains he clearly and unequivocally invoked his right to silence when he told the police officers, "Yeah. It is what it is, I ain't going to say no more, man." The State challenges this contention by highlighting the fact that for twenty minutes before making that statement Muldrew had been giving the police officers evasive answers with similar phrasing regarding the photographic evidence showing him at the convenience store with a gun. Specifically, when the police officers asked Muldrew for additional details about what was depicted in the photographs, such as what led to him to shoot Victim in the head and putting the gun he took from the cash register in his house before returning to the scene of the shooting, Muldrew had noted he was going to jail and responded "[t]hat's what it is" and "[t]his is what it is, right here." Thus, when placed in context, Muldrew's statement that "It is what it is, I ain't going to say no more" was entirely consistent with his prior statements indicating he had nothing further to say to explain the details depicted in the photographs rather than indicating Muldrew no longer wanted to speak with the police officers.

Our review of the facts and the video of Muldrew’s questioning supports finding Muldrew’s isolated statement that “It is what it is, I ain’t going to say no more” did not clearly and unambiguously invoke his right to silence. See Rice, 573 S.W.3d at 67 (internal citation omitted); O’Neal, 392 S.W.3d at 569 (citing Clemons, 946 S.W.2d at 219). While Muldrew was initially reticent to speak with the police, he agreed to talk with them if they showed him photos showing his involvement. See Howland, 576 S.W.3d at 624. The police officers then showed Muldrew the photographs from the convenience store surveillance video and asked Muldrew to explain the events depicted therein. Prior to the statement now at issue on appeal, Muldrew had been pointing to the photographs of him aiming a gun at Victim and of Victim having been shot, saying “[t]hat’s what it is” and “[t]his is what it is, right here,” indicating the pictures spoke for themselves and that he was going to jail whether or not he provided any other details or explanations. Muldrew was tapping and pushing away the photographs when he made the statement he now claims constituted an unequivocal assertion of his desire to end the police officers’ questioning. We find the facts presented here distinguishable from Rice, in which the defendant said near the outset of a hospital interrogation that he “[did not] wanna talk no more.” See Rice, 573 S.W.3d at 68. The facts of Rice presented a clear and unequivocal invocation of the defendant’s right to silence where the defendant, who was in physical pain, did not want to speak with police officers. See id. In contrast, the facts of this case more closely resemble those in Wolf. In Wolf, the defendant’s expression “that’s my final statement” was held to be ambiguous in the context of the questioning because “while it is arguable that it could have been read as evincing an intent by the appellant to cut off all questioning . . . , it could just as easily have been understood by a reasonable law enforcement officer, under the existing circumstances, as indicating that the appellant would not change his statement that he did not kill his

grandmother.” See Wolf, 91 S.W.3d at 644. Here, Muldrew’s expression was equally ambiguous as to whether he wanted to invoke his right to remain silent or simply had nothing further to say about the photographs, which the police officers indicated they would show to a jury with or without his explanation of the events. We are not persuaded that Muldrew clearly and unambiguously invoked his right to silence. See Rice, 573 S.W.3d at 67 (internal citation omitted). Accordingly, the trial court did not err in overruling Muldrew’s motion to suppress. See Holman, 502 S.W.3d at 624 (citing Lammers, 479 S.W.3d at 630). Point Two is denied.

Conclusion

The judgment of the trial court is affirmed.


KURT S. ODENWALD, Judge

Sherri B. Sullivan, C.J., concurs.
Kelly C. Broniec, J., concurs.