Filed 4/30/15 P. v. Orellana CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN ANTONIO ORELLANA, Defendant and Appellant.	B255892 (Los Angeles County Super. Ct. No. BA403082)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Juan Orellana of oral copulation of a child under ten and lewd acts on a child. On appeal, Orellana contends the trial court violated his Fifth and Sixth Amendment rights by permitting the People to introduce damaging admissions Orellana made when a detective interrogated him. Orellana argues he had retained an attorney and he tried to tell the detective that he wanted his lawyer to be there but the detective interrupted him. Orellana also contends the detective threatened him, promised him leniency, and lied about nonexistent scientific evidence, rendering his incriminating admissions involuntary. We find no error, and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Vanessa's Allegations*

Vanessa M. was born in June 2007. Orellana was a good friend of Vanessa's father, Pedro, who was deported in about 2011. Orellana and his girlfriend Blanca Ardon acted as godparents to Vanessa. They took Vanessa places on weekends -- to the park, out to eat, and to their apartment. Orellana's teenage daughter Monica usually went along. Vanessa called Orellana her "padrino."

On September 16, 2012, a Sunday, Orellana, Ardon, Monica, and Vanessa went to The Grove shopping center and to a store across the street. They took Monica home and then went to their apartment, taking Vanessa with them. Ardon left the apartment to walk a short distance to get some telephone cards. Orellana stayed home alone with Vanessa. It was the first time Orellana had ever been home alone with Vanessa. Vanessa was five years old at the time.

Around 4:00 that afternoon, Ardon called Vanessa's mother, Claudia Calderon. Ardon told Calderon that Vanessa was crying and that they were going to bring her home. Orellana and Ardon brought Vanessa back to Calderon's apartment around 6:00 p.m. According to Calderon, Vanessa seemed nervous. She got into bed right away. As soon as Orellana and Ardon left, Vanessa asked her mother to come into the bathroom. Vanessa was crying and told Calderon that Orellana had touched her private parts. Vanessa pointed to her crotch. Vanessa said Orellana had pulled her underwear

down and bitten her or tried to bite her "in her privates." Vanessa said Orellana had opened her legs and had her sit on top of him. She told Calderon that Orellana's zipper had hurt her leg. According to Calderon, Vanessa was "screaming for [her] to never let her go with her godparents again."

Calderon called Orellana and Ardon. She asked Ardon how she could allow her boyfriend to do this. Ardon said she did not know what Calderon was talking about. Ardon gave the phone to Orellana. Calderon told Orellana she "couldn't believe that he did that to [her] daughter." She cursed at him. Orellana said he had not done anything. He offered to take Vanessa to the doctor.

Calderon took Vanessa to Children's Hospital that night. Medical personnel examined Vanessa. Police and a social worker arrived. Calderon told the police officer what had happened. The officer took Calderon and Vanessa to County/USC Hospital. Around 2:15 a.m., a forensic nurse-practitioner, Shana Cripe, interviewed Vanessa, examined her, and took swabs. Cripe asked Vanessa's mother to wait outside. Cripe usually asks the child "Why are you here?" and "What happened?"

Vanessa told Cripe that her padrino had "pull[ed] his zipper down and it scared [her]," that he had "hit [her] with the zipper on [her] private part," and that he had "pulled at [her] underwear under [her] dress." Vanessa said that her padrino had put his fingers and "his private part on [her] private part," that his "private part looked like a snake," and that "stuff came out of his private part on the bed." Vanessa pointed to her vaginal area when she used the term "private part." Vanessa told Cripe that her padrino had bitten her "on the private part with his teeth" and she told him it hurt. Vanessa said, "He showed me pictures of naked grownups with Hello Kitty because it was my birthday."[1] Cripe was unable to understand about a quarter of what Vanessa said: some of what she told Cripe just did not make sense. Cripe said this was fairly normal for a five-year-old patient.

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[1] Vanessa's birthday is June 29, not September 16.

Cripe then interviewed Calderon outside Vanessa's presence. Calderon told Cripe that Vanessa had urinated and wiped herself with toilet paper since Orellana and Ardon brought her home but had not defecated or taken a bath.

