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**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION FOURTEEN**

STATE OF KANSAS,)
Plaintiff,)
vs.)
STEPHANIE ANN MENARD,)
Defendant.)
_____)

Case No. 09CR 2360

MEMORANDUM DECISION AND ORDER
State's Motion for Jackson v. Denno Hearing
Defendant's Motion to Suppress Statement
Defendant's Motion in Limine

The State filed a motion for a *Jackson v. Denno* hearing on February 18, 2010. Defendant filed a Motion to Suppress Statement and a Motion in Limine on February 19, 2010. The court held a hearing on the motions February 24, 2010. At the hearing, both counsel stipulated to the admission of the video of the October 25, 2009 interview with the defendant. The court, having reviewed the video and the briefs of both counsel and having heard the arguments of counsel on February 24, 2010, is now ready to issue a ruling on the motions.

Motion to Suppress/Jackson v. Denno

Stephanie Menard was interviewed first by Detective Kiley Rice and then by Detective Brett Butell on October 25, 2009. Detective Rice began the interview by

indicating to Ms. Menard that at first they needed to speak with her "more as a witness" but that he had just been told something "so the stakes just got raised." Detective Rice then administered the Miranda warning to Ms. Menard. While Ms. Menard did not explicitly state that she was waiving her Miranda rights, she did speak with Detective Rice. She denied involvement in the events related to the death of Gerald Eberhardt.

Subsequently, Detective Rice left the interview room and later Detective Butell entered. The entirety of Detective Butell's interview of Ms. Menard is as follows:

Butell: "Okay Stephanie, your story and Melissa's story and Kala's story are not matching up."

STEPHANIE: "Well . . . I don't know what to tell you, I told you my story and I ain't talking to anyone . . . so . . ."

Butell: "Okay."

STEPHANIE: "Am I being arrested?"

Butell: "We haven't determined that yet, so"

STEPHANIE: "Well, what would I be arrested for?"

Butell: "Conspiracy to commit murder . . ."

STEPHANIE: "Okay, but, what's that got to do with me?"

Butell (Finishing his statement): "First Degree Murder."

STEPHANIE: "I wasn't there . . ."

Butell: "Everyone else says you knew about it."

STEPHANIE: "I don't know . . . No I didn't. So you are going to go by what everyone else is telling you just because they want someone to go down? I'm not talking, Dude! No."

Butell: "Okay."

STEPHANIE: "If you're not going to arrest me than can I leave?"

Butell: "Nope."

STEPHANIE: "How is that?"

Butell (as he is leaving the room): "You're being detained."

Detective Rice reentered the interrogation room approximately seven minutes later.

He brought with him Kala Kuck and he said the following:

“You’re both in here so I only have to say this one time. (To Kala Kuck:) Have a seat. One or both of you know more than you are telling me. Alright . . . and you’re going to have your opportunity to tell me and it’d be a lot better if you came forward before I have to go the other route . . . Scottie’s mom’s talking . . . And I ain’t playing anymore . . . Scottie shot him last night . . . your car was there and somebody drove him out there. . . after midnight. You all better figure it out cause I’ll break Scottie and Scottie’s gonna talk . . . And it’d be a lot better if I hear it from you all who the hell drove him out there and what’s going on . . . **you want an attorney that’s fine . . . that’s your right as an American citizen but neither one of you are going anywhere til I find out what’s going on.** (He gestured to Kala Kuck for her to leave:) Come on.” (Emphasis added.)

He then left the room with Ms. Kuck.

Detective Rice again reentered the interrogation room approximately seven or eight minutes later and said to Ms. Menard, “Do you want an attorney or does it behoove you to talk with me?” Ms. Menard answered, “What good would it do?” Detective Rice then continues to speak with her ultimately extracting a confession from her.

Conclusions of Law

The 5th Amendment of the United States Constitution states:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” (Emphasis added.)

U.S. Const. Amend. V.

In the seminal case, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) the

United States Supreme Court ruled as follows:

“[w]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda, 384 U.S. at 478; 86 S.Ct. at 1630.

In the present case Ms. Menard did receive Miranda warnings and although she did not specifically indicate that she understood her rights and wished to waive them, she did initially answer Detective Rice's questions.

Several minutes after Detective Rice left the interrogation room, Detective Butell entered the interrogation room and attempted to resume the questioning. Ms. Menard informed Detective Butell that she had told her story and that she wasn't talking to anyone. Detective Butell ceased the questioning but did respond to questions from Ms. Menard as to whether she was being arrested and if arrested, what she would be arrested for. He informed

her that the arrest would be for conspiracy to commit first degree murder. Ms. Menard said "I'm not talking, Dude" and asked "if you're not going to arrest me, can I leave?" Butell tells her no and that she is being detained and leaves the room.

The State argues in its response to the defendant's motion to suppress that there is no obligation to stop questioning if the suspect's statement is ambiguous, citing *State v. Holmes*, 278 Kan. 603, 102 P.3d 406 (2004) and *State v. Donesay*, 265 Kan. 60, 959 P.2d 862 (1998). *Holmes* can be distinguished from the present case. Holmes signed a Miranda waiver while Ms. Menard never explicitly waived Miranda rights either verbally or in writing. She did, however, begin to answer questions. More importantly, Holmes was ambiguous when he said, "I think I'll just quit talking," because he added the phrase, "I don't know."

"A suspect must unambiguously request counsel so that a reasonable police officer in those circumstances would understand the statement to be a request for an attorney. *State v. Ninci*, 262 Kan. 21, 41, 936 P.2d 1364 (1997). The same rule applies to the right to remain silent. *State v. Donesay*, 260 Kan. at 73. When a suspect makes a statement which might be ambiguous as to whether the suspect is asserting a right to remain silent or to confer with counsel, the interrogator may ask questions to clarify, but the interrogator is not required to clarify and may continue the questioning. *State v. Speed*, 265 Kan. 26, 37-38, 961 P. 2d 13 (1998).

State v. Holmes, 278 Kan. at 618.

However, the two statements made by Ms. Menard that she wasn't talking to anyone were not equivocal or ambiguous. While Ms. Menard did use the phrase "I don't know," the phrase was used prior to Ms. Menard saying "I'm not talking, Dude. No." In addition, Ms. Menard did not initiate further communication with officers other than a request to leave.

Likewise, the present case can be distinguished from *Donesay*. The trial judge found that *Donesay*'s statement was not ambiguous. Instead, the judge found that *Donesay* initially was willing to talk but was tired and didn't want to talk at that time. Later the judge found that he was willing to talk about something other than the shooting.

Neither of those fact situations occurred with Ms. Menard. She clearly invoked her right to remain silent in her conversation with Detective Butell and Detective Butell honored her invocation of that right by ceasing his questioning and leaving the room.

However, Detective Rice was not finished with Ms. Menard. Detective Rice came back into the interrogation room with Kala Kuck and lectured Ms. Kuck and Ms. Menard that this was their opportunity to tell him what happened and that he wasn't playing with them anymore. He told them that they have a right to an attorney but threatened them that neither of them will be going anywhere until he finds out what's going on.

Even if Ms. Menard's statement would have been ambiguous and the officers either asked questions to clarify her statement or just continued questioning, the court would not have found any subsequent statement to be voluntary. Ms. Menard was concerned about being detained. She already had asked Detective Butell about whether she was being arrested and whether she could leave. When Detective Rice entered the room the second time, he clearly appeared to be frustrated with the two young women's failure to tell him what happened. His voice was raised when he told them that "neither one of you are going anywhere 'til I find out what's going." At that point Ms. Menard had been in an interrogation room for a little over an hour.

The court finds that the initial statement that Ms. Menard made to Detective Rice was voluntarily made after she was given Miranda warnings. However, this court finds that Ms. Menard unambiguously invoked her right to remain silent when she spoke with Detective Butell. Questioning should have ceased at that time. In addition, the court finds that her later statement to Detective Rice was not voluntarily made due to Detective Rice's threat of continued detention if she did not talk. Under either analysis, the court finds that the later statements Ms. Menard made to Detective Rice were not voluntarily made and are not admissible. The court grants defendant's motion to suppress as to any statements made after Ms. Menard invoked her right to remain silent while speaking to Detective Butell.

Defendant's Motion in Limine

Defendant first argues in her motion that the State should be prohibited from presenting any statements from any witnesses who do not testify at trial. The State counters that statements of co-conspirators are admissible at trial as an exception to the hearsay rule.

K.S.A. 60-460 states in relevant part at subsection (i)(2):

“Evidence of a statement which is made other than by a witness testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:

....
“(i) *Vicarious admissions*. As against a party, a statement which would be admissible if made by the declarant at the hearing if . . . (2) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination.”

The State cites the case *State v. Sharp*, 289 Kan. 72, 210 P.3d 590 (2009) for authority. *Sharp* overrules prior cases which required as one of the prerequisites for

admission of a co-conspirators' statement that the statement of the co-conspirator had to have been made outside the presence of the accused. See *State v. Bird*, 238 Kan. 160, 175-76, 708 P.2d 946 (1985) and *State v. Roberts*, 223 Kan. 49, 574 P.2d 164 (1977) for the prior cases overruled by *Sharp*. However, *Sharp* does not stand for the proposition that all statements of co-conspirators are admissible.

The difficulty with motions in limine is that the context in which a statement would be offered is generally not available at the time the motion is heard. In this case the court has not been provided with the context in which a co-conspirator's statement would be offered.

If the State plans to offer an alleged co-conspirator's statement or confession through the testimony of a law enforcement officer, then the Confrontation Clause comes into play. Under *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed. 2d 177, 124 Supreme Court 1354 (2004) the first step is to determine if the statement is testimonial.

Testimonial statements include, at a minimum, 'prior testimony at a preliminary hearing, before a grand jury, or at a former trial . . . **and to police interrogations.**' 541 U.S. at 68. If the statement is testimonial, it may only be admitted if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. 541 U.S. at 59, 68. If the statement is not testimonial, the *Crawford* court stated that it is wholly consistent with the Confrontation Clause to analyze the issue based on the applicable hearsay law. 541 U.S. at 68." (Emphasis added.)

State v. Jackson, 280 Kan. 16, 35, 118 P.3d 1238 (2006).

The State indicated at the motion hearing that the video of Scott Mosher's statement to law enforcement officers would not be offered. The State, however, contended that the "contents of the tape" were admissible. This court disagrees with the State on that issue. Any statement that any of the co-defendants made to law enforcement officers would be

testimonial under *Crawford* and therefore would not be admissible unless the declarant was unavailable and the defendant had had a prior opportunity to cross-examine the declarant.

A co-conspirator's statement which is relevant to the alleged plan or its subject matter and made **while the conspiracy was in progress**, would be admissible under *Crawford* as long as it fits within the Kansas hearsay exception. For example, one of the alleged co-conspirators could testify about what another alleged co-conspirator said while the conspiracy was in progress, if the statement was relevant to the plan or its subject matter. That situation occurred in *Sharp*. Cornell testified in Ms. Sharp's trial about what Mr. Hollingsworth said while the conspiracy was in progress. Cornell was available to be cross-examined about the context in which the statement was made as well as the demeanor of the declarant.

This court cannot grant item number one in defendant's motion in limine as it is currently worded, because it would prohibit the admission of a co-conspirator's statement in a situation similar to the example from *Sharp* set out above. The court, however, will insure that defendant's rights of confrontation under the Constitution are not violated.

The second issue in defendant's motion in limine will be reserved by the court. The issue is premature until the court is presented with the photographs that the State plans to offer into evidence. It may be that this issue can be resolved by agreement between the State and defense counsel, but if that is not possible, the court will hold a hearing where the photographs can be presented and counsel can make their arguments.


The third item in the motion in limine was the defendant's request to prohibit the State from presenting evidence of the relationship between Scott Mosher, Michelle Eberhardt, and Gerald Eberhardt. The State did not object to that request as long as it applied to both the State and the defendant. The court granted the motion in limine which prohibits presentation of evidence of a prior relationship between the deceased, Michelle Eberhardt, and Scott Mosher and applies it to both the State and the defendant.

The final issue raised in defendant's motion in limine was defendant's request that the State be prohibited from presenting evidence of a prior attempt on Gerald Eberhardt's life by Michelle Eberhardt, Scott Mosher, and Carl "James" Baldwin. The defendant argues that such evidence is not relevant in the trial of Stephanie Menard. Without knowing the context in which this information would be presented, the court is going to reserve this issue as well.

The above is the court's ruling on the Defendant's Motion to Suppress and a partial ruling on Defendant's Motion in Limine. No further journal entry is required.

IT IS SO ORDERED.

Dated this 12th day of March, 2010.



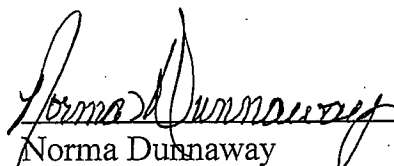
Nancy Parrish
District Judge, Third Judicial District
Division 14

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in pick-up bin this 12th day of March, 2010, to the following:

Jacqie Spradling
Assistant District Attorney
Shawnee County Courthouse
Topeka, KS 66603

Timothy Keck
640 Crest
Topeka, KS 66606



Norma Dunnaway
Administrative Assistant