IN THE SUPREME COURT OF THE STATE OF NEVADA

EFRAIN CHAVARIN-ARREOLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49741

FILED

JUL 11 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 lewdness with a minor under the age of fourteen. Eighth Judicial District Court, Clark County; David Wall, Judge. The district court sentenced appellant Efrain Chavarin-Arreola to serve two consecutive prison terms of 24 to 84 months.

First, Chevarin-Arreola contends that the district court erred in denying his pretrial suppression motion. Specifically, Chevarin-Arreola contends that his confession was coerced during a polygraph examination in which he was not allowed to have family in the building, the examiner intimidated him by asking invalid control questions and threatened him, and he was not read his Miranda[1] rights. Further, Chevarin-Arreola argues that police officers implied that he would be given counseling if he

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

08-17705

confessed and "minimized" the offenses, and thus persuaded him to give a false confession.

A criminal defendant must be warned that he has the right to remain silent and to assistance of counsel before he can be subjected to custodial interrogation.[2] "Custody" is defined as "'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'"[3] Chevarin-Arreola had not been formally arrested when he made his statements. Accordingly, the pertinent inquiry "'is how a reasonable man in the suspect's position would have understood his situation.'"[4] We consider the totality of the circumstances in deciding whether Chevarin-Arreola was in custody; no single factor is dispositive.[5] Important considerations in determining whether one was in custody include the site of the interrogation, whether the investigation has focused on the subject, whether the objective indicia of arrest are present, and the length and

---

[2]Id. at 467-69; Holyfield v. State, 101 Nev. 793, 797, 711 P.2d 834, 836-37 (1985), abrogated in part on other grounds as recognized by Boehm v. State, 113 Nev. 910, 913 n.1, 944 P.2d 269, 271 n.1 (1997).

[3]Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251-52 (1996) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)), overruled in part on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005).

[4]Id. at 154, 912 P.2d at 252 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

[5]Id. (citing Beheler, 463 U.S. at 1125).

form of the questioning.[6] The objective indicia of arrest include whether the suspect was told the questioning was voluntary or that he was free to leave, whether the suspect was not formally under arrest, whether the suspect could move about freely during questioning, whether the suspect voluntarily responded to questions, whether the atmosphere of questioning was police-dominated, whether the police used strong-arm tactics or deception during questioning, and whether the police actually arrested the suspect at the termination of questioning.[7]

The district court concluded, and we agree, that Chevarin-Arreola was not in custody during the polygraph examination and during the follow-up interview. Chevarin-Arreola was told several times that he was free to leave and transported himself to the polygraph examination twelve days after his initial interview. Prior to taking the polygraph examination, Chevarin-Arreola signed a waiver that stated he was taking the test voluntarily and he understood he could refuse to answer any of the questions. Although Chevarin-Arreola was the focus of the investigation during the time of the polygraph, this focus was not the equivalent of "focus" for Miranda purposes.[8] Following the examination,

---

[6]Id. at 154-55, 912 P.2d at 252 (citing People v. Celaya, 236 Cal. Rptr. 489, 492 (Ct. App. 1987)).

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

[8]Beckwith v. U.S., 425 U.S. 341, 347 (1976) (defining "focus" as "'questioning initiated by law enforcement officers after a person has been

continued on next page . . .

Chaevarin-Arreola transported himself to the police department for a follow-up interview. Prior to the interview, he was apprised of his Miranda rights. The interview lasted 22-25 minutes. After giving an oral and written statement, Chevarin-Arreola left the police station. Accordingly, the district court did not err by denying Chevarin-Arreola's motion to suppress.

Second, Chevarin-Arreola contends that the district court erred by instructing the jury that the victim's testimony need not be corroborated, and that this instruction violated his constitutional and due process rights. Chevarin-Arreola argues that this instruction unfairly focuses the jury's attention on the victim's testimony because there is not an opposite instruction saying that Chevarin-Arreola's testimony did not need to be corroborated.

Initially, we note that Chevarin-Arreola did not object to the jury instruction below. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.[9] Generally, an appellant must show that he

---

. . . continued

taken into custody or otherwise deprived of his freedom of action in any significant way'" (quoting Miranda, 384 U.S. at 444)).

[9]See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

was prejudiced by a particular error in order to prove that it affected his substantial rights.[10]

This court has unequivocally stated that "it is appropriate for the district court to instruct the jurors that it is sufficient to base their decision on the alleged victim's uncorroborated testimony as long as the testimony establishes all of the material elements of the crime."[11] "A 'no corroboration' instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law."[12] The instruction given by the district court was a correct statement of Nevada law. Accordingly, the district court did not err in giving the instruction. Thus, Chevarin-Arreola failed to show any error that affected his substantial rights.

Third, Chevarin-Arreola contends that the use of the word "victim" to describe the complainant presupposes that a crime has been committed. Chevarin-Arreola argues that whether or not there is a "victim" is a material fact that the jury should decide, and not a fact supported by the power of the court.

We note that Chevarin-Arreola did not object to the use of the word "victim" below. Assuming without deciding that it was error to refer

---

[10]Id.

[11]Gaxiola v. State, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005).

[12]Id. at 648, 119 P.3d at 1232.

to the complainant as a "victim," Chevarin-Arreola failed to demonstrate that he was prejudiced by the use of the word "victim" such that it affected his substantial rights.

Fourth, Chevarin-Arreola contends that the district court erred by not declaring a mistrial sua sponte for prosecutorial misconduct when the prosecutor commented on Chevarin-Arreola's right to remain silent. Specifically, the prosecutor stated: "Think about credibility, ladies and gentlemen. A defendant who takes the stand says one statement is complete lies. First time we hear that—I didn't hear that before until he took the stand. Detective Given didn't hear that."

Chevarin-Arreola's contention is not supported by the record because he never invoked his right to remain silent. The prosecutor's comment was merely a reference to credibility and inconsistencies between Chevarin-Arreola's previous statements and his testimony, which is permissible argument under Nevada law.[13] Further, defense counsel objected to the comment and the district court admonished the jury to disregard the remark with regard to what the prosecutor might have heard. Accordingly, the district court did not err in failing to declare a mistrial based on prosecutorial misconduct.

Fifth, Chevarin-Arreola contends that the district court erred by giving a constitutionally inadequate "presumption of innocence" jury

---

[13]See, e.g., Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990); Klein v. State, 105 Nev. 880, 883-84, 784 P.2d 970, 972-73 (1989).

instruction. Specifically, Chevarin-Arreola argues that the instruction should have stated that a defendant is presumed innocent "unless the contrary is proved," rather than "until the contrary is proved." Over trial counsel's objection, the district court determined that the instruction contained language as set forth in NRS 175.191.

Chevarin-Arreola did not demonstrate that the instruction is an incorrect statement of law.[14] Accordingly, the district court did not err by giving the presumption of innocence instruction.

Having considered Chevarin-Arreola's contentions and determined that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

---

[14]See NRS 175.191 ("A defendant in a criminal action is presumed to be innocent until the contrary is proved").

cc: Hon. David Wall, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk