IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY M. SCHNABL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39642

FILED

AUG 2 5 2003

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

ORDER OF AFFIRMANCE

Appellant, Troy Schnabl, appeals from a judgment of conviction entered upon verdicts of guilty in connection with charges of robbery and first-degree murder. His primary contention on appeal is that the district court improperly admitted his statements to police at trial.[1] We affirm.

FACTUAL AND PROCEDURAL HISTORY

On January 15, 2001, police found the body of sixty-seven year old Mrs. Tiffany Averill in her home at Sunrise Oaks Mobile Home Park in Las Vegas. Mrs. Averill died from a large wound across her neck caused by a sharp-edged weapon. Her body was slumped in a wheelchair next to an open rifle box.

Mrs. Averill's husband was confined in a Las Vegas hospital when the police discovered her body. Upon returning to his home, Mr. Averill discovered that several guns, an unopened bottle of liquor and a realistic looking fake bomb were missing, and reported to police that he suspected Schnabl, an acquaintance.

Police ultimately found the fake bomb in a locker rented to Robert Whitesell, and placed him under arrest for possession of the device.

[1]See NRS 177.015.

03-14218

Investigating officers also found one of Mr. Averill's guns in a hotel room rented by Whitesell from January 15 to January 19, 2001. During an interview with Detectives James Vaccaro and Brent Becker, Whitesell implicated Schnabl.

On March 1, 2001, the detectives conducted inquiries at Schnabl's place of employment and interviewed him. They learned from his employer that Schnabl had not worked on January 15. They also learned that Whitesell had been employed at the same location but had not been seen since January 13.

Before interviewing Schnabl, the detectives administered Miranda[2] warnings, to which Schnabl replied that he understood his rights. During the interview, Schnabl told the detectives he had not been to the Averill home since 2000. When the detectives left the interview area, Schnabl followed them back to the detectives' car. He was crying, and Detective Vaccaro asked him if he was in the Averill home on January 15, 2001. Schnabl stood there in silence and the detective suggested that what happened to Mrs. Averill could have been an accident. Schnabl responded that the detective knew what happened to her was no accident.

Detective Vaccaro again asked what happened at the Averill home. Schnabl responded he would call the detective the next day. When the detectives were preparing to leave, Schnabl asked Detective Vaccaro if he could borrow his gun, because he wanted to commit suicide.

On March 7, 2001, Detective Becker and Detective Sergeant Kevin Manning arrested Schnabl. They asked why he did not call as promised. Schnabl stated he was trying to obtain funding to hire an attorney. When Detective Becker informed Schnabl he would read him his

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

rights following booking and provide him with an opportunity to make a statement, Schnabl asked whether "there was a chance he could have an attorney present for this." The detective responded that whether an attorney would be present was Schnabl's decision.

After booking, Detective Becker asked Schnabl if he wanted to make a statement. Schnabl again inquired whether he could have an attorney present. The detective told him there were presently no attorneys at the jail, "but if that's what he wished one would be appointed for him." The detective told Schnabl that if he wanted an attorney, he could speak to the attorney first and if he still desired to make a statement, he could do so later.

Following this exchange, Detective Becker began to walk away, but Schnabl said he wanted to talk right then. They were joined by Sergeant Manning and the three proceeded to an interview room. Schnabl inquired why attorneys were not at the jail. Detective Becker explained that "they don't have attorneys assigned to the jail for these circumstances." Schnabl affirmed he still wished to make a statement at that time.

Schnabl conditioned his statement on not being tape recorded and not being asked questions by the officers. The officers agreed to these conditions. Detective Becker read Schnabl his Miranda warnings from a card and asked him if he understood his rights. Schnabl responded: "maybe, I don't like to say yes or no to anything." Schnabl refused to sign the acknowledgement of rights card.

Schnabl related what occurred on January 15. At one point when Detective Becker asked Schnabl a question, Schnabl told him not to ask any questions and then continued with the following description of

events. Schnabl stated he met with Whitesell and Ernest Valezquez[3] on January 14 and discussed acquiring guns, robbing a bank and going to Mexico. On January 15, the three men walked from a bar to the Averill residence, because Schnabl knew that Mr. Averill owned several guns. Mrs. Averill recognized him and admitted the men inside. Whitesell and Valezquez inquired whether they could purchase some guns. Mrs. Averill told them her husband was in the hospital, but she would call him. She went to her bedroom to use the telephone, and Whitesell followed her. Schnabl saw Whitesell punch her twice in the head and heard a gurgling sound. He saw Mrs. Averill leaning against the wall and Whitesell putting a box cutter into his pocket. Whitesell removed several weapons from a box under the bed and placed them into a backpack. Schnabl and Valezquez left the residence, and shortly thereafter, Whitesell joined them with the weapons in the backpack.

On January 14, 2002, the State filed an amended information against Schnabl, charging him with burglary, robbery with use of a deadly weapon against a victim sixty-five years of age or older, and murder with use of a deadly weapon against a victim sixty-five years of age or older. The information alleged that Schnabl conspired with Whitesell and Valezquez to rob and burglarize Mrs. Averill's home and that the three men killed Mrs. Averill in the course of committing these felonies.

Prior to trial, Schnabl filed a motion to suppress his statements made to police. At a hearing on Schnabl's motion, the district court took testimony from Detective Becker, Sergeant Manning and Schnabl. At the conclusion of the hearing, the district court denied

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[3]These two men were co-defendants with Schnabl, but they were tried separately.

Schnabl's motion to suppress based upon three considerations. First, Schnabl spoke for forty minutes with no questions from Sergeant Manning and only two questions from Detective Becker. Second, Schnabl knew he had a right to remain silent, but he wanted to speak with the police and did so at length. Third, Schnabl did not clearly invoke his right to the presence of counsel.

At trial, the jury found Schnabl guilty of first-degree murder and robbery. The district court sentenced Schnabl to concurrent sentences of life imprisonment without the possibility of parole on the murder conviction and seventy-two to eighty months for the robbery conviction. The district court gave Schnabl credit for 404 days of pre-sentence incarceration. Additionally, the court assessed a $25 administrative assessment, a $250 DNA analysis fee and required Schnabl to submit to testing for genetic markers. The court also imposed a fine of $5,570 jointly and severally with Schnabl's co-defendants.

DISCUSSION

Schnabl contends that the district court erred in denying his motion to suppress his statements made to Detective Becker and Sergeant Manning on March 7, 2001, thus invalidating his convictions. Specifically, Schnabl contends that the admission of his statements violated his right to counsel under Miranda because he unequivocally invoked his right to an attorney.

"A criminal defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary confession."[4] Statements made during custodial interrogation are inadmissible unless

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[4]Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987) (citing Jackson v. Denno, 378 U.S. 368, 376 (1964)).

freely and voluntarily given after a waiver of rights pursuant to Miranda.[5] When the voluntariness of a defendant's statement is put into issue, "the trial judge receives evidence on the voluntariness of the statement and determines whether the statement was voluntary. If so, it is admitted."[6] "'In order to be voluntary, a confession must be the product of a "rational intellect and a free will."'"[7]

"The district court's decision regarding voluntariness is final unless such finding is plainly untenable."[8] The admissibility of a confession is primarily a factual question based upon the totality of the circumstances without reliance on overwhelming evidence of a defendant's guilt.[9] Relevant factors include: the age of the accused; his level of education and intelligence; whether he was advised of his constitutional rights; the length of any detention; the repeated or prolonged nature of the questioning; and the use of physical punishment, such as the deprivation

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[5]Id. (citing Franklin v. State, 96 Nev. 417, 421, 610 P.2d, 732, 734-35 (1980)).

[6]Laursen v. State, 97 Nev. 568, 570, 634 P.2d 1230, 1231 (1981).

[7]Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997) (quoting Passama, 103 Nev. at 213-14, 735 P.2d at 322) (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

[8]Thompson v. State, 108 Nev. 749, 753, 838 P.2d 452, 455 (1992), overruled on other grounds by Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000).

[9]See Echavarria v. State, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992); Passama, 103 Nev. at 214, 735 P.2d at 323 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

of food or sleep.[10] Where substantial evidence supports the district court's determination, we will not disturb that conclusion on appeal.[11]

Police must terminate questioning when the suspect makes a clear, specific and unambiguous demand for counsel.[12] However, an ambiguous or equivocal request reasonably indicating that the suspect "'might be invoking the right to counsel' is not sufficient" to require termination of questioning.[13] If the request is ambiguous, police may ask further questions to clarify whether a suspect has invoked his right to counsel, but the police are not required to clarify a suspect's request.[14]

Substantial evidence and the totality of the circumstance supports the district court's conclusion that Schnabl voluntarily waived his Fifth Amendment privilege against self-incrimination and provided police with a statement. Schnabl was college educated,[15] in his mid-forties and police advised him of his constitutional rights, both on the date he made his statement and a week earlier.

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[10]Passama, 103 Nev. at 214, 735 P.2d at 323 (citing Schneckloth, 412 U.S. at 226).

[11]Floyd v. State, 118 Nev. 156, 172, 42 P.3d 249, 260 (2002), cert. denied, ___ U.S. ___, 123 S. Ct. 1257 (2003).

[12]Davis v. United States, 512 U.S. 452, 459 (1994).

[13]Harte v. State, 116 Nev. 1054, 1066, 13 P.3d 420, 428 (2000) (quoting Davis, 512 U.S. at 459).

[14]Davis, 512 U.S. at 461-62; People v. Scaffidi, 15 Cal. Rptr. 2d 167, 171 (Ct. App. 1992).

[15]Schnabl attended community college and a university.

Schnabl clearly understood his right to have an attorney present and waived this right. Before Detective Becker read Schnabl his Miranda warnings at the jail, Schnabl asked if an attorney could be present. When told that none was available at the jail, Schnabl did not state he would not make a statement without an attorney present or that he wanted an attorney at that time. Rather, he inquired why none was available at the jail. Following this inquiry, Schnabl reaffirmed that he wanted to make a statement and conditioned his statement as previously noted. Schnabl cannot legitimately argue that, when police gave him his Miranda warnings and he began to speak without questioning, he did not do so voluntarily. He spoke at length and under his own conditions.

Additionally, Schnabl's assertions were not clear and unequivocal invocations of his right to an attorney, sufficient to preclude further questioning. While Schnabl testified at the suppression hearing that he unambiguously invoked his right to have an attorney present, the district court was best suited to make a factual determination of whether Schnabl invoked this right. The district court could properly have determined that Schnabl's statements did not amount to a clear request for an attorney, but rather only an inquiry as to whether an attorney could be present.[16]

Thus, we conclude that the district court correctly determined that Schnabl's waiver was intelligent and knowing, as well as voluntary, and that his statement was voluntarily given. Accordingly, substantial

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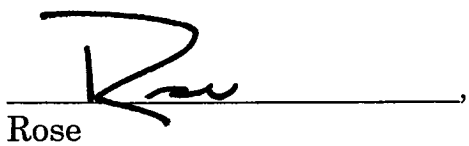
[16]See Williams v. State, 113 Nev. 1008, 1014, 945 P.2d 438, 442 (1997) (district court properly considered the credibility of the defendant and police in determining whether the defendant invoked his right to an attorney).

evidence and the totality of the circumstances support the district court's conclusion that Schnabl's statement was admissible.[17]

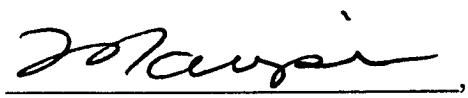
CONCLUSION

We conclude that the district court correctly denied Schnabl's motion to suppress his statements to police. Schnabl clearly understood his right to have an attorney present for questioning, but he waived this right. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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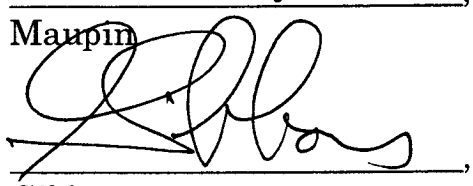

_____, J.
Gibbons

cc: Hon. Sally L. Loehrer, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Robert M. Draskovich, Chtd.
Clark County Clerk

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[17]We have considered Schnabl's other contention on appeal and conclude that it lacks merit. The jury instructions used by the district court substantially covered Schnabl's proposed jury instructions on conspiracy and credibility.