IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA ETHAN AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70991

FILED

JUN 29 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Joshua Ethan Aguilar appeals from a judgment of conviction for battery with a deadly weapon causing substantial bodily harm and assault with a deadly weapon. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.[1]

Aguilar argues that the district court committed three errors. First, he alleges that the court erred in denying his motion to suppress certain statements made during a recorded police interrogation despite his alleged invocation of his right to remain silent. Second, he alleges that the district court erroneously admitted a tape recording in which Aguilar's girlfriend stated that she learned that Aguilar committed the crime. Third, he contends that the district court erred by failing to grant a mistrial for a related reason.[2]

As to the first issue, the parties agree that, after Aguilar was arrested, he was read his *Miranda*[3] rights and then interrogated about the

[1]We note that although Judge Polaha signed the Judgment of Conviction, Judge Lidia Stiglich presided over the matter until May 16, 2016 and Judge Patrick Flanagan presided over the remainder of the trial.

[2]We do not recount the facts except as necessary to this disposition.

[3]*Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

crime. He contends, however, that he quickly invoked his right to remain silent but the police continued to question him nonetheless, eventually resulting in him making statements that were used against him at trial.

After a suspect has been taken into custody and *Mirandized*, and "shows that she intends to exercise her Fifth Amendment privilege by expressing her right to remain silent, any statement taken after that point cannot be used against the suspect, unless she freely and voluntarily waives that right." *Dewey v. State*, 123 Nev. 483, 489–90, 169 P.3d 1149, 1153 (2007) (citing *Miranda*, 384 U.S. at 478; *Michigan v. Mosley*, 423 U.S. 96, 103–06 (1975)). In order for a suspect to invoke his right to silence, he must do so "unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)).

When we review a ruling on a motion to suppress, "we review the district court's legal conclusions de novo and its factual findings for clear error." *Lamb v. State*, 127 Nev. 26, 31, 251 P.3d 700, 703 (2011). This court "will not disturb a district court's determination of whether a defendant invoked his right to remain silent if that decision is supported by substantial evidence." *Maestas v. State*, 128 Nev. 124, 144-45, 275 P.3d 74, 87–88 (2012). Here, during the suppression hearing, the district court heard testimony from one of the police officers who conducted the interrogation and also listened to the recording of the interrogation itself before determining that Aguilar did not unambiguously invoke his right to remain silent.

Aguilar challenges the district court's ruling on appeal, but notably has failed to provide us with a copy of the recording that the district court listened to. Furthermore, there appears to be no official or complete written transcript of the interrogation (if there was one, it has not been provided to us and all we have are a few selected quotes drafted

by the prosecutor). Without the recording itself, we cannot conclude that the district court committed error in interpreting its contents when the district court was able to hear the recording and we are not. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"); *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (it is the appellant's burden to make an adequate appellate record and this court "cannot properly consider matters not appearing in that record"). This is especially true in a case like this where the analysis can turn on a suspect's particular tone of voice, something that cannot be properly conveyed in a written transcript. *Cf. Hall v. Thomas*, 611 F.3d 1259, 1289 (11th Cir. 2010) (assessing the defendant's tone); *United States v. Wright*, 777 F.3d 769, 777 (5th Cir. 2015), *cert. denied*, 135 S. Ct. 2821 (2015) (considering the tone throughout the conversation). Therefore, we must presume that the district court's finding of equivocality was correct.

Turning to the second issue, Aguilar contends that the district court erred in allowing the jury to hear a taped statement in which his girlfriend admitted knowing that Aguilar committed the crime. Aguilar contends that this statement constituted inadmissible hearsay. However, his argument suffers from several flaws. As an initial matter, the recording was offered to impeach the girlfriend's trial testimony, not as substantive evidence. Moreover, Aguilar has failed to provide a copy of the recording, or a written transcript of it, for our review as part of the appellate record. Below, after Aguilar objected, the district judge stated that he listened to the recording twice outside the presence of the jury

before admitting it. The court found that the recording sounded like the girlfriend was stating what she personally saw. But the girlfriend then testified that she was just stating what she had heard from other people. This is a conflict that we cannot resolve without being able to review the recording that the district court reviewed, so we have no basis to conclude that the district court erred. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135; *Johnson*, 113 Nev. at 776, 942 P.2d at 170. Accordingly, we presume that the statement was admissible.

Furthermore, even if we were able to listen to the recording and were to decide that the district court clearly erred in its interpretation of the girlfriend's recorded statement, there may be several other ways the statement would still be admissible. From what we can glean based on indirect references to the recorded statement in the record, the girlfriend appears to claim to have overheard that Aguilar committed the crime, although the appellate record is totally unclear regarding from whom she heard it. But she was present at the scene of the crime along with Aguilar, and therefore the possibility exists that she may have heard it directly from Aguilar himself (in which case it would be admissible either as a statement against interest, NRS 51.345, or a statement by party-opponent, NRS 51.035(3)(a)), or that she heard someone else shout it as the crime happened (in which case it would be admissible as either an excited utterance, NRS 51.095, or present-sense-impression, NRS 51.085). Without being able to review the recording, and without further evidence in the record, we cannot exclude any of these possibilities and therefore cannot conclude that the district court—which did review the recording—committed any error.

Lastly, Aguilar argues that the district court abused its discretion by not granting a mistrial. A mistrial is an extreme remedy

that should be invoked only as a last resort. *Glover v. Eighth Judicial District Court*, 125 Nev. 691, 710, 220 P.3d 684, 697 (2009) (district court must consider, among other things, "the alternatives to a mistrial and choose the alternative least harmful"); *see also Renico v. Lett*, 559 U.S. 766, 774 (2010) ("'the power [to grant a mistrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes'") (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)); *United States v. Rullan-Rivera*, 60 F.3d 16, 18 (1st Cir. 1995) (granting a mistrial is "to be employed only if the demonstrated harm can be cured by no less drastic means"). Here, we conclude that the decision to deny a mistrial was well within the district court's discretion where the district court committed no error in admitting the evidence.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Department 8, Second Judicial District Court
Hon. Patrick Flanagan, Chief Judge, Second Judicial District Court
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk