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5-26-2005

### Summary of Rosky v. State, 121 Nev. Adv. Op. No. 22

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*Nevada Law Journal*

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***Rosky v. State*, 121 Nev. Adv. Op. No. 22, 111 P.3d 690 (May 26, 2005)<sup>1</sup>**

**CRIMINAL LAW – APPEALS, FIFTH AMENDMENT, EVIDENCE**

**Summary**

Police executed a search warrant at John Rosky’s apartment as part of an investigation into the sexual assault of a 13-year-old girl. Two police officers eventually drove Rosky to a police substation for questioning but they did not formally arrest him or administer *Miranda* warnings. Police informed Rosky that his participation was voluntary and that he was free to leave at any time. At one point during the questioning, Rosky took a ten-minute break and went outside the police station unaccompanied by the detectives. The detectives used mild forms of deception and confronted Rosky with their belief that he was guilty. Approximately 1½ hours into the interview, Rosky admitted to a brief consensual act of sexual intercourse with the 13-year-old girl.

Rosky was arrested after the interview and released on bail. However, Rosky failed to appear in court. Authorities eventually located him in Mexico and obtained extradition.

At trial, Rosky moved to suppress his confession because the officers did not administer *Miranda* warnings and his statements were made involuntarily. The district court concluded that *Miranda* did not apply because the statements were elicited in a non-custodial setting and that Rosky made the statements voluntarily.

The district court also admitted evidence that Rosky fondled and digitally penetrated a 12-year-old girl ten years earlier. The district court ruled that the prior bad act was admissible as part of a common scheme or plan and as modus operandi. Also at trial, the court instructed the jury on flight.

Rosky was convicted of sexual assault and indecent exposure. Rosky appealed asserting that the district court committed reversible error by (1) denying his motion to suppress the statement he made to police, (2) admitting prior bad act testimony, and (3) instructing the jury on flight.

**Issues and Disposition**

**Issues:**

- (1) – What is the proper standard of review regarding whether a suspect is “in custody” for purposes of *Miranda*?
- (2) – What is the proper standard of review regarding whether a statement is made voluntarily?
- (3) – Was Rosky “in custody” for *Miranda* purposes?
- (4) – Were Rosky’s statements voluntarily given?
- (5) – Should the trial court have admitted prior bad act testimony?
- (6) – Should the trial court have instructed the jury on flight?

**Disposition:**

- (1), (2) – A trial court’s custody and voluntariness determinations present mixed questions of law and fact. While a trial court’s factual findings are reviewed for clear error, the ultimate

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<sup>1</sup> By Jason Peck

determination of whether a person was in custody and whether a statement was voluntary should be reviewed de novo.

- (3) – Rosky was not in custody for *Miranda* purposes because he was not under arrest and a reasonable person in Rosky’s position would have felt at liberty to terminate the interrogation and leave.
- (4) – Rosky’s statements to police were made voluntarily because police did not overbear Rosky’s will. For example, when detectives asked Rosky if he was too intoxicated to be interviewed, Rosky clearly stated he was coherent and fine. Also, the detectives’ use of slight subterfuges to elicit Rosky’s confession was appropriate. Finally, Rosky tried to deflect the accusations and used semantical dodges to mislead the detectives.
- (5) – The trial court should not have admitted prior bad act evidence because it did not show a common plan or scheme. The instant offense and the prior bad act were not part of a single, preconceived overarching plan that resulted in improper sexual contact with the victim in the instant case. Further, the crimes were independent of one another, were eight years apart, and could not be planned until each victim came within reach. Nor should the prior bad act have been admitted as modus operandi evidence because the defendant’s identity was not at issue during the trial.
- (6) – Instruction on flight was proper because the record supported the conclusion that Rosky fled with consciousness of guilt and to evade arrest.

## **Commentary**

### **State of the Law Before Rosky**

Standards of review:

The standard of review of a district court’s “in custody” determination for purposes of *Miranda* has not been consistent in Nevada. In 1998, the Nevada Supreme Court applied a substantial evidence standard.<sup>2</sup> Two years later, the Court held that the district court will not be overruled unless definitely and firmly convinced of error.<sup>3</sup>

Custody under *Miranda*:

A suspect’s statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning.<sup>4</sup> “Custody” for *Miranda* purposes means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.<sup>5</sup> If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect’s position would feel “at liberty to terminate the interrogation and leave.”<sup>6</sup> All the circumstances surrounding the interrogation determine whether a reasonable person would feel at liberty to terminate the interrogation and leave.<sup>7</sup>

The Nevada Supreme Court has provided several factors pertinent to the objective custody determination: (1) the site of the interrogation; (2) whether the investigation has focused on the subject; (3) the length and form of questioning; and (4) whether the objective indicia of

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<sup>2</sup> Mitchell v. State, 971 P.2d 813 (Nev. 1998).

<sup>3</sup> Proferes v. State, 13 P.3d 955, 956 (Nev. 2000).

<sup>4</sup> State v. Talyor, 968 P.2d 315, 323 (Nev. 1998).

<sup>5</sup> Alward v. State, 912 P.2d 243, 252 (Nev. 1996).

<sup>6</sup> Thompson v. Keohane, 516 U.S. 99, 112 (1995).

<sup>7</sup> Stansbury v. California, 511 U.S. 318, 322 (1994).

arrest are present.<sup>8</sup> In determining the last factor, the objective indicia of arrest, a court will consider the following: (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.<sup>9</sup>

#### Voluntariness of statement:

A statement is voluntary if not coerced by physical intimidation or psychological pressure.<sup>10</sup> Factors relevant to voluntariness include the youth of the accused, lack of education, low intelligence, lack of any advice of constitutional rights, length of detention, repeated and prolonged nature of questioning, and use of physical punishment such as deprivation of food or sleep.<sup>11</sup>

#### Prior bad acts:

Evidence of prior bad acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.<sup>12</sup> Nevertheless, prior bad act evidence may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>13</sup> To be admissible, a prior bad act must be (1) relevant to the crime charged, (2) proven by clear and convincing evidence, and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.<sup>14</sup>

Modus operandi evidence is proper where a positive identification of the perpetrator has not been made and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial.<sup>15</sup>

#### Flight instruction:

A district may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest.<sup>16</sup>

### **Effect of *Rosky* on Current Law**

*Rosky* clarified the standard of review concerning whether a person is “in custody” for purposes of *Miranda* and whether a statement is made voluntarily. *Rosky* overrules prior case law applying a more deferential standard of direct appellate review.

The Nevada Supreme Court applied existing law to determine whether *Rosky* was in custody when he confessed, whether his statements were made voluntarily, whether evidence of

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<sup>8</sup> *Alward*, 912 P.2d at 252.

<sup>9</sup> *Taylor*, 968 P.2d at 323 n.1.

<sup>10</sup> *Brust v. State*, 839 P.2d 1300, 1301 (Nev. 1992).

<sup>11</sup> *Alward*, 912 P.2d at 252.

<sup>12</sup> NEV. REV. STAT. 48.045(2) (2004).

<sup>13</sup> *See Richmond v. State*, 59 P.3d 1249, 1254 (Nev. 2002).

<sup>14</sup> *Tinch v. State*, 946 P.2d 1061, 1064-65 (Nev. 1997).

<sup>15</sup> *Mortensen v. State*, 986 P.2d 1105, 1110 (Nev. 1999).

<sup>16</sup> *See Walker v. State*, 944 P.2d 762, 773 (Nev. 1997).

the prior molestation was admissible, and whether an instruction of flight was proper. *Rosky* has no effect on the state of the law in these areas.

### **Conclusion**

Appellate review of whether a defendant was “in custody” for *Miranda* purposes and voluntariness of a defendant’s statements requires a two-step analysis. First, the trial court’s factual findings pertaining to the circumstances surrounding an interrogation are entitled to deference and will be reviewed for clear error. Second, the trial court’s ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo.