

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY HOOKS,

No. 37214

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 15 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary and one count of forgery. For the burglary, appellant Jerry Hooks was sentenced to imprisonment for a maximum term of 72 months and a minimum term of 16 months. For the robbery, he was sentenced to imprisonment for a maximum term of 34 months and a minimum term of 12 months. The district court further ordered Hooks to submit to genetic marker or secretor status testing and to pay a \$250 analysis fee and a \$25 assessment fee.

Hooks filed in the district court a pretrial motion to suppress his post-arrest inculpatory statements to police. In the motion, Hooks argued that the police reports relevant to his arrest failed to indicate that he was advised of his rights pursuant to Miranda v. Arizona¹ and failed to demonstrate that his statements to police were voluntarily made. The district court conducted a hearing on the motion pursuant to Jackson v. Denno² and heard testimony from Las Vegas Metropolitan Police Department ("LVMPD") Officer Chris Arnold. Officer Arnold testified that while Hooks was in custody for the charged crimes, Arnold witnessed LVMPD Detective Paul Evans verbally inform Hooks of his Miranda rights. Officer Arnold further testified that he was the only other officer present during the questioning, which occurred in an open and populated booking area of the Clark County Detention Center. Hooks made statements in response to two or three questions by Detective Evans and

¹384 U.S. 436 (1966).

²378 U.S. 368 (1964).

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then invoked his right to remain silent. Officer Arnold indicated that no force, threats, promises or coercion occurred during the questioning. After hearing argument from counsel, the district court ruled that Hooks' statements were admissible, considering the totality of circumstances, including the fact that the Miranda warnings were given.

Hooks first contends that the district court erred in determining that his statements were admissible. Hooks argues that no documentary evidence supports a finding that he was informed of his Miranda rights prior to any questioning. Hooks also contends that it is unlikely that he would make inculpatory statements and then invoke his right to remain silent. We conclude that these contentions lack merit.

A confession is inadmissible unless the State demonstrates by a preponderance of the evidence that the confession was freely and voluntarily given.³ Whether an accused was advised of his constitutional rights is among the factors relevant to the voluntariness of a confession.⁴ The question of admissibility is primarily a factual one, and a district court's determination to admit a confession will not be disturbed on appeal where it is supported by substantial evidence.⁵ Moreover, where the issue is one of credibility, the district court's determination will not be reversed absent clear error.⁶ Here, the district court concluded that Miranda warnings were given. Implicit in this determination is a finding that Officer Arnold's testimony was credible. The record does not reveal any clear error in this finding. Further, we conclude that the district court's determination that Hooks' statements were admissible at trial is supported by substantial evidence.

Hooks next contends that the district court erred in responding to a question from the jury. During its deliberations, the jury forwarded the following question to the court: "Judge, are we to take the Miranda acts into consideration? If so, can we have a Miranda card?"

³Elvik v. State, 114 Nev. 883, 890, 965 P.2d 281, 286 (1998); Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

⁴Chambers, 114 Nev. at 981, 944 P.2d at 809.

⁵Id.

⁶Williams v. State, 113 Nev. 1008, 1014, 945 P.2d 438, 442 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

Although Hooks has not provided this court with any record of the district court's actual response to the jury, Hooks claims that the court's response indicated that Miranda was an issue for the court alone and that this improperly removed from the jury's consideration whether Hooks' admissions to police were voluntarily made. We conclude that this claim also lacks merit.

There is no constitutional requirement that both a judge and jury pass upon the voluntariness of a confession.⁷ Hooks therefore relies on a rule of Nevada procedural law stating that where voluntariness of a confession is at issue, a trial judge first hears evidence of voluntariness and if the court finds the confession was voluntarily made, the jury is instructed it must also find the confession voluntary before it may be considered.⁸ A jury need not be instructed to consider the voluntariness of a confession under this rule, however, unless voluntariness is raised as an issue.⁹ A defendant's failure to properly raise the issue will result in a waiver of the issue for purposes of appeal.¹⁰

At trial in this case, testimony from Officer Arnold together with testimony from Detective Evans showed that Hooks was advised of his Miranda rights and during subsequent questioning he admitted that he tried to cash the forged check in question knowing that it was false because he needed rent money. During cross-examination of these witnesses, defense counsel inquired regarding the lack of documentation reflecting that Hooks was advised of his Miranda rights. At a subsequent hearing outside of the jury's presence, defense counsel indicated that his inquiries regarding Miranda were limited to impeaching the credibility of the State's witnesses and that he was not raising any voluntariness issue. Hooks subsequently testified that police did not inform him of his Miranda rights prior to questioning and that he did not make any inculpatory statements to law enforcement officers during questioning. During closing arguments, defense counsel stated:

⁷Grimaldi v. State, 90 Nev. 83, 85-86, 518 P.2d 615, 616-17 (1974).

⁸Id. at 85, 518 P.2d at 616.

⁹Dawson v. State, 108 Nev. 112, 120, 825 P.2d 593, 598 (1992); Laursen v. State, 97 Nev. 568, 570, 634 P.2d 1230, 1231 (1981).

¹⁰Wilkins v. State, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980).

[W]e heard testimony, of a confession that had allegedly occurred. I would submit to you that that testimony was incorrect. Either because of a bias or perhaps because of the two-and-a-half years that have passed. The officer did not include the Miranda warnings that he had allegedly given my client. The issue of the whether or not his confession is voluntary is not before you.

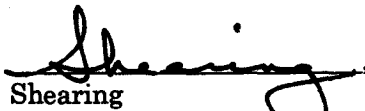
...

What is at issue is the accuracy of the police officer's memory

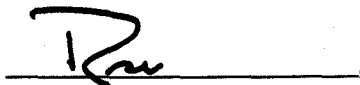
(Emphasis added). Defense counsel did not request a jury instruction on the voluntariness of any statements by Hooks. But after the district court's receipt of the jury question referring to Miranda, defense counsel attempted to revive the issue of whether Hooks' statements were voluntarily made by arguing that the matter should be submitted to the jury. We conclude that at this point in the proceedings Hooks had already waived any right to insist that the jury determine the voluntariness of his statements. Accordingly, he cannot properly assert on appeal a claim of error arising from the district court's failure to submit the issue to the jury.¹¹

Having considered Hooks' contentions and concluded that they lack merit, we

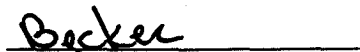
ORDER the judgment of the district court AFFIRMED.¹²



Shearing J.



Rose J.



Becker J.

¹¹We note that the jury was properly instructed regarding the presumption of innocence, the State's burden of proof and that the weight and credibility of the witnesses' testimony was for the jury to determine.

¹²Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Robert M. Draskovich, Chtd.
Clark County Clerk