

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PRENTICE MARSHALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68747

FILED

MAR 29 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Prentice Marshall appeals from a judgment of conviction, pursuant to a guilty plea, of robbery with the use of a deadly weapon; grand larceny auto; two counts of conspiracy to commit robbery, with the intent to promote, further or assist a criminal gang; robbery with the use of a deadly weapon, with the intent to promote, further or assist a criminal gang; burglary while in possession of a firearm, with the intent to promote, further or assist a criminal gang; attempted robbery with the use of a deadly weapon, with the intent to promote, further or assist a criminal gang; and murder with the use of a deadly weapon, with the intent to promote, further or assist a criminal gang. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Marshall asserts the district court erred and his first statement to the detectives should have been suppressed because he was

not read his *Miranda*¹ rights prior to the interview and his confession was involuntary and the byproduct of coercion.²

“[A] trial court’s custody and voluntariness determinations present mixed questions of law and fact.” *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). “The district court’s purely historical factual findings pertaining to the ‘scene- and action-setting’ circumstances surrounding an interrogation is entitled to deference and will be reviewed for clear error.” *Id.* However, we review de novo the ultimate determination of whether a person was in custody and whether a statement is voluntary. *Id.*

Custody under *Miranda*

Although acknowledging he was at a hospital, which is not typically an area controlled by the police, Marshall asserts he was in custody for *Miranda* purposes because the police controlled the area around him, the police had already identified him as a suspect in the Nettleton shooting when they interviewed him, multiple indicia of arrest were present during the first interview with detectives, and the questioning of him was exhaustive and focused on his involvement in the Nettleton shooting.

“The Fifth Amendment privilege against self-incrimination provides that a suspect’s statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning.” *State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998).

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

²These issues were preserved for appeal pursuant to NRS 174.035(3).

“Custody’ for *Miranda* purposes means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *Rosky*, 121 Nev. at 191, 111 P.3d at 695. Because Marshall was not formally arrested when he was first interviewed by the detectives, “the pertinent inquiry is whether a reasonable person in the suspect’s position would feel ‘at liberty to terminate the interrogation and leave.’” *Id.* (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). This court considers the totality of the circumstances when deciding whether a person was in custody. *Alward v. State*, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996), *overruled on other grounds by Rosky*, 121 Nev. 184, 111 P.3d 690.

The district court determined Marshall was not in custody for *Miranda* purposes, and we agree. Marshall voluntarily took himself to North Vista Hospital for treatment of gunshot wounds. Because Marshall had reported he had been robbed and shot, a single police officer in full uniform was dispatched to the hospital to take Marshall’s statement. The police officer spoke with Marshall for approximately 40 minutes while medical staff worked on Marshall. Shortly after the police officer concluded her conversation with Marshall a crime scene analyst arrived at the hospital to process Marshall for possible evidence.

Due to the severity of his wounds, Marshall was transported by ambulance to University Medical Center (UMC), where he was admitted at 4:30 a.m. At the direction of her sergeant, the police officer followed in her patrol vehicle. Once at UMC, the police officer stayed nearby Marshall, sometimes inside his room and sometimes outside of his room, waiting for detectives to arrive so she could pass information on to them. Medical staff continued to interact with Marshall and Marshall’s

movements in the hospital were directed by the medical staff. Detectives Mark Suranowitz and Alan Antoniewicz arrived at UMC in the 5 a.m. hour, and after their arrival, the police officer had no further interaction with Marshall and waited outside of Marshall's room.

Upon their arrival at UMC, the detectives asked a nurse what Marshall's condition was, what medications he was on, and whether he would be able to communicate in a coherent manner and understand what was going on. The nurse informed them Marshall had been given a half dose of morphine, he was coherent and would be able to talk to them and understand everything. Detective Suranowitz testified that, although Marshall was a suspect in the Nettleton shooting, at that time there was no police hold placed on Marshall and he would have been free to leave because they did not have probable cause to arrest him.

The detectives, who were in plain clothes, introduced themselves to Marshall and explained they wanted to talk to him to find out what happened. Marshall initially told the detectives he was walking home from a bus stop when a couple of guys approached him and asked for all of his stuff. During the interview, the detectives told Marshall they were trying to figure out what happened, they had talked to people and the stories were not matching up, they did not believe Marshall was being totally honest with them, and this was his one chance to be honest with them. The detectives told Marshall he did not have to talk to them if he did not want to and he could tell them to leave and they would leave.

Marshall continued to talk to the detectives. It was only after the detectives questioned Marshall's veracity, and Marshall informed them he left out part of the story, that the detectives questioned Marshall about facts related to the Nettleton shooting. The form of the questions,

however, was not leading as the detectives did not put any words in Marshall's mouth; instead the detectives asked Marshall to tell them how things happened, why things started, where things happened, what Marshall did, and what other people did.

Ultimately Marshall confessed to activities which implicated him in the Nettleton shooting. The detectives then concluded the interview and left the room. The interview lasted approximately 50 minutes and, during the interview, medical personnel came in and out of the room, but no one other than medical personnel entered the room.

Approximately 10 minutes after the first interview, a nurse informed the detectives Marshall wanted to speak with them again. The detectives returned to Marshall's room and, before questioning him, they informed him he was under arrest and advised him of his *Miranda* rights. He stated he understood and agreed to speak with them. This second interview lasted approximately 8 minutes. After the conclusion of the second interview a police hold was placed on Marshall with the hospital. Marshall was not placed in handcuffs or restraints and he remained in the same room and bed; however, an officer remained at the hospital with him and he was not free to leave at that point. A notation was added to the UMC Interdisciplinary Progress Notes at 6:45 a.m. stating it was explained to Marshall he was on a police hold at that point.

Detective Suranowitz testified at the evidentiary hearing on the motion to suppress that he was never aware that Marshall's friends or family members were there to see Marshall, he was not aware an attorney

called to talk to Marshall,³ he was not aware of anyone being denied access to Marshall prior to the first interview, and, prior to the first interview, he never denied anyone access to Marshall.

The district court found that although Marshall may not have been free to leave and he may not have been able to move about freely, this was because he was in the hospital being treated for his wounds. This finding is supported by the record. Objectively considering the totality of the circumstances, we conclude a reasonable person in Marshall's position would have felt at liberty to terminate the interview and request the officers to leave. Therefore, we conclude Marshall was not in custody for *Miranda* purposes when the detectives first interviewed him and *Miranda* warnings were unnecessary. *See Alward* at 155, 912 P.2d at 252 (identifying four factors to be considered when making the objective custody determination); *Taylor*, 114 Nev. at 1082 n.1, 968 P.2d 323 n.1 (identifying several objective indicia of arrest); *see also Commonwealth v. McGrail*, 952 N.E.2d 969, 976 (Ct. App. Mass. 2011) (holding the questioning of a person in a hospital, where the person "was in an unsecured area, surrounded by the general public and various medical

³Even if the detectives were aware of an attorney's attempts to reach Marshall, they were not required to inform Marshall of the attorney's attempts to contact him or to update Marshall on the status of his legal representation, and their failure to do so has no bearing on whether Marshall was in custody for *Miranda* purposes. *See Moran v. Burbine*, 475 U.S. 412, 426-427 (1986). Marshall points out several States have departed from *Moran* and have held the police are required to inform a defendant when they are aware counsel is attempting to reach the defendant and he urges this court to also depart from *Moran* in this regard. We need not address this issue because the only evidence in the record regarding this matter is that the detectives were not aware counsel was attempting to reach Marshall.

professionals,” was noncustodial because “[a] reasonable person would have understood that he was being held at the hospital by medical personnel for medical purposes, in light of the potential severity of his injuries”).

Voluntariness

Marshall argues his confession was involuntary because the detectives told him they wanted “to try and help [Defendant Marshall] out” and this was an express promise of future leniency that induced him to confess. Marshall also asserts his confession was involuntary because the detectives deceived him about the case against him and their investigation by telling him they had spoken with the victim, Saul, and the other guy. Finally, he asserts the following factors contribute to the involuntary nature of his confession: he had turned 18 only a couple of months before the incident; he had not yet graduated from high school; he had been held back a year during his schooling; he was under the influence of morphine and in the process of seeking medical treatment when he was questioned; he was not properly Mirandized prior to the interview; he was denied his ability to speak to counsel prior to the interview; the interview lasted over 50 minutes; he had a police hold placed on him; he was monitored and guarded by the police for three to four hours prior to the interview; and the questioning was repeated and prolonged in nature.

“A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement.” *Passama v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). “Unlike the objective custody analysis, the voluntariness analysis involves a subjective element as it logically depends on the accused’s characteristics” and it is the

prosecution's burden to demonstrate, by a preponderance of the evidence, that a confession was voluntary. *Rosky*, 121 Nev. at 193, 111 P.3d at 696. A court must look at "the effect of the totality of the circumstances on the will of the defendant" when determining the voluntariness of a confession. *Passama*, 103 Nev. at 214, 735 P.2d at 323. "The question in each case is whether the defendant's will was overborne when he confessed." *Id.*

Implicit and explicit promises that trick a defendant into a confession can render a confession involuntary. *See id.* at 215, 735 P.2d at 323; *see also Franklin v. State*, 96 Nev. 417, 421, 610 P.2d 732, 734-35 (1980). Although police deception is a relevant factor in determining whether a confession is voluntary, "an officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary" and "confessions obtained through the use of subterfuge are not vitiated so long as the methods used are not of a type reasonably likely to procure an untrue statement." *Sheriff, Washoe Cty. v. Bessey*, 112 Nev. 322, 324-25, 914 P.2d 618, 620-21 (1996).

At the evidentiary hearing on the motion to suppress, Detective Suranowitz testified that before the interview he was informed by a nurse that Marshall had half a dose of morphine, he was coherent and would be able to talk to them and understand everything. When the detectives entered the room, Marshall was awake and in a sitting position and, although he had medical devices hooked up to him, he was not strapped down. Detective Suranowitz testified Marshall was clear when he spoke, alert, and conversing like a normal person. Detective Suranowitz also testified regarding the room Marshall was in and said the door was not locked; Marshall could adjust the bed and call the nurse as

needed; Marshall had a phone, water, and a restroom available to him; and there was a television in the room.

At the beginning of the first interview, the detectives introduced themselves to Marshall as detectives, explained they wanted to talk to Marshall to find out what happened, and said they wanted to "try and help [him] out." There is no indication that the detectives' statement they wanted to help Marshall out induced him to talk about the Nettleton shooting or that the statement was an implicit or explicit promise of leniency to Marshall in exchange for talking to them. Further, there is nothing in the record to indicate that Marshall perceived this statement as an offer of leniency.

Later during the interview, the detectives told Marshall he was free to terminate the questioning at any time, which he acknowledged he understood, and Marshall continued to talk to the detectives. Although the detectives deceived Marshall by telling him they had talked to Saul and others regarding the incident, the detectives never told Marshall what these other individuals had allegedly told them, nor did they provide him with facts regarding the Nettleton shooting. Subsequently, Marshall confessed to activities which implicated him in the Nettleton shooting and described for the detectives what occurred. The interview lasted approximately 50 minutes. At no time during the interview did Marshall indicate he did not want to talk to the detectives.

Detective Suranowitz further testified he was not aware an attorney had attempted to contact Marshall. And nothing in the record indicates that Marshall was aware counsel tried to contact him.

The district court agreed with the State's assertion that Marshall was lucid when he made his confession and denied the motion to


suppress. The court's factual finding of lucidity is supported by the record and not clearly wrong. We conclude that when subjectively considering the totality of the circumstances in this case the State met its burden and proved Marshall's confession was voluntary and his will was not overborne when he confessed.⁴ See *Passama*, 103 Nev. at 214, 735 P.2d at 323 (identifying factors to be considered when determining whether a defendant's confession was voluntarily given).

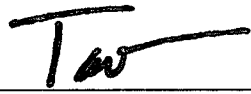
Although the detectives misrepresented the fact they had spoken with Saul and others about the case before talking to Marshall, the deception was a minor intrinsic one that under the totality of the circumstances was not reasonable likely to procure an untrue statement. See *Bessey*, 112 Nev. at 324, 914 P.2d at 619. Further, even assuming counsel was denied contact with Marshall, because nothing in the record indicates Marshall was aware counsel tried to contact him, such a denial would not have rendered his confession involuntary. See *Moran*, 475 U.S. at 422-24 (events occurring outside presence of suspect have no bearing on the suspect's ability to understand and knowingly waive a constitutional right, and although potentially unethical, the failure to inform a person that counsel is attempting to reach him "is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them"); see also *Goldstein v. State*, 89 Nev. 527, 529-30, 516 P.2d 111, 112-13 (1973).

⁴Because we conclude Marshall's confession was voluntarily given and not the product of coercion, we need not address Marshall's claim that his second statement to the detectives should have been suppressed as fruit of the poisonous tree.

Because Marshall was not in custody for *Miranda* purposes during his first interview with the detectives and because we conclude his confession was voluntary and not the product of coercion, we further conclude the district court did not err by denying Marshall's motion to suppress. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Jessie Elizabeth Walsh, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk