

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ANTHONY BRANDON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39657

FILED

FEB 19 2004

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

ORDER OF AFFIRMANCE

Michael Brandon appeals his judgment of conviction entered upon jury verdicts finding him guilty of sexual abuse of his two minor daughters. Brandon contends on appeal that, at trial, the district court improperly admitted a confession obtained in violation of his constitutional rights and erred in refusing his requested jury instruction concerning the voluntariness of the confession. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 7, 2001, Brandon met with licensed social worker Marly Henry at Southern Nevada Adult Mental Health Services ("SNAMH"), ostensibly to seek counseling. Brandon stated that he attempted suicide some three days earlier because his wife had left him after finding out he had molested their daughters. Henry noted that Brandon appeared cooperative and seemed "perfectly normal," but at times seemed depressed and was crying. Henry informed Brandon that, as a mandated reporter, she was required to contact Child Protective Services to report the molestation. Brandon voluntarily waited for the police detectives to respond.

Two plainclothes detectives arrived twenty minutes after Henry's report of the interview and introduced themselves to Brandon. Brandon agreed to speak with them. The detectives informed Brandon

that he had the right to leave, that he was not under arrest, that they would not arrest him that day, and that any decision to proceed with formal court process would be left to the district attorney. Although the interview was non-custodial, the detectives administered Miranda warnings to Brandon. Throughout the interview, Brandon stated he needed help and that he did not “just want to be locked up.” The detectives responded that Brandon would feel better if he “[got] it off [his] chest” and that talking to them would help his daughters. The detectives also indicated that they wanted to help Brandon. The interview took less than one hour and was conducted at the SNAMH office. During the interview, Brandon admitted to sexually abusing his two daughters over the past seven years. Brandon also stated he had no intention of committing suicide.

Brandon voluntarily submitted to arrest on June 12, 2001. Prior to trial, Brandon filed a motion to suppress his confession and requested a Jackson v. Denno¹ hearing. The district court denied Brandon’s motion. At trial, the jury convicted Brandon on thirteen counts of sexual assault of a minor under sixteen, four counts of battery with intent to commit sexual assault, twenty-nine counts of sexual assault of a minor under fourteen, and seven counts of lewdness with a child under fourteen. The district court sentenced Brandon to a combined minimum of thirty-five years in prison on all counts. Brandon appeals.

¹378 U.S. 368, 395 (1964) (holding that a defendant is entitled to a hearing on the voluntariness of his confession by a body other than the one trying his guilt or innocence).

DISCUSSION

Brandon's confession

Brandon argues that he did not freely and voluntarily confess, given that the detectives (1) promised not to arrest him, (2) promised treatment rather than punishment, (3) suggested that Brandon might be able to help his family if he confessed, and (4) took advantage of his mentally vulnerable state. We disagree.

A confession is not admissible in evidence unless it is freely and voluntarily given²; *i.e.*, “the product of a ‘rational intellect and a free will.’”³ “A confession is involuntary whether coerced by physical intimidation or psychological pressure.”⁴ In determining voluntariness, the court must consider the totality of circumstances and its effect on the defendant’s will.⁵ The court may consider the following factors: “the youth of the accused; his lack of education or his low intelligence; 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 such as the deprivation of food or sleep.”⁶ We will not disturb a district court’s

²Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987).

³Id. at 213-14, 735 P.2d at 322 (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

⁴Id. at 214, 735 P.2d at 322-23.

⁵Sheriff v. Bessey, 112 Nev. 322, 324, 914 P.2d 618, 619 (1996).

⁶Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998) (quoting Passama, 103 Nev. at 214, 735 P.2d at 323)).

decision regarding the voluntariness of a confession if supported by substantial evidence.⁷

In this case, the police administered Miranda warnings before questioning and informed Brandon that they were investigating sexual abuse allegations. While the detectives promised not to arrest him that day, they stated that the decision to proceed would be left to the district attorney. Although the detectives encouraged Brandon to confess for therapeutic reasons, informing Brandon that he could “get it off [his] chest,” they never promised treatment. The detectives suggested that a confession would also help Brandon’s family, but did not imply any definite results. Moreover, Brandon was thirty-seven years old, well-educated and possessed at least average intelligence. The interview lasted less than one hour, and he was free to leave whenever he chose. Although Brandon presented expert testimony that his recent suicide attempts made him mentally vulnerable and that he virtually regarded the detectives as counselors, the district court and the jury were entitled to disregard this evidence. Henry and the detectives testified to Brandon’s renunciation of his willingness to commit suicide at the time of the interviews. Further, he voluntarily waited for the detectives so he could confess and indicated that his suicide attempts may have been a cry for attention. Therefore, under the totality of the circumstances, we conclude that substantial evidence supports the proposition in this case that Brandon voluntarily and truthfully admitted to molesting his children.

⁷Allan v. State, 118 Nev. 19, 23-24, 38 P.3d 175, 178 (2002).

Jury instruction

Brandon contends that the district court erred by refusing the following voluntariness instruction:

To determine whether a statement is voluntary, this jury must look to see whether a confession was extracted by any sorts of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence.

A defendant in a criminal case has a right to jury instructions on his theory of the case whenever there is evidence to support that theory.⁸ However, the district court may refuse to give a proposed instruction if the law stated in it is substantially covered by other instructions.⁹ Here, the district court instructed the jury as follows:

The fact that the court has admitted into evidence the alleged statement, confession or admission of the defendant does not bind the jury to accept the court's conclusion; and the jury, before it may take a statement, confession or admission into consideration, must for itself find whether or not it was a voluntary statement, confession or admission. If the jury concludes a statement, confession or admission was not made voluntarily, it is the duty of the jury to entirely disregard the same and not consider it for any purpose.

We conclude that the district court properly instructed the jury on the question of whether Brandon's confession was voluntary and that the proposed instruction did not substantially add to the instruction given on

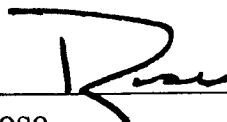
⁸Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76 (2002).


⁹Id. at 372, 46 P.3d at 77.

the issue. Also, the instruction given stressed that the jury was not bound by the court's determination of voluntariness, and substantial evidence supports the voluntariness of the confession. Finally, Brandon's proposed instruction, that the jury could consider "direct or implied promises, however slight" on the issue of voluntariness, did not accurately reflect Nevada law concerning the admission of confessions.

Accordingly, we

ORDER the judgment of conviction of the district court
AFFIRMED.¹⁰


_____, J.
Rose


_____, J.
Maupin

cc: Hon. Sally L. Loehrer, District Judge
Thomas C. Michaelides
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁰This matter was submitted for decision by a panel of this court comprised of Justices Rose, Leavitt, and Maupin. Justice Leavitt having died in office on January 9, 2004, this matter was decided by a two-justice panel.