

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMIAN MICHAEL GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57811

FILED

JUN 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malore*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of 11 counts of sexual assault of a minor under 14 years of age, 6 counts of lewdness with a child under 14 years of age, and 2 counts of child abuse and neglect. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Damian Michael Gonzales and his ex-wife had three children, daughters S.G. and K.G., and son D.G. One Sunday, while S.G. and K.G. were getting ready for their weekly visit to Gonzales' apartment, K.G. began to cry. Their mother asked what was wrong and both K.G. and S.G. told her that Gonzales had been inappropriately touching them. The mother reported this conversation to the police, and the girls were interviewed by two sexual assault detectives.

A week later, Gonzales agreed to talk to the police about K.G.'s and S.G.'s allegations. Gonzales and his girlfriend, Grace, drove to the police station. While Grace waited in the lobby, Gonzales was taken into an interview room, which had visible recording equipment, and police detectives placed a hand-held audio recorder on the table. The detectives interviewed Gonzales for about one hour; during the interview he

confessed to showing his daughters pornographic movies and sexually assaulting them. Gonzales was arrested, and Grace was allowed into the interview room to speak to him. After ushering Grace into the room, the detectives stepped just outside of the room but left the door open. The conversation between Gonzales and Grace was recorded by the equipment in the room. During this conversation, Gonzales made several inculpatory statements.

At trial, K.G. and S.G. testified that Gonzales had repeatedly sexually assaulted them. Among other things, they testified that Gonzales had sexual intercourse and performed cunnilingus on them several times. Gonzales was convicted and raises three matters on appeal.

First, Gonzales argues that there is insufficient evidence to sustain his convictions because K.G.'s and S.G.'s testimonies were inconsistent. We review sufficiency claims in the light most favorable to the prosecution. Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). While the defense did illuminate several inconsistencies in their testimony, it is the jury's duty to determine the credibility and weight of conflicting testimony. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Based on the victims' testimony and Gonzales' admissions to the police, as described above, we conclude that sufficient evidence exists to sustain his convictions.

Second, Gonzales argues that the district court abused its discretion by denying his motion to suppress his statements to the police because they were the product of custodial interrogation and were involuntary. We disagree. A district court's determinations of custodial interrogation and voluntariness requires a two-step analysis. Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). First, the district

court's purely factual findings are entitled to deference and will be reviewed for clear error. Id. Second, the district court's determination of custodial status and the voluntariness of the confession are reviewed de novo. Id.

Gonzales argues that his statements to the detectives involved custodial interrogation. Because Gonzales was not formally arrested, we must determine whether a reasonable person in Gonzales' position would feel free to end the interrogation and leave. Id. at 191, 111 P.3d at 695. While the detectives did not advise Gonzales of his Miranda¹ rights, we conclude that a reasonable person would not have believed that he was in custody. Gonzales drove himself to the interview. The detectives told him that he was not under arrest and did not have to answer questions and he could leave at any time. And the detectives did not arrest, restrain, or otherwise inhibit Gonzales' movement until after the interview. We conclude that the district court did not err by finding that there was no custodial interrogation. Silva v. State, 113 Nev. 1365, 1370-71, 951 P.2d 591, 594-95 (1997) (holding the suspect was not in custody when he was told he was not under arrest and he went voluntarily to the police station); see also Rosky, 121 Nev. at 192-93, 111 P.3d at 695-96 (holding suspect was not in custody when police used mildly deceptive questioning, was told participation was voluntary, and was not restrained).

Gonzales' statements and the circumstances also clearly demonstrate that he understood the detectives and that his statements were voluntary. The question of whether a statement is voluntary is a mixed question of fact and law that is properly reviewed de novo.

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

Rosky, 121 Nev. at 190, 111 P.3d at 694. The State bears the burden of proving voluntariness, based on the totality of the circumstances, by a preponderance of the evidence.” Dewey v. State, 123 Nev. 483, 492, 169 P.3d 1149, 1154 (2007). The established criteria to consider when making a voluntariness determination include: the accused’s age; his education or intelligence level; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment. Id. at 492, 169 P.3d at 1155.

We conclude that the State established, by a preponderance of the evidence, that Gonzales’ confession was voluntary. There is no evidence in the record that Gonzales is of an age or intelligence that increased the likelihood that his confession was involuntary. He was told that he did not need to answer the detectives’ questions and that he was free to go. There is no evidence of physical punishment such as sleep or food deprivation. And there is no indication that Gonzales was subjected to repeated or prolonged questioning. Therefore, we conclude that Gonzales’ contentions in this regard are without merit.

Because the district court did not err in determining that Gonzalez was not in custody and that his statements were voluntary, we hold that the district court did not abuse its discretion by denying his motion to suppress.


Third, Gonzales contends that the district court erred by denying his motion for acquittal or, in the alternative, his motion for a new trial because the district court admitted a videotape of Gonzales and Grace that had been recorded while they were in the police interview room. Gonzales made inculpatory statements during that conversation.

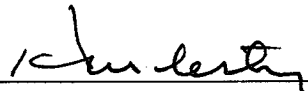
Specifically, he contends that the recorded statement was inadmissible because it was unlawfully intercepted or recorded. NRS 179.430; NRS 179.440; NRS 179.500. In this, he relies on NRS 175.381, which provides that "at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice." However, sufficient evidence supports Gonzales' convictions aside from his inculpatory statements to Grace, including the testimony of the victims and his admissions to the detectives. And furthermore, Grace testified about the challenged conversation at trial. Therefore, we conclude that he failed to show that the district court erred in this regard.

Having considered Gonzales' claims and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk