

IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL ZEPEDA A/K/A MANUEL
ESPINOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49115

FILED

JUN 09 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a minor under the age of fourteen years, six counts of sexual assault of a minor under the age of sixteen years, and four counts of lewdness with a child under the age of fourteen years. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. On March 6, 2007, the district court sentenced appellant Manuel Zepeda to serve twelve concurrent terms of life in prison with the possibility of parole.

Zepeda raises two issues on appeal. First, he contends that the prosecutor improperly questioned him regarding possible burglaries or robberies that had occurred at his place of employment. Zepeda characterizes the questioning as the improper introduction of prior bad acts. In particular, Zepeda claims he was unfairly prejudiced by two questions posed during cross-examination.

The first claimed error was when the prosecutor inquired:

MR. CARROLL (prosecutor): You thought you were going to be questioned about a crime that happened at a company you worked for, correct?

MR. ZEPEDA: Yes.

Zepeda failed to object to this question. Failure to object at the trial court level precludes appellate consideration of an issue, unless the defendant demonstrates plain error affecting his substantial rights.¹ “In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice.”²

Here, the prosecutor's question did not name the crime that had occurred, nor did it necessarily infer that Zepeda was a suspect in that crime. Zepeda had already testified on direct examination that he had appeared at the police station voluntarily to speak with a detective about “something else, not for [the sexual assault].” Therefore, we conclude that Zepeda has not demonstrated plain error with respect to the first challenged question.

The second question that Zepeda claims was prejudicial occurred later:

MR. CARROLL (prosecutor): In addition to asking you those questions, isn't it true the detectives

¹Flores v. State, 121 Nev. 706, 120 P.3d 1170, 1180-81 (2005).

²Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal citations and quotations omitted).

also asked you a whole series of questions about some type of burglaries that had happened at your company?

MR. BUCHANAN (defense counsel): To which I'm going to object.

THE COURT: Excuse me. Approach the bench.

(sidebar conference outside the presence of the court reporter and jury)

THE COURT: Sustained. The jury is ordered to disregard it.

Zepeda claims that this questioning was an improper and prejudicial introduction of prior bad act evidence. Immediately after counsel objected to this questioning, the district judge admonished the jury to disregard it. "There is a presumption that jurors follow jury instructions."³ Moreover, Zepeda mentioned a possible "robbery" before the State inquired about the burglaries. Specifically, during cross-examination when questioned "why did you think you were going to the police station that day," Zepeda answered "due to a robbery that occurred in the company where I worked." Even assuming that any error occurred, we conclude that the prosecutor's question was not so prejudicial as to warrant reversal of Zepeda's conviction in light of the evidence presented of Zepeda's guilt, including his confession.

³Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997), clarified on other grounds, 114 Nev. 221, 954 P.2d 744 (1998); see also Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980) (holding that any indication of defendant's previous criminal activity based on witness's testimony was cured by trial court's immediate admonition to jury).

Zepeda also complains that the district court erred in failing to hold a Petrocelli⁴ hearing. We disagree. The district court sustained defense counsel's objection, the evidence was not admitted, and the jury was admonished to disregard any reference to burglaries. And again, the challenged exchanges did not directly implicate Zepeda in any uncharged burglary. Therefore, we conclude that no relief is warranted in this regard.

Second, Zepeda asserts that the district court erred in denying his motion to suppress. In particular, he contends that because of the language barrier and his lack of familiarity with the American justice system he did not believe that he was free to leave during questioning and his confession was the product of a custodial interrogation. Because he was not read his Miranda⁵ rights until halfway through the interview, he contends that the first part of the interview should have been suppressed. He also argues that his lack of education and experience rendered him unable to intelligently, knowingly, and voluntarily waive his Miranda rights and the second part of the interview should likewise be suppressed as an involuntary confession. Finally, Zepeda asserts that the police interrogators violated his Fifth Amendment right to counsel.

A review of a district court's "in custody" determination involves a two-step analysis.⁶ The district court's historical factual

⁴Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

⁵Miranda v. Arizona, 384 U.S. 436 (1966).

⁶Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

findings are entitled to deference and will be reviewed for clear error. However, the district court's ultimate determination of custody status and determination of whether a statement was voluntary will be reviewed de novo.⁷ In determining whether Zepeda was subject to custodial interrogation, the district court must look at "all of the circumstances surrounding the interrogation."⁸ We have previously listed "several factors pertinent to the objective custody determination: (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning."⁹ Objective indicia of arrest include:

- (1) whether the suspect was told that the questioning was voluntary or that he was free to leave;
- (2) whether the suspect was not formally under arrest;
- (3) whether the suspect could move about freely during questioning;
- (4) whether the suspect voluntarily responded to questions;
- (5) whether the atmosphere of questioning was police-dominated;
- (6) whether the police used strong-arm tactics or deception during questioning; and
- (7) whether the police arrested the suspect at the termination of questioning.¹⁰

⁷Id.

⁸Id. at 191, 111 P.3d at 695 (quoting Stansbury v. California, 511 U.S. 318, 322 (1994)).

⁹Id. at 192, 111 P.3d at 695 (quoting Alward v. State, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996)).

¹⁰State v. Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1 (1998).

A suspect is considered "in custody" if he is formally arrested or if his freedom of movement has been restrained to the degree associated with a formal arrest so that a reasonable person would not feel free to leave.¹¹ A suspect's or the police's subjective view of the circumstances does not determine whether the suspect was, in fact, in custody.¹² Just because questioning takes place at the police station does not automatically mean that the suspect is in custody, especially when he voluntarily appeared at the station.¹³

We conclude that based on the totality of the circumstances, Zepeda was not subject to custodial interrogation and therefore the police officers were not required to read Zepeda his Miranda¹⁴ rights at the beginning of the interview. Zepeda drove his own car to the police station and met three officers in the lobby of the building. He was directed to an interview room by the officers and was told that he was free to leave at any time. An officer in plain clothes conducted the relatively short interview in Spanish, which was Zepeda's native language. Zepeda's background and education are not factors for consideration in this regard, as Zepeda's subjective view of the circumstances is not determinative of

¹¹Id. at 1071, 968 P.2d at 923.

¹²Id.

¹³Silva v. State, 113 Nev. 1365, 1370, 951 P.2d 591, 594 (1997) (citing California v. Beheler, 463 U.S. 1121, 1123, 1125 (1983)).

¹⁴Miranda v. Arizona, 384 U.S. 436 (1966).

custody status. The objective indicia of arrest indicate that Zepeda's interrogation was noncustodial.

Next, Zepeda argues that his confession was not voluntary. "Unlike the objective custody analysis, the voluntariness analysis involves a subjective element as it logically depends on the accused's characteristics."¹⁵ The relevant factors to consider include: (1) the youth of the accused, (2) the accused's lack of education or low intelligence, (3) the lack of advisement of constitutional rights, (4) the length of detention, (5) whether the questioning was repeated or prolonged, and (6) the use of physical punishment.¹⁶

Zepeda was 32 years old at the time of the interview. He asserts that he is "uneducated," but does not state precisely at what point he terminated his formal education. Nothing in the record indicates that he is unintelligent or suffers from mental impairment. As stated above, the interview was conducted in his native language. He confessed twice, once before being read his Miranda rights, and once after being read his rights. And he was not in custody when he made his statement. The interrogation was relatively short, and Zepeda was not subjected to any form of physical punishment. Therefore, we conclude that Zepeda's pre-arrest statements to police were given voluntarily.

Zepeda's final contention is that the officer conducting the interview "used words" to make sure he did not get an attorney in

¹⁵Rosky, 121 Nev. at 193, 111 P.3d at 696.

¹⁶Id. at 193-94, 111 P.3d at 696.

violation of his Fifth Amendment right to counsel. In Davis v. United States, the United States Supreme Court held that law enforcement officers need not cease questioning a suspect after an ambiguous or equivocal reference to an attorney when “a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel.”¹⁷ After admitting to having sexual relations with the victim, Zepeda hesitantly asked if someone might recommend an attorney. His exact words were:

ZEPEDA: If you can recommend an attorney or something, but.

DETECTIVE SOLORIO: A what?

ZEPEDA: A lawyer or something, I don't know.

DETECTIVE SOLORIO: Are you telling me that you want a lawyer?

ZEPEDA: No, you tell me. I don't know how . . .

Pursuant to Davis, the detective attempted to clarify whether Zepeda was asking for an attorney.¹⁸ The officer conducting the interview then informed Zepeda that if he wanted a lawyer the interview would be over and it would not cost him anything. Next, the detective turned to the other two officers present and stated, in English, that he was ending the interview because Zepeda was not sure whether he wanted an attorney. Zepeda then stated, “I am not living well anyway, I know what I've done,” and asked the officer to continue the interview. The officer inquired twice

¹⁷512 U.S. 452, 458-60 (1994).

¹⁸See id. at 461.

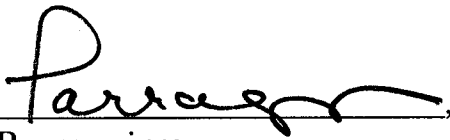
more if Zepeda wanted to continue the interview and Zepeda answered affirmatively. Zepeda was then read his Miranda rights and repeated his confession.

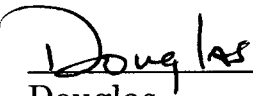
The interview transcript does not support Zepeda's contention that his confession was the result of manipulation that violated his Fifth Amendment right to counsel. Despite the fact that Zepeda did not unequivocally invoke the right to counsel, the investigating detective had begun terminating the interview when Zepeda first mentioned anything about counsel. Only after Zepeda expressed that his conscience was weighing on him, asked the officers to continue the questioning, and had his Miranda rights explained to him, did the interview resume. We conclude that the district court did not err in denying Zepeda's motion to suppress.

Having considered Zepeda's arguments and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk