IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CAMERON FRANCES COVINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71909

ORDER OF AFFIRMANCE

Cameron Frances Covington appeals from a judgment of conviction for burglary following a jury trial. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

After a doctor learned that her office had been broken into, police identified Covington, a patient of the doctor, as a possible suspect.[1] After searching Covington's residence, detectives arrested Covington for possession of controlled substances in violation of his probation. Following his arrest, Covington made certain incriminating statements to a detective, William Meguire, after Meguire informed Covington of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

At a pre-trial motion to suppress hearing, Covington argued that his statements must be suppressed, in part, because his *Miranda* waiver was not knowing and intelligent. There, Covington argued that he was not capable of giving a knowing and voluntary waiver of his *Miranda* rights for several reasons including because of his emotional state at the time of the questioning and because he was under the influence of drugs.

[1]We do not recount the facts except as necessary to our disposition.

The district court denied his motion to suppress. In so doing, it found that, under the totality of the circumstances, Covington's emotional state and use of drugs as shown by a presumptive positive drug test did not vitiate the voluntariness of his statements. Further, the district court found that, based on video evidence of the questioning, after Detective Meguire advised Covington of his *Miranda* rights, Covington gave a perceptible nod in acknowledgement of those rights. At the conclusion of the trial, the jury found Covington guilty of burglary.

On appeal, Covington argues that the district court erred in denying his motion to suppress because Detective Meguire improperly advised him of his *Miranda* rights. Covington concedes that this argument was not presented to the district court in his motion to suppress or at the hearing on that motion. Still, he maintains this court should reverse his conviction and remand for a new trial with instructions to suppress his statements because Detective Meguire's improper advisement of his *Miranda* rights constitutes plain and constitutional error.

"[A]ll unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension." *Martinorellan v. State*, 131 Nev. ___, ___, 343 P.3d 590, 593 (2015). "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" *Vega v. State*, 126 Nev. 332, 338, 236 P.3d 632, 637 (2010) (quoting *Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007)). Under this standard of review, plain error "does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Before advising Covington of his *Miranda* rights, Detective Meguire informed Covington that he was legally required to read Covington the rights afforded to him under *Miranda* and not doing so could lead to legal trouble for Detective Meguire. Covington takes issue with these statements.

Covington argues that Detective Meguire's prefatory comments undermined Covington's ability to appreciate the importance of his *Miranda* rights. Covington contends Detective Meguire failed to indicate "the importance of the *Miranda* warnings and the protections they afford." Consequently, Covington argues that admitting his statements elicited in response to Detective Meguire's questioning at that time was in violation of *Miranda* and prejudicial to him. We disagree.

"*Miranda* establishes procedural safeguards 'to secure and protect the Fifth Amendment privilege against compulsory self-incrimination during the inherently coercive atmosphere of an in-custody interrogation.'" *Stewart v. State*, 133 Nev. ___, 393 P.3d 685, 688 (2017) (quoting *Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007)). *Miranda* requires a suspect to be given four "now-familiar warnings: '[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *Id.* (quoting *Florida v. Powell*, 559 U.S. 50, 59-60 (2010)). "To be constitutionally adequate, *Miranda* warnings must be 'sufficiently comprehensive and comprehensible when given a commonsense reading.'" *Id.* (quoting *Powell*, 559 U.S. at 63).

The record reveals that Detective Meguire informed Covington of his *Miranda* rights in a "sufficiently comprehensive and comprehensible"

manner. *See id.* We reject Covington's contention that Detective Meguire's pre-*Miranda* statements, describing how he was legally required to advise Covington of his rights under *Miranda*, undermined the constitutionality of his recitation of those rights. *See Powell*, 559 U.S. at 59-60 ("[A suspect] must be warned [of his *Miranda* rights] prior to any questioning . . . .") (quoting *Miranda*, 384 U.S. at 479). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

TAO, J., concurring:

I agree with my colleagues that Covington is not entitled to appellate relief for all of the reasons set forth in the principal order which I join in full, but I write separately to further clarify precisely what Covington argues in his appeal and what he does not, and why relief is not warranted.

There's no dispute that all of the requirements to trigger *Miranda* warnings were present: Covington was arrested, interrogated, and confessed to the crime, and his confession was used against him during his criminal trial. In his appeal, Covington concedes that, before commencing interrogation, the police administered *Miranda* warnings that look entirely proper on their face. He claims, however, that the police verbally downplayed their importance just before they were given, thereby rendering the warnings inadequate and his ultimate post-*Miranda* confession inadmissible.

I.

The famous *Miranda* warnings that police officers must administer to defendants in custody before commencing any interrogation,

aren't themselves enshrined anywhere in the Constitution. *New York v. Quarles*, 467 U.S. 649, 654 (1984); *see Dickerson v. United States*, 530 U.S. 428, 450 (Scalia, J., dissenting) ("the Court has (thankfully) long since abandoned he notion that failure to comply with *Miranda's* rules is itself a violation of the Constitution"). Rather, they are merely judicially-created prophylactic measures designed to ensure that the Fifth Amendment right against compulsory self-incrimination is protected. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). The United States Supreme Court has never held that the warnings themselves are either rooted in or required by the Constitution, and the Court "has squarely concluded that it is possible—indeed not uncommon—for the police to violate *Miranda* without also violating the Constitution." *Dickerson*, 530 U.S. at 451 (Scalia, J., dissenting). As commentators have noted, sometimes the actual text of the Constitution, and the body of judicial case law called "constitutional law," aren't the same thing. *See* Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, pp. 2 (Princeton Univ. Press 2004). *Miranda* stands as perhaps the leading example of the divergence. *See Dickerson*, 530 U.S. at 451 (Scalia, J., dissenting).

As the case law now stands, analyzing the legality of a *Miranda* warning and subsequent waiver involves two dimensions. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). More colloquially, the waiver must be "voluntary" in that it was preceded by valid *Miranda* warnings; and the wavier must also have

been "knowing and intelligent" apart from whether the warnings themselves were correctly read. These are discrete and separate inquiries. *See id.* A suspect must invoke his right to remain silent, or his right to an attorney, in an "unequivocal" manner or else the interrogation can continue. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). A suspect who does not unequivocally invoke his right to remain silent, or who does so ambiguously while continuing to answer questions, is deemed to have waived his rights and consented to the interrogation. *Id.*

Covington alleges a failure of the first prong only: he challenges whether a proper warning was administered before he waived his right to remain silent and agreed to be interrogated. He alleges no other error in his brief. He does not argue, for example, that proper *Miranda* warnings were given, but then he was tricked into waiving them. He does not argue that he could not or did not comprehend the meaning of the *Miranda* warnings, nor that he was incapable of waiving them for any reason such as intoxication or mental incapacity. Below in district court, Covington argued that he responded to the *Miranda* warnings by merely nodding his head and therefore never consented to the interrogation, but he does not re-assert that argument on appeal (and in any event it's foreclosed by *Berghuis*, 560 U.S. at 383, which held that a suspect who fails to unequivocally invoke his *Miranda* rights and continues to answer questions is deemed to have waived them). He also does not allege that, apart from the quality of the *Miranda* warnings themselves, his confession was coerced or involuntary in any other way, as would be the case had he argued that the *Miranda* warnings were properly given and he fully consented to waive them, but then a confession was brutally beaten out of him afterwards.

These aren't the arguments he's making. The only issue before us in this appeal is the validity of the warnings themselves.

II.

As to the warnings, Covington does not allege that they weren't given, or that what was given was facially inaccurate or incomplete. Quite to the contrary, he seems to agree that the police administered *Miranda* warnings that were exactly correct quite literally down to the letter, a point confirmed by the interrogation transcript. He does not contend that the words of the warnings were made unclear by the tone of voice or manner in which they were delivered: he does not argue that the police detective spoke in anything other than a straightforward, clear, unhurried, and completely intelligible inflection. Finally, he does not allege that he, no stranger to the criminal justice system, had any trouble understanding the rights that the warnings were designed to convey; indeed, in view of his criminal record, he likely knew exactly what they were before he ever walked into the interrogation room.

Rather, his only argument is that the warnings were "undermined" by words outside of the warnings themselves, specifically, the giving of the following preface just before the warning:

> "[S]ince we're here at the police department right now, I have to read you your rights before I can talk to you. That's just protocol, you know, that's so I don't get sued. Technically, if I'm talking to you here at the police department, you get, you know incarcerated, that kind of stuff, and I don't read you your rights, it could fall back on me. Does that make sense to you?"

These words were immediately followed by what Covington concedes was a properly worded and delivered *Miranda* warning. Nonetheless, Covington

contends that the preface, and the preface alone, made his decision to waive his *Miranda* rights involuntary and rendered his confession inadmissible. As he writes in his brief, the preface resulted in the "minimization of the import of the *Miranda* warnings . . . . Nowhere in [the detective]'s explanation is there any indication of the importance of the *Miranda* warnings and the protections they afford."

But this is not the law. Taken literally, Covington's argument asserts that police officers must not only administer *Miranda* warnings correctly before commencing interrogation; they must also must go out of their way to add additional language emphasizing to the suspect that the warnings are really, really important and the suspect should pay really, really close attention to every word. This would mark a sea change from existing law, because the *Miranda* decision itself wouldn't meet Covington's standard: it merely requires specific warnings to be given, with no requirement that officers also express an additional "indication of [their] importance." According to Covington, a police officer who literally read the accepted and established warnings in the most professional manner possible, but said nothing less and nothing more about their importance to the suspect, would have failed to give a proper warning. A half-century of U.S. Supreme Court precedent would be wrong.

The essence of *Miranda* isn't that a suspect must truly comprehend the full gravity of the warnings and how the criminal justice system works as well as a trained lawyer would before the police can question him. It's to avoid the kind of police coercion that could result in involuntary and possibly false confessions to crimes the suspect may not have committed. Merely because a suspect was not affirmatively advised that he should consider his Constitutional rights important does not mean

that he was coerced into doing something against his will. "There is a world of difference . . . between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord." *Dickerson*, 530 U.S. at 449 (Scalia, J., dissenting).

III.

The only case that Covington cites that comes remotely close to supporting his argument—and it's not all that close—is *Doody v. Ryan*, 649 F.3d 986 (9th Cir. 2011). That case includes language suggesting that police officers should not imply to suspects that the *Miranda* warnings are just formalities. *Id.* at 1002. But the rest of the holding of the case is far afield from Covington's argument, and the Ninth Circuit's opinion doesn't suggest that an otherwise proper warning can be made improper based solely upon that implication alone. Rather, the court reversed because it found a litany of errors in the *Miranda* warning at issue: the suspect was a juvenile who had never heard the warnings before; the police department had a separate written warning form for juveniles and the officers deviated from their own form; in giving the warning they ad-libbed and "expressly misinformed" the suspect that he had a right to counsel only "if" he was involved in the crime; and the warnings themselves were so meandering and incomprehensible that they spanned twelve highly-confusing pages of transcript. *Id.* at 1003. Needless to say, nothing of the kind occurred here. As far as I can tell, no court has held that an entirely proper *Miranda* warning becomes invalid merely because it was preceded by a preface like the one given here.

Covington nonetheless calls the preface an illegal "subterfuge." Even assuming that it was any such thing, "[p]olice subterfuge is permissible if the methods used are not of a type reasonably likely to procure an untrue statement." *Carroll v. State*, 132 Nev. ___, ___, 371 P.3d

1023, 1031 (2016) (internal quotation marks omitted). And that's the case even when the subterfuge involved active deception. *Id.* In Covington's case, the detective's statement was actually the truth: he almost certainly would get into all kinds of legal trouble if he conducted a custodial interrogation without first reading the *Miranda* rights. Granted, it was an incomplete statement of all of the reasons behind giving the warning. But I don't know how we can call something a "subterfuge" that's actually truthful. In any event, it's hard to see how, by itself, the preface was "reasonably likely" to elicit a false confession to a crime that Covington didn't commit.

IV.

For these reasons, as well as those set forth in the principal order, I concur. Covington's constitutional rights weren't violated and the detective's statements weren't reasonably likely to elicit a false confession to a crime that Covington didn't actually commit.

Tao, J.

Tao

GIBBONS, J., concurring:

I agree with my colleagues that the judgment of conviction should be affirmed. Specifically, I believe Covington has not demonstrated plain error. I write separately to explain that had he presented his appellate arguments in the district court, suppression of Covington's confession may have been warranted. I am writing in the hope of encouraging the police to implement better interrogation practices and to discourage improper practices. A description of the facts is necessary to

illustrate the problems inherent in law enforcement practices that sidestep the safeguards mandated by the Supreme Court in *Miranda v. Arizona*.[2]

A doctor's office in Incline Village, Nevada, was burglarized and Covington was identified as a possible suspect. Covington was arrested for illegal drug possession, a violation of his probation. Following Covington's arrest, a Placer County Sheriff's Detective, William Meguire, interrogated him about the burglary of the doctor's office. The custodial interview took place at the sheriff's office in Tahoe City, California, and was video recorded.

Detective Meguire spoke with Covington before he informed Covington of his *Miranda* rights. During that conversation, Detective Meguire made a series of statements that suggested that Covington needed to talk to him and that the *Miranda* warnings were only a perfunctory formality. First, he told Covington, "bottom line is this . . . you need to be honest with me because there's a lot of stuff I know that I can't tell you." Later, Detective Meguire explained Covington's constitutional rights using a correct *Miranda* warning, but he did so in a manner that minimized the significance of the rights. Next, he said: "I have to read you your rights before I can talk to you. That's just protocol, you know, that's so I don't get sued." Detective Meguire also emphasized that reading of the rights was necessary to protect him from a lawsuit and to avoid other possible negative repercussions to himself.

Detective Meguire did not frame Covington's rights, as prescribed by *Miranda*, as affirmative rights that Covington had the ability to exercise. Instead, he said, "I'm going to read you your rights and then we can talk from that point," not that "you can decide if you want to talk."

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[2]*Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

Further, Detective Meguire neither asked Covington if he wanted to talk or sought a waiver in any form before questioning Covington. Detective Meguire then read the *Miranda* warnings, asked Covington if he understood his rights, and Covington nodded. Then, Detective Meguire immediately followed the warnings with a statement: "I need you to be forthcoming and honest with me" and then proceeded into his questions. Covington never invoked his right to remain silent or to have the assistance of an attorney. In response to Detective Meguire's questioning, Covington made incriminating comments concerning the break-in at the doctor's office. Based on these comments, Covington was charged with burglary.

At a pre-trial motion to suppress hearing, Covington argued that his statements must be suppressed, in part, because his *Miranda* waiver was not knowing and intelligent. There, Covington argued that he was not capable of giving a knowing and voluntary waiver of his *Miranda* rights because of implied promises and threats made by Detective Meguire during questioning, and because he was under the influence of drugs and was in a fragile emotional state.

The district court denied his motion to suppress in an oral ruling. In its decision, the court found that, under the totality of the circumstances, Covington's emotional state and use of drugs as shown by a presumptive positive drug test did not vitiate the voluntariness of his statements. Further, the district court found that Covington was sufficiently aware of his *Miranda* rights so an express waiver of the rights was not necessary. The court made no findings on the claim of involuntariness due to promises or threats from the detective. A written order with findings of fact and conclusions of law was never prepared. The

jury found Covington guilty of burglary based, in part, on Covington's statements to Detective Meguire.

On appeal, Covington makes a different argument than the one asserted below. He now argues that the district court erred in denying his motion to suppress because Detective Meguire improperly mischaracterized the nature and significance of Covington's *Miranda* rights. Covington argues that Detective Meguire's prefatory comments were part of a strategy to undermine Covington's ability to understand and appreciate the importance of his *Miranda* rights. Consequently, Covington argues that allowing his statements to be used at trial was a violation of *Miranda* and prejudicial to him.

Covington concedes that this specific argument was not presented to the district court in his motion to suppress or at the hearing on that motion. Still, he maintains this court should reverse his conviction and remand for a new trial with instructions to suppress his statements, because Detective Meguire's improper preface before advising Covington of his *Miranda* rights constitutes plain and constitutional error.

I agree with my colleagues that the standard of review is plain error under *Martinorellan v. State*, 131 Nev. ___, ___, 343 P.3d 590, 593 (2015). Further, the burden of proof is on the State to show a waiver of constitutional rights, *see Floyd v. State*, 118 Nev. 156, 171, 42 P.3d 249, 259 (2002), *abrogated on other grounds by Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008), but a waiver does not have to be express or in writing. *Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 182 (2006).

The record reveals that while Detective Meguire informed Covington of his *Miranda* rights in a "sufficiently comprehensive and comprehensible" manner, Detective Meguire improperly suggested that

these rights protected him from Covington and any fallout from their conversation rather than the other way around. The fact that a proper *Miranda* warning was administered does not, on its own, mean that any statement a suspect gives thereafter is admissible. Courts need to examine the totality of the circumstances to ensure not only that a suspect was informed of his *Miranda* rights, but also that the suspect understood those rights and waived them. *See Floyd*, 118 Nev. at 171, 42 P.3d at 259 ("Though informed of his *Miranda* rights, unless the defendant knowingly and voluntarily waived them, statements made during custodial interrogation are inadmissible."). Detective Meguire should not have commenced the interrogation by gratuitously suggesting that advising someone of his constitutional rights is a mere formality to protect the police officer.

Under the circumstances in this case, I conclude that the statements Detective Meguire made before and immediately after he advised Covington of his constitutional rights likely undermined Covington's ability to make a knowing and intelligent waiver of his right to remain silent or to have the assistance of an attorney. *See Mendoza*, 122 Nev. at 276, 130 P.3d at 181. Combined with the undisputed fact that no explicit waiver of rights was sought or expressed, it may have been an erroneous decision to deny the motion to suppress. Yet as explained before, this argument was not presented to the district court. Nor was the record developed to show a pattern of improper pre-*Miranda* conditioning, or the effect of the statements by Detective Meguire on Covington, as Covington has experience with the criminal justice system. Therefore, I concur in the judgment.

_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk