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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. CEBERINO MARQUEZ PEREZ, Defendant and Appellant.	B236417 (Los Angeles County Super. Ct. No. BA370983)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Reversed in part and affirmed in part.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Ceberino[1] Marquez Perez guilty of, among other things, multiple counts of sexual intercourse or sodomy with a child under 10. His statement to detectives about the crimes was admitted at trial. On appeal, defendant contends that his statement was not knowing, intelligent and voluntary, under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also raises contentions concerning prosecutorial misconduct, the admission and exclusion of certain evidence, and instructional error. We reject these contentions, although we reverse an attorney fees order. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The sexual abuse.*

At the time of trial in 2011, J. C. was 10 years old. In 2009, when J. was eight, she lived with her family and extended family in a house. In a detached, converted garage on the property lived defendant and J.'s uncle, Porfirio. J. would sleep in the garage all the time with defendant, who told J.'s mother he wanted custody of J. because he loved her like a daughter. Defendant was nice to J. and bought her things like clothes, food, and toys. But he also made her watch videos that had "bad things" in them—"photos" and videos "for adults only." People were naked in the videos, and, according to J., a "boy" put his private part into a "girl['s]" "front part."

When J. was eight, defendant touched her "front part," going underneath her underwear. She tried to kick him. Defendant told her not to tell anyone, that he would buy her everything she wanted. Although it made her feel bad, she didn't tell anyone what had happened.

Another time, defendant tried to put "[h]is front part" into her bottom. It was painful, and she struggled and told him to stop.

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[1] Also spelled "Severiano" in the record.

Once, she was sleeping in the garage and defendant pulled her pants down and put his private on hers. It was "[h]urtful." This happened more than 20 times. She would try to push him away, but she couldn't stop him.

Defendant wanted J. to put her mouth on his penis, but she refused. He put his mouth on her front part.

J. described defendant's penis as a "[h]ard" "stick." Something white and saliva-like came out of the tip. Sometimes, defendant put a "[w]hite" "rubber" on his private part. J. drew a picture of defendant's penis for the assistant district attorney and Detective Brenda Salazar, the investigating officer, and described it as "sticky," peach in color, and like a mushroom.

Defendant also tried to have J. drink something he put a pill into, and he might have told her the pill was for energy and sex. She pretended to drink it. She was with defendant when he bought the pill, which came in a black and purple package or bag. At the same store where defendant bought pills, there was an adults-only area where defendant got condoms and movies like the one he showed to her.

When J. was seven, her mother, Mildred, found blood in J.'s underwear. She examined J., and everything looked fine, although Mildred told a detective that J. had small blisters that Mildred attributed to J.'s failure to bathe.[2]

Porfirio, J.'s uncle, lived in a separate room in the garage with defendant. Sometimes defendant brought a woman home, and Porfirio would hear "sex noises," although he didn't know who made them. He told detectives he heard those noises when J. was in the room with defendant but he never saw anything sexual between them. He never saw or heard pornographic movies.

J. kept what was happening a secret because she was afraid she would get in trouble and she was afraid people would think she liked it.

B. *J. is placed in foster care and reports the abuse.*

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[2] Mildred did not tell the sexual assault nurse about the blood in J.'s underwear.

Because J.'s stepfather hit her, J. and her siblings were placed in foster care in May 2009. Defendant reported the abuse, which made J. "kind of mad" at him. Mildred, who downplayed the abuse, was also upset at defendant for calling the police. J. testified that she told her social worker what had happened and then she told her foster mother and parents.[3]

After being arrested on May 4, 2010, defendant gave to detectives a statement admitting he had sexual intercourse with J. He also said that she orally copulated him and he orally copulated her.[4] Children's clothing, pornographic movies, cell phones, and cameras were found in defendant's room. A video from one of the cell phones or cameras was of J. dancing in a shirt and underwear. A man's voice, identified by Detective Salazar as defendant's, said "a ver," which could mean, "to see," "let's see," or "to have done something." No condoms, energy pills or children's underwear were found in the room.

Ann Allison, a nurse at the Center for Assault Treatment Services, examined J. on May 6, 2010. In a recorded interview, J. told Allison that she saw defendant watching a movie about sex in which a "boy" and "girl" were "humping" each other. J. and defendant watched the movie together and he told her it was their little secret. She was seven the first time he touched her by "squishing" her front private part. His private part looked like a "can" and "mushroom," and "saliva" came out. Defendant put his "private" in her "butt" and it felt "icky" and "gross." J. said both that defendant never put his front private in hers and that he did. She said he only kissed her mouth, but she also said he used to kiss her private. He gave her pills that he put in water. Afraid she would be grounded, J. had only told her mother about this the day before.

After the interview, Allison examined J.'s vaginal and anal areas, both of which were "[w]ithin normal limits" with no physical findings. She had no obvious scars,

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[3] Dalila Sandoval, J.'s social worker, testified that J. never said defendant sexually abused her.

[4] Defendant's statement is discussed in greater detail in Section III.

transections or tears. Allison reported that J. had a normal examination consistent with what J. said. A normal examination does not mean something "didn't happen, but it can't confirm that it did." According to Allison, a child who relates feeling pain indicates that physical contact was made at or near the hymen.

II. Procedural background.

On September 2, 2011, a jury found defendant guilty of counts 1, 2, and 3, sexual intercourse or sodomy with a child under 10 (Pen. Code, § 288.7, subd. (a));[5] counts 4 and 6, misdemeanor assault and battery (§§ 240, 242, 243, subd. (a)); and count 5, oral copulation with a child under 10 (§ 288.7, subd. (b)).

On September 27, 2011, the trial court sentenced defendant to 25 years to life on count 1 and to a consecutive 15 years to life on count 5. The court sentenced him to concurrent 25 years to life terms on counts 2 and 3, and the People, in the interest of justice, dismissed counts 4 and 6.

DISCUSSION

III. The admissibility of defendant's statement to detectives under *Miranda*.

Defendant contends that the trial court erred by admitting his statement to detectives because it was, first, not knowingly or intelligently made and, second, it was not voluntary because it was obtained by coercion and promised benefits. We find that no error occurred in admitting the statement.

A. *Proceedings related to defendant's statement.*

1. Reading of defendant's rights.

On May 4, 2010, Detectives Eric Oseguera and Salazar interviewed defendant, who had been arrested. The interview was in Spanish and lasted just over an hour and a half, with several breaks.[6] Defendant said he finished "[f]irst of elementary school," and he denied having mental disabilities. Detective Oseguera then read defendant his rights:

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

[6] The interview was videotaped, and we have reviewed the video.

"[Detective:] Okay. Look, I am going to ask you these four questions just to see if you understand. Just answer yes or no. Okay? And it is . . . it is Spanish, I am going to read them. So . . . no, they are not in English, not . . . like that. The first one: You have the right to remain silent. Do you understand that? Uh, tell me, yes or no. You have to tell me with your mouth, . . .

"[Defendant:] Yes, but . . . uh . . . how . . . if one does not understand the thing, what is one suppose to say . . . ?

"[Detective:] Yes, if you do not understand something that I am explaining to you, stop me and I will explain it okay. But always, us as policemen, when we contact someone, like that, in the community we have to . . . read this to see if they are mentally capable and well.

"[Defendant:] No . . . .

"[Detective:] That is why I asked you those questions, because sometimes people that . . . that are not well of their head . . . .

"[Defendant:] Yes[,] yes . . . .

"[Detective:] . . . or people are a little bit crazy, people . . . .

"[Defendant:] Uhm-hum.

"[Detective:] Right? And . . . like I said . . . I am going to read, again, and you only answer, yes or no. Okay? Uh . . . you have the right to remain silent, do you understand this?

"[Defendant:] But, I . . . uh . . . uh . . . uh . . . what . . . ? I mean . . . if you are going to ask me a question, if, if I do not know . . . .

"[Detective:] Oh, if you do not know, you do not know. This is not . . . this is not a test.

"[Defendant:] Oh, no, no . . . [¶] [Laughs] [¶]

"[Detective:] No, no, no. This is not a test, do not worry.

"[Defendant:] Look, this is like . . . like standard, how do you call it? We have to ask that question to everyone.

"[Defendant:] Uhm-hum. No, oh, it is okay.

"[Detective:] Everyone. There are in English and in Spanish. . . . And you just tell me if you understand what I am telling you, it's . . . the question is very simple. You have the right to remain silent and the answer is going to be, yes or no.

"[Defendant:] No, well, uh . . . yes, I understand what is . . .

"[Detective:] That is what I wanted to know. Uh . . . anything you say, can be used against you in a court of law. Do you understand that?

"[Defendant:] Uhm-hum.

"[Detective:] Well . . . you have to tell me, yes or no.

"[Defendant:] Yes.

"[Detective:] Okay. Uh . . . You have the right to have an attorney present, before and during questioning. Do you understand that?

"[Defendant:] Yes.

"[Detective:] Okay. If you do not have . . . money to pay for an attorney, one will be appointed to you, free of charge, before questioning, if you so desire. Do you understand this?

"[Defendant:] Yes.

"[Detective:] Okay. Do you feel okay talking to me?

"[Defendant:] Well, yes, well, I really do not [unintelligible].

"[Detective:] Okay. That is what I wanted to know, because many people feel uncomfortable and they say, oh, I do not understand, because of your accent in Spanish or something.

"[Defendant:] No, but you are talking to me in Spanish. It is not like if you are talking to me in English . . . I do not understand, but, like that, it's okay.

"[Detective:] Okay. Look then, uh, this is the [form] that I have to fill out with your information and present to my supervisor . . . but I read this to you in Spanish. Here it's in English, but you indicated . . . yes. If you could just sign here, like . . . you sign. Anyway you sign, whether in print or signature . . . . Okay. Just put down the date. . . ."

2. Defendant's statement about J.

After going over defendant's rights, Detective Oseguera asked about defendant's relationship with J. Initially, defendant denied having inappropriate sexual contact with J. Detective Oseguera asked defendant if J. "offer[ed]" herself to him, and defendant said she hadn't, that she was just an eight-year-old girl. When the detective suggested that maybe something just happened and defendant shouldn't try to cover up something that was not a big deal, defendant said J. was like a sister to him, that he didn't touch her, and he asked how "am I going to get into it with her, when she is a girl?" Defendant, however, admitted that they slept together in the same bed.

Detective Oseguera suggested perhaps something happened while defendant was drunk, for example, maybe J. approached defendant and he didn't know what he was doing. Defendant again said nothing happened, that J. was just a little girl. The detective told defendant that what happened was voluntary and J. liked it, and defendant asked, "[H]ow am I going to have sexual intercourse with a girl, . . . she is . . . very little." When the detective again suggested that defendant had sex with J. when he was drunk, defendant agreed he drank at times, and "one does not know" what goes on, but "I do not believe it." Defendant didn't think it happened, because J. was a child who could not have sex like a woman. But if J. said it happened, he didn't realize it. Detective Oseguera asked if defendant used a condom with J., and defendant said he wasn't sure he had sex with her. He asked how he would put on a condom if he was drunk. But if J. said he put one on, "well then I did put it on."

The detective warned defendant that there was evidence of a crime, for example, medical reports, and sometimes a person gets in trouble for trying to cover up a crime. He added he was getting J.'s medical report in five minutes, but he wanted to hear it from defendant first. Defendant repeated that if he did it, he did not realize it. He continued to doubt J. could have sex like a woman.

At this point, Detective Salazar entered the room. Detective Oseguera told defendant that the doctors said J. was penetrated, that she was not a virgin. Defendant again said "no," he did not "use" her. But when the detectives said J. loved him, defendant said, "Well if[,] if she . . . says so, well that is the way it must be." When

Detective Oseguera asked if they'd had sex several times, defendant repeated, "if that's what J. says."

Detective Salazar told defendant that if he would promise not to have sex with J. until she turned 18, then "[w]e give her to you." She also told defendant that J. loved him and liked it. Defendant said, "[Y]es, it happened" once when he was drunk, as J. said. When pressed about how many times they had sex, at first defendant said J. was lying, then he said it happened twice and he used a condom. Defendant then said they had sex three or four times, and he was drunk three of the times and the fourth time he was hung over. He used a condom all the time. Sometimes she kissed his penis. At first he denied putting his penis in J.'s "behind," then he said it was just "playing."

He kissed J.'s vagina two to three times a week and they had sex three times a week. She said it hurt her, so then they would just play. He never penetrated her; just the "tip" went in.

Defendant brought up that he had adult movies, which he caught J. watching. He told her to stop, but she wanted to do what they were doing in the movie.

