Filed 5/25/17 P. v. Calderon CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>NERY ISAAC CALDERON,<br><br>Defendant and Appellant. | 2d Crim. No. B277717<br>(Super. Ct. No. VA132252)<br>(Los Angeles County) |

A jury convicted Nery Isaac Calderon of six crimes against J.O.: five counts of lewd act on a child under age 14 (Pen. Code, § 288, subd. (a))[1] and one count of continuous sexual abuse of a child (§ 288.5, subd. (a)). The jury also convicted Calderon of seven crimes against C.O.: three counts of rape (§ 261, subd. (a)(2)), one count of aggravated sexual assault of a child (§ 269, subd. (a)(1)), one count of forcible lewd act on a child (§ 288, subd. (b)(1)), and two counts of lewd act on a child (§ 288, subd. (c)(1)).

[1] All further statutory references are to the Penal Code.

Calderon admitted a prior strike conviction (§ 667, subd. (a)(1)). The trial court sentenced him to 182 years to life in state prison.

Calderon claims that the judgment should be reversed because the trial court improperly admitted a police interview obtained in violation of his *Miranda*[2] rights. We affirm.

BACKGROUND

Calderon began to molest J.O. when she was five or six years old. He penetrated her vagina with his fingers and penis on dozens of occasions. He massaged and grabbed her breasts, vagina, and buttocks when her mother would leave the house. He orally copulated her. The abuse lasted until J.O. was 13 or 14 years old. J.O. never told her mother about it because she believed Calderon when he told her that she would be taken away if she said anything.

Calderon began to molest C.O. when she was 12 or 13 years old, around the time he stopped abusing J.O. He touched her breasts, vagina, and buttocks on a near-daily basis, whenever her mother was not in the house. He digitally penetrated and orally copulated her vagina. He forced her to orally copulate him. On multiple occasions, he sent C.O.'s mother away so he could rape her. C.O. never told her mother about Calderon's abuse.

Police arrested Calderon in October 2013. He claimed that he "wasn't doing very well when [he] was arrested" because of his recent hospitalization due to a stroke. Two detectives interviewed Calderon on the day of his arrest. At the beginning of the interview, the detectives asked if he had ever been arrested. Calderon admitted that he had been twice, in

---

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

1989 and 1995. The detectives then advised him, in his native language Spanish, of his *Miranda* rights:

"[Detective]: You have the right to not speak. You understand?

"Calderon: Oh, yes.

"[Detective]: What you say could be used against you in court. You understand?

"Calderon: Uh-huh.

"[Detective]: Yes or no?

"Calderon: Yes.

"[Detective]: Okay. You have the right to have an attorney here present while we speak. You understand?

"Calderon: Uh-huh.

"[Detective]: Yes or no?

"Calderon: Yes.

"[Detective]: If you want an attorney but you don't have money the court will give you one before we speak. You understand?

"Calderon: Uh-huh.

"[Detective]: Yes or no?

"Calderon: Yes.

"[Detective]: Do you understand your rights as I have read them to you?

"Calderon: Yes but I don't have the money to pay for one.

"[Detective]: Okay. But do you understand what I told you?

"Calderon: Uh-huh.

"[Detective]: Okay.

"Calderon: Yes."

During the interview, a detective asked Calderon, "[D]o you think that it is possible that you did molest [J.O. and C.O.] while you were drunk?" Calderon replied, "I don't know the truth. I can't tell you if yes or no because I don't know." Later, Calderon told the detectives that he did not know whether he molested J.O. and C.O. while he was drunk, and that he told J.O. that if he ever "messed up" with her or C.O. he wanted forgiveness. He denied molesting J.O. and C.O. throughout the remainder of the interview.

At trial, Calderon testified that he had a fourth grade education. He claimed that he was confused during the interview, did not understand the questions asked, and did not know how to answer the questions. He could not recall saying that he did not know whether he molested J.O. and C.O. while drunk. He denied abusing them.

## DISCUSSION

Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda*, *supra*, 384 U.S. at p. 444.) To determine whether the detectives here employed the requisite safeguards during Calderon's interview, "we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) Because police recorded Calderon's

interview, the relevant facts are undisputed and subject to our independent review.

*Miranda* requires that a defendant be informed that he or she "has a right to the presence of an attorney, either retained or appointed," before and during questioning. (*Miranda*, *supra*, 384 U.S. at p. 444.) A defendant may waive this right, "provided the waiver is made voluntarily, knowingly, and intelligently." (*Ibid.*) A waiver is voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) It is knowing and intelligent if it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Ibid.*) Whether a confession is voluntary, knowing, and intelligent is judged by the totality of the circumstances. (*Ibid.*) A defendant's "willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights" will often constitute an implied waiver under the totality of the circumstances. (*People v. Cruz* (2008) 44 Cal.4th 636, 667.)

In *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 215-216 (*Sauceda-Contreras*), a police officer read the defendant his *Miranda* rights. After she read each right the defendant stated that he understood it. (*Ibid.*) But after he heard all of the *Miranda* warnings he said, "'If you can bring me a lawyer, that way I[,] I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me.'" (*Id.* at p. 216.) The officer responded, "'Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present?'" (*Ibid.*) The defendant

replied, "'Oh, okay that's fine.'" (*Ibid.*) The officer then confirmed again that the defendant was willing to be interviewed. (*Ibid.*)

The Supreme Court held that the defendant waived his *Miranda* rights knowingly and intelligently. (*Sauceda-Contreras*, *supra*, 55 Cal.4th at p. 220.) The officer's statement that "'perhaps [he] didn't understand [his] rights'" did not address whether an attorney could be provided at that time. (*Ibid.*) The officer did not "restate the right to counsel or confirm [the] defendant's understanding of that right . . . ." (*Ibid.*) But she did properly advise him of his rights initially, and the defendant stated that he understood each of them. (*Id.* at p. 221.) He also stated that it was "fine" to be interviewed without an attorney present before he answered questions. (*Ibid.*) Under the totality of the circumstances, that was a knowing and intelligent waiver. (*Ibid.*)

Calderon contends that he was not fully aware of his *Miranda* rights because he did not know an attorney would be provided to him without cost. Without that awareness, he could not knowingly and intelligently waive his rights. But, as in *Sauceda-Contreras*, the detectives here properly admonished Calderon. Like the defendant in *Sauceda-Contreras*, Calderon stated that he understood each of those rights. And like the defendant in *Sauceda-Contreras*, Calderon proceeded to answer the detectives' questions after they asked clarifying questions. Under the totality of the circumstances, there was a knowing and intelligent waiver.

That Calderon had been recently released from the hospital at the time of his police interview and had a relatively low level of education does not change our conclusion. Other

than stating that he "wasn't doing very well," Calderon presented no evidence that his recent stroke impaired his judgment in any way. (*People v. Whitson* (1998) 17 Cal.4th 229, 249.) Nor did he present evidence that he lacked the requisite intelligence to understand his *Miranda* rights or the consequences of waiving them. (*Id.* at p. 250.)

This case is unlike *United States v. Botello-Rosales* (9th Cir. 2013) 728 F.3d 865 (*Botello-Rosales*), on which Calderon primarily relies. The detective in *Botello-Rosales* told the defendant, in Spanish, "If you don't have the money to pay for a lawyer, you have the right. One, who is free, could be given to you." (*Id.* at p. 867.) The detective used the Spanish word "libre" to mean "free." (*Ibid.*) But because "libre" translates to "being available" or "at liberty to do something," it suggested that the defendant's right to appointed counsel was "contingent on the approval of a request or on the lawyer's availability . . . ." (*Ibid.*) Such a warning failed to convey that the government would appoint counsel if the defendant could not afford an attorney. (*Ibid.*) The failure to clarify the warning prevented the defendant from making a knowing and intelligent waiver. (*Id.* at p. 868.)

*Botello-Rosales* is inapposite. Calderon received adequate warnings, and said that he understood them before answering questions. *Miranda*'s requirements were met here. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 387.)

But even if they were not, the admission of Calderon's police interview was harmless. The "admissions" Calderon made to police—that he did not know whether he molested J.O. and C.O. while he was drunk, and that he wanted forgiveness if he ever "messed up"—were minor. The evidence against him was substantial: Both J.O. and C.O. testified at

trial. J.O. said that, over the course of nearly a decade, Calderon penetrated her vagina with his fingers and penis; touched her breasts, vagina, and buttocks; and orally copulated her. C.O. said that Calderon touched her breasts, vagina, and buttocks on a near-daily basis; digitally penetrated and orally copulated her vagina; forced her to orally copulate him; and raped her on multiple occasions. Both J.O.'s and C.O.'s testimony was consistent with the interviews they gave to police. In contrast, Calderon was inconsistent: On direct examination he denied abusing drugs or alcohol and denied abusing J.O. and C.O., but on cross-examination he admitted that he drank heavily and that he told police that it was possible that he committed sexual misconduct. Under these circumstances, the admission of Calderon's statements was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Robert J. Higa, Judge

Superior Court County of Los Angeles

---

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.