After interviewing Vanessa and her mother, Cripe had Vanessa take her clothes off. She examined her for injuries and used a Woods Lamp to look for proteins or secretions. Saliva usually would not light up under the Woods Lamp but semen would. No proteins or secretions appeared on Vanessa's body, nor did she have any cuts, scratches, marks, or other injuries. Cripe did not see any redness in Vanessa's vaginal area but noted that it had been more than eight hours since Vanessa had been returned to her mother. Cripe's examination of Vanessa's genital and anal areas revealed nothing out of the ordinary. Cripe concluded that she could not either "confirm or negate sexual abuse[,] because the exam was normal."

Los Angeles Police Department Detective Theresa Hernandez also interviewed Vanessa and her mother on September 24, 2012, at Rampart station. Vanessa's interview was videotaped.

2. *The Detective Interviews Orellana*

Detective Hernandez called Orellana and asked him to come in for an interview. Hernandez and Orellana arranged a time to meet but Orellana did not appear for the meeting. Hernandez called Orellana and left him a couple of messages. Orellana did not respond and Hernandez had officers arrest him on September 26, 2012. The arresting officers brought Orellana to Rampart station around 8:00 p.m. and Hernandez interviewed him. Hernandez left the door of the interview room open. She sat across the table from Orellana. Orellana was not handcuffed during the interview. Hernandez was dressed in "business casual" attire, a t-shirt and slacks. Hernandez – a certified Spanish speaker -- interviewed Orellana in Spanish. The interview was videotaped.

Hernandez first asked Orellana a number of preliminary questions about his age, address, occupation, and the like. Hernandez then said, "I'll talk to you about the case I have, okay?" Hernandez went on, "But in order to do that I need to read your, -- to read you your rights. Okay?" Hernandez told Orellana he had the right to remain silent,

that anything he said could be used against him in a court of law, that he had the right to the presence of an attorney before and during any interrogation, and that if he did not "have the money to pay an attorney, one will be appointed to you at no cost before you're being [] interrogated." After each statement, Hernandez asked Orellana, "Do you understand?" Each time Hernandez answered, "Yes."

Hernandez then asked Orellana, "Didn't I call you yesterday for [] an appointment?" and "[D]id I say that you had no problems?" Hernandez answered, "Yes, and then I talked to the attorney 'cause I had already paid her, and she told me, 'You can't go because first,' she said . . . . " Hernandez interrupted: "But it's not, . . . it's not the attorney's decision. Like I just told you, those are your rights. If you want to talk to me about the case, I can discuss it with you." Hernandez said, "Well, yeah. That's what I wanted to talk about, but . . . . " Hernandez interrupted again: " 'Well, yeah?' Is that the answer? 'Well, yeah.' Okay, I just need your signature here please." Hernandez had Orellana sign a *Miranda* waiver form.[2]

Hernandez told Orellana, "[I]n a moment I'm gonna ask you everything I have to ask you. . . . Now, . . . people always think the worst about the cases, okay?" Hernandez said she worked for the sexual assault unit but that she already knew Orellana had not raped anyone. Orellana expressed relief. Hernandez told Orellana that he had "touched someone" but not raped her. Hernandez said touching someone was "not a big deal" to her but if Orellana lied to her, that would make it a big deal. Hernandez noted that Orellana's record consisted of only a domestic violence arrest and a misdemeanor case of some sort, and that she knew he was not "a bad person."

Hernandez told Orellana she wanted to understand "why did this happen with the girl . . . what happened that day?" Orellana responded, "[I]t's not gonna happen again because I'm not gonna be with the girl anymore." Orellana said he had offered to take Vanessa to the doctor "because I hadn't done anything to the girl." Hernandez said, "You did touch her. You did give her oral sex, okay?" Orellana said, "No. No."

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

Hernandez then told Orellana that his saliva had been found in a DNA test. Hernandez later said this falsehood was a commonly-used interrogation technique.

Hernandez told Orellana, "[Y]ou moved her underwear to the side and then you put your finger [sic] and then she pushed you and then you went and gave her oral sex with your tongue." Hernandez said, "A girl that age doesn't lie." She asked Orellana, "Did you force yourself over on her [sic]?" Orellana answered, "No." Hernandez noted Orellana had not done anything like that when Vanessa had been with him before. Orellana mentioned that they were always with his daughter Monica. Hernandez asked if it was different that day because Monica was not there. Orellana said his wife (referring to Ardon) had been there but had gone out to buy some cards. Orellana eventually said that he had put Vanessa on his lap but had not touched her. He again denied any oral copulation.

Hernandez then told Orellana she knew he was not a liar but if he "turn[ed] into a liar" she would "talk to the D.A." and "raise the charge." Hernandez repeated that a DNA test showed Vanessa had Orellana's saliva "down there." Hernandez said, "You wanna lie to me here? That's fine. I close the book but we're going to arrest you, okay? Don't lie to me. Be honest with me." Hernandez told Orellana, "You did it, and the question I'm asking you [is] why?" Orellana said, "But I wasn't gonna hurt her." Hernandez again accused Orellana of putting his finger in Vanessa's vagina and "oral sex." Orellana said, "Not internal. None of that. . . . It wasn't internal."

Hernandez told Orellana, "We have to put this behind you." She said Vanessa was not hurt, that Orellana did not "force" her, but that he did "grope[]" her. Orellana said, "No. No." Hernandez told Orellana Vanessa had said, when Orellana "gave her oral sex," she pushed him and he moved back and then left her alone. Orellana said, "Yes." Then Hernandez asked, "Did you make a mistake? Did you do something stupid?" Orellana answered, "Yes, I made a mistake." He said he was not going to do it again, "God willing."

Hernandez told Orellana, "if what you need is therapy, we can get you that, . . . and depending on what the D.A. says, if this is not very serious, probation or

something." Hernandez talked about Vanessa being a child. Then she said, "She attracted [sic] you sexually, but what happened that different day [sic] that you have never done it before?" Orellana answered, "It was a, like just an impulse." There was some discussion of Vanessa's dress being up. Hernandez asked if Orellana felt "[s]omething erotic" when he saw Vanessa with her "dress up high like that." Orellana said, "I mean, I just saw her like a girl . . . but . . . I had never done it before nor am I gonna do it [sic]. Just like an impulse." When Hernandez asked what he felt, Orellana said, "I mean, in my mind, you know. I mean, what an adult person would imagine."

Eventually Orellana seemed to admit having touched Vanessa's crotch outside her underwear with his tongue. He also seemed to admit having had an erection but repeated that he could not harm Vanessa because she is a girl. He said he "hugged her and that's all." Hernandez told Orellana she had to send the case to the district attorney but she would note that Orellana cooperated. Orellana repeated, "[I]t won't happen again."

3. *The Charges, the Hearing, and the Trial*

The People charged Orellana with oral copulation of a child under ten in violation of Penal Code section 288.7 subdivision (b) and with having committed a lewd act on a child in violation of Penal Code section 288(a). The case went to trial in January 2014. Orellana's attorney moved to exclude Orellana's statements to Detective Hernandez in the interview on the ground that "there was no knowing, intelligent, voluntary waiver of his *Miranda* rights." The court conducted a hearing outside the jury's presence. Detective Hernandez testified. The defense called Orellana. The court read the transcript of the interview and watched at least part of the videotape.

Hernandez testified that she read Orellana each of his *Miranda* rights in Spanish and that he said "yes" when asked if he understood each. Hernandez testified Orellana said he "wasn't sure" if he wanted to talk to her, and he mentioned having spoken with an attorney. Hernandez told Orellana it was his decision, his right, and he could talk to her if he wanted to. Orellana then said "well, yeah -- [t]hat he would talk to

[Hernandez]." Hernandez testified that Orellana never said that he did not want to talk to her, never asked to stop the interview, and never asked for an attorney. Hernandez said she never threatened Orellana during the interview.

On cross-examination, Hernandez admitted that -- before Orellana was arrested and brought in for the interview -- she had "received a message from a law firm that they wanted to speak to [her]" about Orellana. Hernandez testified that, when she reminded Orellana at the beginning of the interview that she had told him on the phone he had no problems, she was "trying to make him feel comfortable."

Orellana also testified at the hearing. Orellana said he was from Honduras and had attended school for only two years. Orellana claimed he told Hernandez he wanted to have a lawyer present during the interview, that he tried to tell her that two or three times but she interrupted. Orellana had paid and spoken with an attorney; the attorney had told him to call if and when he was interviewed. Orellana said he had signed the *Miranda* form but could not read it. He testified Hernandez "didn't explain" the form.

Orellana said he did not call the lawyer to represent him in the interview because the police had taken his wallet with the lawyer's business card in it when he was arrested. When defense counsel asked Orellana if he had felt "intimidated" by the detective, he answered, "Yes, because I didn't have the attorney that I had looked for to represent me." Orellana testified he continued to talk to Hernandez because he was "afraid [if he did not] she would have the D.A. punish me." He said he had initially denied the allegations but Hernandez got angry and said not to insult her, that she had been "doing this" for many years.

On cross-examination, Orellana admitted he had answered "yes" to each of the *Miranda* questions. Orellana said when he answered yes, that he understood he had the right to have an attorney present before and during any questioning, "at that moment I wanted to explain to her that I already had an attorney." Orellana claimed he told Hernandez that he wanted his lawyer there "but she said that I didn't need him there." He said he felt "intimidated" "because I'm a shy person -- in the way I express myself." Then he said, "If it's a police officer, yes, I am afraid. I'm a shy person." Orellana

claimed he did not understand all of Hernandez's questions. When asked what he did when he did not understand a question, he answered, "I wanted to express myself, but she would interrupt." Orellana admitted that he never stopped answering the detective's questions. He also admitted having denied some accusations that Hernandez made during the interview.

At the conclusion of testimony at the hearing, the prosecutor cited and discussed United States Supreme Court cases. He argued that, while Hernandez "could have perhaps been nicer with the defendant," there was "nothing to indicate that he didn't knowingly give up his rights." The prosecutor said Hernandez did not threaten Orellana, initially sitting at a table making "small talk" with him, and "there [was] nothing during those *Miranda* questions that was intimidating or coercive." The prosecutor argued that, after Hernandez read Orellana his rights, "he could have invoked. He never did. And whether the court wants to believe that this detective cut him off, he still engages in conversation during the entire interview with her. He has the ability to say I don't want to talk any more. I want to speak to my lawyer. And he didn't." The prosecutor said Hernandez encouraged Orellana to tell the truth and said it would be better for him, but she did not made promises about what would happen if he admitted the crime. The prosecutor conceded that Hernandez was "aggressive" in the interview but argued that, under the totality of the circumstances, Orellana's will was not overborne.

Defense counsel stated "[t]he main issue . . . [was] whether or not [Orellana] made a voluntary waiver of his right to counsel at this interview." Counsel argued that Orellana "had no opportunity to call the attorney that he paid for." Defense counsel said Orellana "tried" and "intended" to tell Hernandez "that he wanted to have an attorney present," but that she "cut [] him off three times." Counsel argued that Orellana continued to talk to Hernandez because she "threatened to raise the charges on him," and that Hernandez had induced Orellana to make incriminating admissions with promises of leniency as well as threats.

The court stated, "It seems to me that the two issues are whether the defendant was advised of his rights in an understandable way, and whether or not he voluntarily and intelligently waived those rights." On the first issue, the court noted the video- and audio-taped recording showed "that Mr. Orellana was orally advised of his rights. He was asked after each right whether he understood, and he responded yes." The court gave little weight to the form Hernandez had Orellana sign, given Orellana's testimony that he could not read Spanish. The court concluded, "Nonetheless, it does appear that he was advised of each of his rights in a way that was understandable, and that he indicated he understood them."

On the second issue, the court found "problematic" Hernandez's interruption of Orellana "on more than one occasion concerning his attorney and the fact that he had contacted an attorney." However, the court noted, under governing law, a defendant's invocation of his rights to remain silent and to have counsel present during questioning must be express. The court said, "I don't think there was an express invocation here. I think there was some ambiguity in terms of what may have been said, at best. But I don't think there was an express invocation of Mr. Orellana's desire to have his attorney present during questioning. As evidenced further by the fact that he kept talking." As for Orellana's claim of "intimidation," the court stated, "I don't see that, in either the content of the transcript or the portion of the tape that I watched in terms of any body language or tone of voice." The court therefore denied the defense motion to exclude Orellana's statements. But, the court said, defense counsel could argue to the jury that they should give little or no weight to the statements.

In closing argument, defense counsel argued that Orellana repeatedly had denied Vanessa's allegations until Detective Hernandez threatened to "raise the charges" and "close the book," and had suggested he might get probation and therapy. Counsel asked the jurors to "[l]ook at the interview in its totality" and to consider Orellana's "lack of education and how that may play a role in his ability to communicate." Counsel argued that Hernandez was telling Orellana what she "want[ed] to hear" and that Orellana

"relent[ed]" because he was scared. Defense counsel told the jurors, "Ask yourself how voluntary was his confession in light of all the circumstances."

The jury convicted Orellana on both counts. Orellana's attorney moved for a new trial "on the ground that the court erred in admitting into evidence Defendant's involuntary admissions made in his interview with Detective Hernandez." The court denied the motion and sentenced Orellana on the oral copulation count to life in prison with a minimum eligible parole date of 15 years. On the lewd act on a child count, the court sentenced Orellana to the midterm of six years concurrent with the life term.

APPELLANT'S CONTENTIONS

Orellana contends his interrogation by Detective Hernandez without his attorney present violated his Fifth and Sixth Amendment rights to counsel. Orellana also argues that his incriminating admissions were the result of police coercion -- including promises of leniency, threats of retaliation, and "use of fabricated scientific evidence" -- and were therefore involuntary.

DISCUSSION

As with appellate review of *Miranda* issues (see *People v. Hensley* (2014) 59 Cal.4th 788, 809), the trial court's legal conclusion as to the voluntariness of a confession is subject to independent review on appeal. The trial court's resolution of disputed facts and inferences, its evaluation of credibility, and its findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 752-753 (*Dykes*); *People v. Williams* (2010) 49 Cal.4th 405, 436 (*Williams*).)

1. *Detective Hernandez Did Not Violate Orellana's Right to Counsel under the Fifth and Sixth Amendments*

Orellana contends his "confession was the product of a violation of his right to counsel." It is unclear whether Orellana is arguing (1) that he had hired an attorney and could not be questioned without that lawyer present (a Sixth Amendment right), or (2) when he told Hernandez he had hired and spoken with a lawyer, that statement

amounted to an invocation of his right under *Miranda* not to be questioned without an attorney present (a Fifth Amendment right). In either event, Orellana's argument fails.

a. *Sixth Amendment Analysis*

When a person has been formally charged with a crime and is represented by counsel, police must give defense counsel the opportunity to speak with the defendant and be present during questioning. If they do not do so -- absent a waiver -- any statements obtained must be suppressed. (*Minnick v. Mississippi* (1990) 498 U.S. 146.) This Sixth Amendment right to counsel attaches "after the first formal charging proceeding." (*Moran v. Burbine* (1986) 475 U.S. 412, 428 (*Moran*).) In California, a prosecutor's filing of a complaint triggers the Sixth Amendment right to counsel. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1205.) A defendant's consent to police-initiated interrogation after the Sixth Amendment right has attached is not presumed involuntary or coerced simply because counsel has been previously appointed for the defendant. (*Montejo v. Louisiana* (2009) 556 U.S. 778, 794.)

Here, Orellana had been arrested but not charged. He told Hernandez he had hired a lawyer and spoken with that person. He seemed to say the lawyer had told him he did not have to go to the interview. The lawyer or someone on his or her behalf had called and left a message for Hernandez. On these facts, Hernandez did not violate Orellana's Sixth Amendment right to counsel. His Sixth Amendment rights had not attached. The United States Supreme Court has held that, before the initiation of adversarial judicial proceedings, the Sixth Amendment does not preclude the interrogation of a defendant who has validly waived his Fifth Amendment rights even when he is represented by counsel. (*Moran, supra,* 475 U.S. 412; see also *People v. Mattson* (1990) 50 Cal.3d 826, 867 (*Matson*).)[3] Detective Hernandez read each of

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[3] The California Supreme Court held in *People v. Houston* (1986) 42 Cal.3d 595 (*Houston*) that a defendant's right to counsel under article I, section 15 of the California Constitution was violated when interrogating officers did not tell the defendant that counsel who had been retained to represent him was at the police station, asking to see him immediately and demanding that any questioning cease. The underlying events in *Houston* took place six years before *Moran* was decided. The *Houston* court discussed

Orellana's *Miranda* rights to him in Spanish and asked him if he understood each. He said "yes" each time. Orellana then went on to answer Hernandez's questions. Accordingly, he validly waived his Fifth Amendment rights.

b. *Fifth Amendment Analysis*

Orellana also seems to contend that his statements to Hernandez about having hired an attorney constituted an invocation of his right not to proceed with questioning without his attorney present. However, the United States Supreme Court has held that a suspect must unambiguously request counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459.) The *Davis* court rejected the proposition that police must stop questioning when the suspect *might* want a lawyer. (*Id*. at p. 459.) " '[T]he interrogation must cease until an attorney is present *only* [i]f the individual states that he wants an attorney." ' " (*Ibid*., quoting *Moran, supra,* 475 U.S. at p. 433, fn. 4.) "Unless the suspect actually requests an attorney, questioning may continue." (*Davis, supra,* 512 U.S. at p. 462.) Where -- as here -- a defendant refers to an attorney, trial and reviewing courts "must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant." (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125 (*Gonzalez*).)

Orellana argues that he tried to tell Hernandez he wanted a lawyer but she interrupted him. But Orellana never asked for a lawyer or stated he wanted the lawyer he said he had hired to be present before any questioning proceeded. Orellana sat

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Moran -- decided less than seven months earlier -- but based its decision on the California rather than the U.S. Constitution. Chief Justice Lucas dissented, writing that the United States Supreme Court's decision in *Moran* was "clear" and "directly on point." (*Houston,* 42 Cal.3d at p. 617.) In any event, here, no attorney came to the station or otherwise took "diligent steps to come to [Orellana's] aid." (*Id*. at p. 610.) (See also *Mattson, supra,* 50 Cal.3d at p. 868 ("[t]he *Houston* rule was quite narrow . . . and was limited to the facts of that case").)]

calmly and proceeded to answer Hernandez's questions. He made some admissions, but repeatedly denied any oral copulation of Vanessa. On these facts, the trial court properly concluded that Orellana had not unambiguously demanded counsel. (See, e.g., *People v. Bacon* (2010) 50 Cal.4th 1082, 1104 [defendant's statement " 'I think it'd probably be a good idea for me to get an attorney' " was ambiguous or equivocal reference to attorney]; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 19, 23-25 [defendant's remark on being advised of *Miranda* rights that he was confused and his question, "Can I call a lawyer or my mom to talk to you?" (*Id.* at p. 19) did not constitute unequivocal request for counsel to be present; subsequent statements were admissible]; *People v. Gonzalez, supra,* 34 Cal.4th at p. 1119 [defendant's statement to detectives "if . . . you guys are going to charge me I want to talk to a public defender" was conditional, ambiguous, and equivocal]; *People v. Sapp* (2003) 31 Cal.4th 240, 268 [defendant's equivocal effort to invoke right to counsel was inadequate to require that questioning cease].)

2. *Orellana's Admissions in his Interview with Hernandez Were Voluntary*

The federal and state Constitutions bar the use of involuntary confessions against a criminal defendant. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *People v. Benson* (1990) 52 Cal.3d 754, 778 (*Benson*).) A confession is involuntary if it is obtained by force, fear, or a promise of immunity or reward. (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1483.) "The test for determining whether a confession is voluntary is whether the questioned suspect's 'will was overborne at the time he confessed.' " (*People v. Cruz* (2008) 44 Cal.4th 636, 669.)

Coercive police activity is a necessary predicate to a finding that a confession is involuntary. (*Colorado v. Connelly* (1986) 479 U.S. 157.) A statement is involuntary when -- among other circumstances -- it was extracted by threats or obtained by a direct or implied promise. (*Dykes, supra,* 46 Cal.4th at p. 752.) "A confession is 'obtained' by a promise within the proscription of both the federal and state due process guarant[ees] if and only if inducement and statement are linked, as it were, by 'proximate' causation." (*People v. Benson, supra,* 52 Cal.3d at p. 778.) In considering

whether something an officer says is a threat or a promise, courts "do not consider the words spoken in a vacuum but in the context of the conversation." (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203 (*Ramos*).) "In assessing allegedly coercive police tactics, '[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' " (*People v. Smith* (2007) 40 Cal.4th 483, 501 (*Smith*) [quoting *People v. Ray* (1996) 13 Cal.4th 313, 340].) "The business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means." (*People v. Jones* (1998) 17 Cal.4th 279, 297.)

In determining whether a defendant's will was overborne, courts apply a " ' "totality of the circumstances" ' " test and examine the nature of the interrogation and the circumstances relating to the particular defendant. (*People v. Thomas* (2012) 211 Cal.App.4th 987, 1008.) Among the factors to be considered are " ' " 'the crucial element of police coercion,' " ' " whether *Miranda* warnings had been given, the length of the interrogation, its location, and the defendant's maturity, education, physical condition, and mental health. (*Dykes, supra,* 46 Cal.4th at p. 752.) "[N]o single factor is dispositive." (*Williams, supra,* 49 Cal.4th at p. 436.)

The state bears the burden of proving the voluntariness of a confession by a preponderance of the evidence. (*Dykes, supra*, 46 Cal.4th at pp. 752-753; *Benson, supra*, 52 Cal.3d at p. 779.)

Here, Detective Hernandez's interview of Orellana lasted less than an hour. It began around 8:00 p.m.; it was not the middle of the night or very early in the morning, nor was there any evidence that Orellana was sleep-deprived. Orellana was 46 years old and had been arrested before. Hernandez, a certified Spanish speaker, spoke with Orellana in Spanish. Before she asked him any questions, she advised him in Spanish of his *Miranda* rights. He said he understood each of those rights.

While the interview took place in an interrogation room at the police station, Hernandez remained seated across the table from Orellana and she left the door open. Orellana was not handcuffed. Although Hernandez apparently had a gun in a shoulder

holster, she was not wearing a uniform, and there is no evidence that she ever took the gun out of the holster. The videotape of the interview shows that Hernandez and Orellana spoke in a conversational tone. While Hernandez spoke directly -- even forcefully -- to Orellana at times, she never yelled at him or even raised her voice. Orellana does not appear frightened or distraught in the video. He is not trembling, crying, or breathing heavily.

The record does not support Orellana's contention that Hernandez promised him leniency if he confessed. Hernandez did tell Orellana in her initial telephone call that he "had no problems" and in the interview that it was "not a big deal" to have touched someone. But she never assured him -- in the telephone call or in the interview -- that he would not be arrested or charged. Moreover, Orellana already had made a number of incriminating admissions before Hernandez ever mentioned a possible conversation with the district attorney about "therapy" or "probation." Accordingly, the required proximate causation between inducement and statement is missing.

As for Hernandez's use of deception, she did falsely tell Orellana that DNA tests had shown his saliva on Vanessa's genitals. However, "[d]eception does not necessarily invalidate an incriminating statement." (*People v. Maury* (2003) 30 Cal.4th 342, 411.) "The use of a subterfuge by police officers is not necessarily impermissible because subterfuge per se is not the same as coercive conduct." (*People v. Parrison* (1982) 137 Cal.App.3d 529, 537 [police took hand swab, then falsely told defendant swab showed he had handled a gun].) (See also *Smith, supra*, 40 Cal.4th at pp. 505-506 [police told defendant results of sham test for gunshot residue were positive]; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192 [detective falsely told defendant that victim had identified his photograph as the perpetrator].) In any event, Orellana continued throughout the interrogation to deny any skin-to-skin contact with Vanessa's genitals. Accordingly, any police lies about DNA results did not produce a confession to oral copulation.

Hernandez's statement to Orellana that if he lied to her she would talk to the D.A. about "rais[ing] the charge" presents a closer question. However, Orellana already

had made an incriminating statement -- that it was "not gonna happen again" because he was "not gonna be with the girl anymore" -- before Hernandez ever mentioned "raising" any charges. Moreover, Hernandez's statement was coupled with an exhortation to tell the truth. Encouraging a suspect to tell the truth is not coercion. (*Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 494, overruled on other grounds.) Hernandez's statement must be read in the context of the entire interview, including all of her questions and comments, among them an assurance that she knew Orellana had not raped anyone, a reference to how his conduct could have frightened his goddaughter, and an implication that charging and plea bargaining decisions would be made by the district attorney. Viewed in the totality of the circumstances, Hernandez's statement about increasing the charges did not rise to the level of a constitutionally impermissible threat. (Cf. *Williams, supra*, 49 Cal.4th at pp. 435-445 [detectives told defendant " 'you're going to . . . fry in the gas chamber' " and "the only thing that's going to help you, ok is to tell the truth"; officers' vigorous interrogation and display of confidence in defendant's guilt did not render his statements involuntary, as defendant's will was not overborne]; *People v. Belmontes* (1988) 45 Cal.3d 744, 770-774 [officer said to defendant "Thanks for lying to me" and mentioned case might involve the death penalty, then told defendant " 'you want to clear it up so that it's not all [lying] on you' "]; *In re Joe. R.* (1980) 27 Cal.3d 496, 513 [after receiving *Miranda* warnings, minor denied guilt for about 40 minutes; police then loudly, emphatically, and profanely ("bullshit") accused minor of lying and presented him with incriminating evidence; confession was admissible].)

In sum this sort of questioning by a detective may not be admirable. But the issue is whether, under the totality of the circumstances here, Orellana's will was overborne. These facts -- even taken in combination, as is required -- do not amount to an involuntary confession under governing law. (See *People v. Thomas, supra*, 211 Cal.App.4th at pp. 1007-1013 [four-hour interview at 4:24 a.m. of 17-year-old by two detectives did not produce involuntary statement even though detectives falsely told defendant that camera on highway had recorded events; two-hour interview of

15-year-old with IQ of 50 to 70 did not render defendant's statement involuntary even though detectives presented incriminating evidence after defendant had said, " 'I ain't talking no more and we can leave it at that' "]; *People v. Quiroz* (2013) 215 Cal.App.4th 65, 78-79 [witness's statement to police not involuntary even though police told him he faced 50 years in prison for murder but could give them accurate information the district attorney might view favorably; law enforcement "may confront a witness with what they know" and "discuss any advantages that 'naturally accrue' from making a truthful statement"]; *Ramos, supra,* 121 Cal.App.4th at pp. 1200-1204 [defendant's incriminating statement not involuntary even though detective told him his cooperation would benefit him in judicial process and that detective would present the facts to the district attorney on defendant's behalf]; *People v. Holloway* (2004) 33 Cal.4th 96, 112-117 [admissions not involuntary even though detective told defendant " '[w]e're talking about a death penalty case here,' " " '[t]he truth cannot hurt you,' " and " '[t]he longer you sit there and not say anything and you just ride with it, and you're just, you're gone' "; detective's suggestions that killings might have been accidental or done in fit of rage and those circumstances could " 'make[] a lot of difference' " fell "far short of being promises of lenient treatment in exchange for cooperation"]; *People v. Farnam* (2002) 28 Cal.4th 107, 181-183 [18-year-old defendant's confession not involuntary even though he was crying and police falsely told him his fingerprints had been found on victim's wallet].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.*

WE CONCUR:

EDMON, P. J.

KITCHING, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.