IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG R. TABBADA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38805

FILED

APR 21 2003

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

ORDER REVERSING AND REMANDING

Greg R. Tabbada appeals from a judgment of conviction entered after a jury found him guilty of lewdness with a child under the age of fourteen and indecent exposure. Tabbada challenges his conviction on two grounds: (1) whether the district court erred in admitting the child victim's videotaped statement; and (2) whether the district court erred in denying Tabbada's motion to suppress his pre-arrest statements. We conclude that the district court did not abuse its discretion in admitting the child victim's videotaped statement. But, we conclude that the district court erred in failing to suppress Tabbada's pre-arrest statements; therefore, we reverse his conviction and remand this case for a new trial.

Tabbada first contends that the district court erred in admitting the child victim's videotaped statement. Specifically, Tabbada argues that the child victim's statement was cumulative and that it was more prejudicial than probative. NRS 51.385 permits the admission of a statement made by a child victim under the age of ten years. In Felix v. State,[1] we stated that additional hearsay statements under NRS 51.385 should be restricted once the child sexual assault victim's accusations

[1]109 Nev. 151, 200, 849 P.2d 220, 253 (1993), modified on other grounds by Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001).

"have been fairly presented by one or more witnesses as to the time, the place, and the incident and any challenges to the victim's credibility are fairly met."[2] Unlike the six recounted accusations in Felix, in this case the State only introduced one recount, the child victim's videotaped statement.

Although the child victim testified, the child victim failed to recall some details of the incident that the child victim had told the detective during the interview shortly after the incident. Thus, we conclude that the admission of the child victim's videotaped statement did not rise to the level of cumulative error as in Felix. Accordingly, we conclude that the district court did not abuse its discretion in this instance.[3]

Tabbada next contends that the district court erred when it denied his motion to suppress his pre-arrest statements. Tabbada argues that he was "in custody" from the moment he was placed in handcuffs and subsequently taken to the police substation where he made incriminating statements.

We have acknowledged that, under Miranda v. Arizona,[4] "a suspect may not be subjected to an interrogation in official 'custody' unless that person has previously been advised of, and has knowingly and intelligently waived [his or her constitutional rights]."[5] The United States

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[2]Id.

[3]See Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (noting that the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed on appeal unless manifestly wrong).

[4]384 U.S. 436 (1966).

[5]Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996).

Supreme Court has provided that "the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[6] Accordingly, we have provided that the test for determining whether a defendant who has not been arrested is in custody "'is how a reasonable man in the suspect's position would have understood his situation.'"[7]

In analyzing the custody issue, the court must consider the totality of the circumstances, and although no single factor is dispositive, the following facts are important in this analysis:

> (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.[8]

Notably, a suspect's or officer's subjective view of the circumstances is irrelevant in the custody inquiry.[9]

The record reveals that the site of the interrogation does not appear to have been coercive in nature, and the length of questioning was not extensive. And, it is undisputed that the investigation of the incident

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[6]Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (internal quotations and citation omitted), quoted in Stansbury v. California, 511 U.S. 318, 322 (1994).

[7]Alward, 112 Nev. at 154, 812 P.2d at 252 (quoting Berkemer v. McCarty, 468 U.S. 420, 422 (1984)).

[8]Id. at 155, 912 at 252 (placed in list format).

[9]See State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998); see also Stansbury, 511 U.S. at 323.

focused on Tabbada. But, Tabbada contends that the objective indicia of arrest were clearly present, given that he was placed in handcuffs, placed in the police car, and taken to the police substation.

First, Tabbada asserts that handcuffing him was not justified. The Ninth Circuit has provided that "handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention," but "police conducting on-the-scene investigations involving potentially dangerous suspects may take precautionary measures if they are reasonably necessary."[10] The Ninth Circuit has noted that the purpose of the precautionary measures "is 'to allow the officer to pursue his investigation without fear of violence.'"[11] However, when there is no indication that the suspect is dangerous or might flee, courts have determined that there is no justification for handcuffing the suspect, and therefore, the suspect was "in custody."[12]

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[10]United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982); accord United States v. Thompson, 597 F.2d 187, 190 (9th Cir. 1979) (concluding that it was reasonable to handcuff the defendant because he had "repeatedly attempted to reach for his inside coat pocket, despite the officers' repeated warnings not to").

[11]Bautista, 684 F.2d at 1289 (quoting Adams v. Williams, 407 U.S. 143, 146 (1972)); accord U. S. v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995) (concluding that agents' handcuffing of the four suspects was not unreasonable in light of the violent nature of the robberies); U. S. v. Glenna, 878 F.2d 967, 973 (7th Cir. 1989) (concluding that the officers' handcuffing of the defendant was reasonable in light of information that the defendant was armed and dangerous).

[12]See U. S. v. Del Vizo, 918 F.2d 821, 825 (9th Cir. 1990) (concluding that there was no justification for handcuffing the defendant because there was no evidence that the defendant failed to comply with the officers' orders or that the defendant was particularly dangerous,

continued on next page . . .

The State contends that Officer Daniel Joseph Parker was justified in handcuffing Tabbada because of the nature of the crime—the child victim called 911 alleging that she had been raped—and because Officer Parker was concerned that Tabbada would leave. But, there was no evidence that Tabbada was particularly dangerous once the officers arrived. Indeed, Officer Parker did not place Tabbada in handcuffs immediately after his arrival, but waited ten to fifteen minutes. Also, there was no evidence that Tabbada attempted to leave; but to the contrary, the evidence established that Tabbada cooperated and complied with Officer Parker's orders.

Second, Tabbada contends that Officer Parker was not justified in placing him in the police car. The Ninth Circuit has provided that "there is no per se rule that detention in a patrol car constitutes an arrest."[13] In United States v. Torres-Sanchez,[14] the Ninth Circuit concluded that Sanchez' twenty-minute detention in the police car was reasonable. In so concluding, the court reasoned that Sanchez was never required to sit in the police car, but the officers suggested it to him

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. . . *continued*
"especially once he had stepped out of the van, had been frisked and was lying on the ground"); State v. Lescard, 517 A.2d 1158, 1159 (N.H. 1986) (concluding that the defendant was in custody because he was handcuffed at the accident scene and was attended by a police officer while at the hospital); Comm. v. Medley, 612 A.2d 430, 433 (Pa. 1992) (concluding that appellant was in custody, as he was frisked, handcuffed without any indication that he was dangerous, transported to the police station, and placed in a secured waiting area until being interrogated).

[13]U. S. v. Parr, 843 F.2d 1228, 1230 (9th Cir. 1988).

[14]83 F.3d 1123, 1129 (9th Cir. 1996).

because of the cold weather.[15] And, Sanchez was never removed from the scene or driven around in the police care; but instead, Sanchez voluntarily entered the police car and was free to leave after he answered routine questions.[16]

Here, Officer Parker handcuffed Tabbada outside the house and questioned him for almost a half hour. Although Officer Parker testified that he placed Tabbada in the police car because it was cold, he waited at least fifteen to twenty minutes to do so. Also, Officer Parker did not suggest this; rather, he told Tabbada that he was placing him in the police car because of the weather. Tabbada did ask Officer Parker if the police would give him a ride to the police substation, but this occurred while Officer Parker was placing Tabbada in the police car and after Tabbada had been handcuffed for at least fifteen minutes.

We conclude that Tabbada was "in custody" the moment he was placed in handcuffs. Granted, Officer Parker informed Tabbada that he was not under arrest, but was being detained. However, we conclude that a reasonable person in Tabbada's situation—handcuffed and placed in the police car, even though he complied with Officer Parker's order and clearly was cooperating with the officers—would have understood he was "in custody."

Alternatively, the State contends that Tabbada was not "in custody" at the time he was interviewed because the handcuffs were removed and Tabbada was informed several times that he was free to leave. We fail to see how Tabbada's status changed from "custodial" to

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[15]Id.

[16]Id.

"noncustodial" when the handcuffs were removed at the police substation and when he was told he was not under arrest and was free to leave at any time. In fact, courts have been skeptical that any such transformation can so readily occur.[17]

For example, in United States v. Guarino,[18] the defendant was handcuffed for about twelve minutes while federal agents raided his home as part of a narcotics investigation. After removing the handcuffs, the agents stayed in the house, ultimately asking the defendant what was inside a black bag, and the defendant responded that it contained cocaine.[19] Although the defendant's handcuffs were removed twenty minutes before he made the incriminating statement, the court found the statement was obtained in violation of the defendant's Miranda rights:

> Clearly, a reasonable person in defendant's situation, handcuffed with his hands behind his back and surrounded by armed agents, would have understood he was "in custody[.]" The restraint on defendant's freedom of movement or his otherwise custodial situation, however, did not end when his handcuffs were later removed.[20]

Likewise here, we conclude that Tabbada's custodial situation did not end when his handcuffs were removed and when he was told that

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[17]See, e.g., United States v. Lee, 699 F.2d 466, 467-68 (9th Cir. 1982) (upholding the district court's finding that the defendant was "in custody" and was unlawfully interrogated despite the fact that the defendant was not forced into the FBI car and was told he was free to leave or terminate the interview).

[18]629 F. Supp. 320, 322-23 (D. Conn. 1986).

[19]Id. at 323.

[20]Id. at 324 (emphasis in original).

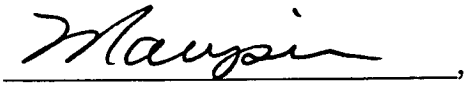
he was not under arrest and was free to leave at any time. Tabbada did not have any means to return home because he was brought to the police substation in the police car. Detective Broome continued to press Tabbada until he made incriminating statements. Tabbada felt it necessary to ask permission to leave, though he was then told that he was under arrest.

Therefore, we conclude that substantial evidence does not support the district court's finding that Tabbada was not "in custody."[21]

Accordingly, we

ORDER the judgment of the district court be REVERSED AND REMANDED to the district court for proceedings consistent with this order.

_____, J.
Rose



_____, J.
Maupin

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
Washoe County Public Defender
Washoe District Court Clerk

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[21]See Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817 (1998) (upholding a district court's determination regarding whether the defendant was "in custody" if it is supported by substantial evidence), overruled on other grounds by Sharma v. State, 118 Nev. ___, 56 P.3d 868 (2002).

GIBBONS, J., dissenting in part:

I would affirm the decision of the district court in its entirety. We will not reverse a district court's determination that a defendant was not "in custody" if the decision is supported by substantial evidence.[1] Substantial evidence is defined as "'that evidence which a reasonable mind might accept as adequate to support a conclusion.'"[2] The decision of the district court that Tabbada was not "in custody" when his pre-arrest statements were made was supported by substantial evidence.

Previously, we concluded that "[a]n individual is not in custody for purposes of Miranda where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process,[3] or where the individual questioned is merely the focus of a criminal investigation."[4] In addition, the test we set forth for determination of custody "'is how a reasonable man in the suspect's position would have understood his situation.'"[5] Neither the police officer's nor the suspect's belief regarding

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[1]Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817 (1998) (citing Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996)).

[2]State v. McKellips, 118 Nev. ___, ___, 49 P.3d 655, 659 (2002) (quoting Bopp v. Lino, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994)).

[3]State v. Taylor 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998) (citing Garcia v. Singletary, 13 F.3d 1487, 1489 (11th Cir. 1994)).

[4]Id. (citing U.S. v. Jones, 21 F.3d 165, 170 (7th Cir. 1994)).

[5]Alward, 112 Nev. at 154, 912 P.2d at 252 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

custody is determinative.[6] While "no single factor is dispositive,"[7] we consider "the totality of circumstances, including: (1) the site of interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning."[8]

The majority concedes that the interrogation site was not coercive and the length of questioning was not excessive. Our divergence begins with the precautionary handcuffing of Tabbada at the scene of the crime. Tabbada was a suspect in the molestation of a nine-year-old girl. Justification existed to handcuff Tabbada during his detention. Consistent with the United States Court of Appeals for the Ninth Circuit, this did not place Tabbada in custody.[9] The majority acknowledges "that the purpose of the precautionary measures 'is "to allow the officer to pursue his investigation without fear of violence."'"[10]

The majority also finds no justification for placing Tabbada inside a police car. However, the majority seemingly disregards the very

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[6]Taylor, 114 Nev. at 1082, 968 P.2d at 323 (citing Stansbury v. California, 511 U.S. 318, 323 (1994)).

[7]Alward, 112 Nev. at 154, 912 P.2d at 252 (citing California v. Beheler, 463 U.S. 1121, 1125 (1983)).

[8]Mitchell, 114 Nev. at 1423, 971 P.2d at 818 (citing Alward, 112 at Nev. 154-55, 912 P.2d at 252).

[9]See United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982) (explaining that police may take "precautionary measures if they are reasonably necessary" regarding "potentially dangerous suspects.").

[10]See majority opinion ante p.4 (quoting Bautista, 684 F.2d at 1289) (quoting Adams v. Williams, 407 U.S. 143, 146 (1972)).

opinion cited in support of its contention.[11] To wit, in United States v. Torres-Sanchez, the suspect voluntarily sat in the car because it was cold outside. The suspect remained in the car at the scene during his detention. The Ninth Circuit concluded the suspect was not in custody.

Tabbada requested police give him a ride to the police substation. The handcuffs, placed on Tabbada as per departmental policy, were removed once Tabbada arrived at the police station. No police department signs were visible in the police substation and, with the exception of the two officers who brought Tabbada to the substation, there were no uniformed police officers walking around. Before questioning began, Tabbada was advised he was not under arrest and was at the police station voluntarily. When asked if he wanted to speak with police, Tabbada responded affirmatively. Notably, Tabbada denied raping Ashly before being asked any questions.

Before the interview began, Tabbada was advised a second time that he was not under arrest and was free to leave at any time. After one hour of questioning, Tabbada invoked his constitutional rights, and the police immediately ceased questioning him. The police did not use coercion or deception. In addition, Tabbada was repeatedly told he was free to leave, his movements were unrestrained, and the atmosphere was not police dominated. These factors suggest a reasonable person would not have thought he was in custody. Therefore, I conclude substantial

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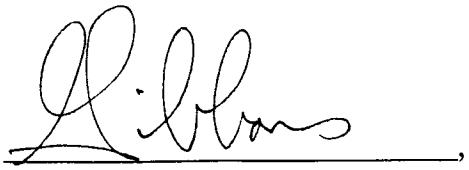
[11]U. S. v. Torres-Sanchez, 83 F.3d 1123, 1129 (9th Cir. 1996).

evidence existed to support the district court's determination that Tabbada was not "in custody" during the initial interview at the police substation.



_____, J.
Gibbons