3. Defendant's motion to exclude his statement and the hearing on the motion.

Defendant moved in limine to exclude his statements. At the hearing on the motion, Dr. Francisco Gomez, a forensic clinical and neuropsychologist, testified for the defense. Dr. Gomez had researched what minimal cognitive abilities a person needs to understand their *Miranda* rights. People with cognitive disorders, including a low I.Q., have a difficult time comprehending *Miranda.* To comprehend *Miranda*, a person needs a minimum fifth grade reading comprehension level. People with low cognitive functioning are susceptible to giving false confessions.

To see if defendant understood information, Dr. Gomez asked defendant if the district attorney had hired Gomez, and defendant answered, " 'Yes.' " When asked if Dr. Gomez was a social worker, defendant again answered, " 'Yes.' " When asked if he was required to answer Dr. Gomez's questions, defendant said, " 'Yes.' "

Defendant, who was 42, had one year of schooling in Mexico, having attended the first grade. He supported a family and children in Michoacán. He was not acculturated to the United States, and he had a history of poverty, which is a significant risk factor for mild mental retardation. He reads the newspaper slowly and has a hard time with mathematical principles like adding and subtracting. His mother was low functioning.

Dr. Gomez gave defendant a standard forensic evaluation, which included psychological testing, a review of third party information (the videotape of defendant's statement), and an assessment of malingering. He performed poorly, in the mildly impaired range, on all neuropsychological testing. On an I.Q. test, defendant scored 61, in the mildly retarded range. Only .5 percent of the population will score lower than he would score or, in other words, out of 200 people, 199 will score higher than he would score. On reading comprehension, he scored an I.Q. of 70, which is equivalent to a second grade reading level. People with a low I.Q. tend to answer "yes" to questions they don't understand. Defendant doesn't process information quick enough to give a knowing response, and he is susceptible to coercion. Dr. Gomez didn't find that defendant was malingering.

To Dr. Gomez, who watched the video of detectives' interview with defendant, he never appeared to understand he was being read his rights. Defendant was confused about what he was being asked to do, and he thought he was supposed to respond to questions. He asked, for example, " 'Now, what if I don't know the answer?' " His rights needed to be broken down into smaller increments for defendant to understand them. In the doctor's opinion, defendant did not have the capacity to give a knowing and intelligent *Miranda* waiver.

His diagnosis was a "rule-out of mild mental retardation," meaning he needed additional information to rule out retardation.

4. The trial court's ruling.

The trial court first found that defendant knowingly and intelligently waived his *Miranda* rights. Although Dr. Gomez said that at least a fifth grade reading comprehension was necessary to understand *Miranda*, the court found that was not the

law. Rather, defendant was a "functioning human being," who worked, had a car, and a family. Defendant also did not adopt suggestions made by the police, although Dr. Gomez said he would. The court therefore noted: "Dr. Gomez said that [defendant] would adopt suggestions that were made by the police, and that is clearly not the case. [¶] [Defendant] for a large portion of this interview denied all of the accusations that were being leveled against him and continued to deny it for quite some time during the course of the interview. [¶] He began to hedge, when confronted with the fact that maybe he was drunk when it happened, but it is clear that [defendant] was aware of certain things as the interview was progressing. He was aware of the confrontational nature of the interview and the seriousness of the interview."

Second, the court found that defendant's statement was voluntary in that the officers did not use improper tactics to coerce a confession. "Initially, the officers began with the idea that if he took responsibility, that the courts would look at that. The case law . . . says that there's nothing improper about that police tactic. . . . ." "[I]n this situation I am holding that that tactic itself . . . was not the motivating cause of the statement; that [defendant] continued to deny the conduct that he was being asked about. [¶] The next . . . tactic that was used was this idea that maybe he was drunk and did not understand or was not even conscious of what was happening. It is a somewhat minimizing of his conduct, but I haven't found any case that finds that that is psychological coercion such that it renders the statement involuntary. [¶] And not only that, I believe that based upon [defendant's] responses to those statements, he was not making admissions. He continued to deny it . . . . So, again, that tactic was not a motivating cause of his statement. [¶] . . . [W]ith the medical evidence, . . . the gist . . . was whether there was penetration. He repeatedly denied any possibility that there would be evidence of penetration, . . . and suggesting that she may have been sexually active with somebody else. [¶] . . . [T]here are a myriad of cases that hold that telling the defendant that they have much more evidence than they do in fact possess is not improper."

B. *Defendant's waiver was knowing and intelligent.*

Defendant contends that his waiver was not knowing and intelligent because of his low I.Q., his lack of education, and his lack of acculturation to mainstream American society, including his unfamiliarity with the criminal justice system. We disagree.

A waiver of *Miranda* rights must be knowing, intelligent and voluntary. (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *People v. Combs* (2004) 34 Cal.4th 821, 845.) A valid waiver has two distinct dimensions: "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Moran*, at p. 421.)

Whether a statement is knowing and intelligent depends on the totality of the circumstances surrounding the interrogation. (*People v. Williams* (2010) 49 Cal.4th 405, 425; see also *Fare v. Michael C.* (1979) 442 U.S. 707, 724-725.) A totality of the circumstances review requires evaluating all the circumstances surrounding the interrogation, including the defendant's age, experience, education, background, and intelligence, and inquiry "into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare*, at p. 725; see also *People v. Johnson* (2010) 183 Cal.App.4th 253, 293.) We accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained. (*People v. Gurule* (2002) 28 Cal.4th 557, 601.)

Here, Dr. Gomez found that defendant had an I.Q. of 61, putting defendant in the mildly mentally retarded range. But a low I.Q. is not " ' "a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood." ' " (*People v. Lewis* (2001) 26 Cal.4th 334, 384 [a confession given when the defendant was 13 and a paranoid schizophrenic was knowing and intelligent].) Instead, intelligence is one of many factors to be considered in assessing the validity of a *Miranda* waiver. (*In*

re Norman H. (1976) 64 Cal.App.3d 997, 1001 [15-year-old boy with an I.Q. of 47 had the capacity to understand the waiver]; *People v. Watson* (1977) 75 Cal.App.3d 384, 396-397 [adult defendant who had organic brain damage, schizophrenia, and an I.Q. of 65 could validly waive *Miranda* rights].) A confession is therefore not inadmissible as a matter of law merely because the accused was of subnormal intelligence.

Although defendant's I.Q. was 61 and Dr. Gomez found, among other things, that he was easily confused and had poor comprehension skills, there were other factors, cited by the trial court, showing that he could knowingly and intelligently waive his *Miranda* rights. Defendant, for example, had a job (he worked at a bakery) and he managed his life, family, and house in Mexico. He was, the trial court concluded, a "functioning human being." Defendant's lack of formal education and alleged failure to "acculturate" to American society (a concept defendant fails to apply to the specifics of his situation) do not undermine the court's conclusion.

Nor does defendant's reliance on *U.S. v. Garibay* (9th Cir. 1998) 143 F.3d 534, impact that conclusion. In *Garibay*, the custodial interview took place in English, although Garibay's primary language was Spanish and he understood only a few things in English. (*Id.* at p. 538.) That fact, combined with evidence Garibay was "borderline retarded with extremely low verbal-English comprehension skills," led the Ninth Circuit to conclude that Garibay's waiver was not knowing and intelligent based on the absence of a written waiver. (*Id.* at pp. 538-539.) Unlike in *Garibay*, the interview here took place in Spanish, defendant's primary language.

In addition, the trial court found that defendant did not succumb to suggestions in the way Dr. Gomez said a person like defendant would. Rather, defendant, for a great portion of the interview, rebuffed the detective's suggestions that J. came onto him or that he was so drunk he didn't know what he was doing. Defendant therefore did not do what Dr. Gomez said someone with his I.Q., comprehension skills, and background would do.

C. *Defendant's statement was voluntary*.

Defendant next contends that his statement was not voluntary, because it was coerced by promised benefits. We disagree.

An involuntary confession—one that is not free because the defendant's will was overborne—is inadmissible at trial under the due process guarantees of the United States and California Constitutions. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398; *People v. Massie* (1998) 19 Cal.4th 550, 576; *People v. Smith* (2007) 40 Cal.4th 483, 501.) A confession is involuntary when elicited by a promise of some benefit or leniency, whether express or implied, and the wrongful inducement and the defendant's statement are causally linked. (*People v. Holloway* (2004) 33 Cal.4th 96, 115; *People v. Maury* (2003) 30 Cal.4th 342, 404-405; *Colorado v. Connelly* (1986) 479 U.S. 157, 164, fn. 2.) But mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by a promise of some benefit or leniency, does not render a subsequent confession involuntary. When the defendant, however, is given to understand that he or she might reasonably expect more lenient treatment at the hands of the police, prosecution, or the courts, in consideration of making a statement, even a truthful one, the inducement may render any ensuing statement by the defendant involuntary and, thus, inadmissible. (*Holloway*, at p. 115.) Although detectives may not lead a suspect to believe he might get the benefit of more lenient treatment if a statement is made, detectives may point out the benefit that flows naturally from a truthful and honest course of conduct. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17; see also *People v. Hill* (1967) 66 Cal.2d 536, 549.) There can be a fine line between permissibly urging a suspect to tell the truth by outlining the benefits that may flow from confessing and impermissibly making an implied promise of lenient treatment in exchange for a confession. (*Holloway*, at p. 117.)

The voluntariness of a suspect's statement is determined based on the totality of the circumstances. Those circumstances include " 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' " (*People v. Williams* (1997) 16 Cal.4th 635, 660.) Questioning by the police may include exchanges of information, summaries of evidence,

an outline of theories of events, confrontation with contradictory facts, debate, and even exaggerated statements implying that the police have more knowledge about a crime than they actually possess. (*People v. Holloway, supra*, 33 Cal.4th at p. 115; see also *People v. Jones* (1998) 17 Cal.4th 279, 299.) 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" are inadmissible. (*People v. Ray* (1996) 13 Cal.4th 313, 340.)

"In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] If a statement is found to be involuntary, the statement and other evidence derived from it are inadmissible for any purpose." (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) We accept "the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained." (*People v. Smith, supra*, 40 Cal.4th at p. 502.)

The gist of defendant's argument here is his low I.Q. rendered him particularly susceptible to the detective's techniques. But if those techniques were not impermissibly coercive, then defendant's argument fails.[7] One of these interrogation techniques defendant appears to fault is Detective Oseguera's initial friendliness to defendant and attempt to minimize what happened, that sometimes "things happen." An attempt to establish a "rapport" with a suspect, however, is not coercive. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1043.) It was also permissible for detectives to suggest theories of the event, such as J. approached defendant or defendant was drunk. (*People v. Holloway, supra,* 33 Cal.4th at p. 115.) The detectives did not represent that any particular benefit would be granted to defendant if he told them how the abuse happened. To the extent, if any, the detectives' remarks implied that giving an account involving

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[7] Dr. Gomez testified for the defense about the correlation between defendant's low I.Q. and any susceptibility to interrogation techniques. Whether and how his low I.Q. impacted his statement was therefore before the court.

intoxication or J. approaching defendant might help defendant, this was nothing more than telling defendant the benefit that might " 'flow[] naturally from a truthful and honest course of conduct.' " (*People v. Jimenez, supra*, 21 Cal.3d at p. 612.)

Detectives also did not use an impermissible coercive technique when they falsely told defendant they had medical reports showing J. had been penetrated. Deception does not necessarily undermine the voluntariness of a defendant's statement unless the deception is of a type reasonably likely to procure an untrue statement. (*People v. Williams, supra,* 49 Cal.4th at p. 443; see *People v. Farnam* (2002) 28 Cal.4th 107, 182 [deception involving the defendant's fingerprints was unlikely to produce false confession].)

Closer to that "fine line" between permissible and impermissible conduct was Detective Salazar's suggestion that if defendant could wait until J. was 18, then "[w]e give her to you." Still, the ploy did not prompt defendant to confess. Defendant had already told detectives that if J. said it happened, then "that is the way it must be" and "[l]ike she says, well that is how it is." In response to the detective's suggestion that defendant could "have" J. when she turned 18, defendant merely said he would look after her, and he promised not to touch her. There was no causal link between defendant's admission he had sexual intercourse with J. and the detective's statement.

Other factors negate an atmosphere of coercion. The interrogation lasted just over an hour and a half, with breaks. Defendant was offered and given water. There is no evidence the interrogating detectives knew of or exploited defendant's cognitive vulnerabilities. (*People v. Smith, supra*, 40 Cal.4th at p. 502.) Dr. Gomez agreed that those vulnerabilities would not be apparent to the officers. Reviewing the totality of the circumstances, we therefore conclude that defendant's statement was voluntary.

IV. Prosecutorial misconduct.

Defendant contends that the prosecutor committed misconduct by repeatedly referencing the "taxpayer" funds paid to Dr. Gomez, the defense expert.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal

Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Misconduct that infringes upon a defendant's constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18.) A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment. (*People v. Watson* (1956) 46 Cal.2d 818.)

Comments by prosecutors are generally treated by juries as words of an advocate in an attempt to persuade. (See *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) The prosecution is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it. (*People v. Collins* (2010) 49 Cal.4th 175, 213.) When a claim of misconduct focuses on comments the prosecutor made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained of remarks in an objectionable fashion. (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.) We must place the challenged statement in context and view the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) Counsel has "broad discretion in discussing the legal and factual merits of a case," but "it is improper to misstate the law." (*People v. Bell* (1989) 49 Cal.3d 502, 538, cited in *People v. Mendoza* (2007) 42 Cal.4th 686, 702.)

Here, the prosecutor elicited that the "court," at the request of the defense, paid Dr. Gomez $4,000 for evaluating defendant, $4,800 for two days of testimony, and $250 per hour preparing to testify. Then, to the jury, the prosecutor argued:

"So that's maybe five days, maybe six days of work, and he made almost $11,000 for working on this case. And he told you that he made in the last year $200,000 in what

he called his forensic practice which really we learn means he comes to court and tries to help the defendant not have as serious consequences for their crimes as they might otherwise have. [¶] . . . [¶]

"Who hires this man? Defendants. Now, at the outset when you think about Dr. Gomez I want you to think about one small thing, but it's sort of indicative of what I think Dr. Gomez's attitude is towards his role and what he needs to do to make sure that those big bucks keep coming his way. [¶] . . . [¶]

"Well, you know what? If you're going to come in here and get $11,000 for a week of work and portray yourself as a scientist, you shouldn't misspeak and you shouldn't leave things out. [¶] You should tell us what you really find to be true . . . . [¶] . . . [¶]

"Thank you, Dr. Gomez. Here is $11,000 for telling us what we all know, which is that this is a process, confession is difficult. We say sometimes confession is good for the soul, but it is hard and it is really, really hard to confess to significant, serious, and sustained sexual molestation of a little, little girl. [¶] . . . [¶]

"And the detectives were trying everything they could to make him say it, and he would not. So we know he was not operating under this coercion, this overbearing force, this confusion and lack of cognitive processing that Dr. Gomez wants you to believe so that he can keep getting checks for $11,000."

"And the fact is that the court might have paid Dr. Gomez's significant bill, but as he told you and he told the defendant, he was asked to do the work that he did in this case by [defense counsel] who is completely entitled to do that and completely entitled to bring Dr. Gomez in here to testify. [¶] But the fact that the defendant is a criminal defendant and has constitutional rights does not give Dr. Gomez some aura of believability that you with your common sense shouldn't be able to penetrate. [¶] He has an interest, a significant financial interest, not just in this case but every case he appears in court on in helping criminal defendants. [¶] . . . [¶] So once you take that, the fact that he's really given us nothing to work off, and you add to it $11,000 earned for basically a

week's work by a man who makes $200,000 a year helping criminal defendants, what has he helped us—what has he helped you to know about that statement?"

Defendant did not object to the prosecutor's questions and argument, and therefore the issue is forfeited on appeal. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; see also *People v. Thompson* (2010) 49 Cal.4th 79, 126.) We will, nonetheless, address the issue because defendant raises an ineffective assistance of counsel claim in connection with his trial counsel's failure to object.

Although defendant agrees that the compensation paid to an expert witness is a proper subject of inquiry, because it is relevant to the witness's credibility and goes to the weight of the testimony (see generally, Evid. Code, § 722, subd. (b)), defendant argues that the prosecutor's repeated references to Dr. Gomez's fee was a "transparent appeal to the passions and prejudices of the jurors as taxpayers" at a "time of chronic fiscal crises."

In *Gray*, the prosecutor elicited from the defense expert witness that the court appointed him to assist the defendant, and the county paid him. (*People v. Gray* (2005) 37 Cal.4th 168, 215.) In closing argument, the prosecutor emphasized that the expert did not say how much he billed the county and that his payment came from taxpayers. The court found no misconduct: "[I]nasmuch as it is common knowledge that the trial judge, the prosecutor, the prosecution expert witnesses, and even appointed defense counsel were all paid from the public coffers, we cannot conclude the attempt to impeach [the expert witness] with the information the public paid his fee played improperly on the jurors' emotions." (*Id.* at pp. 216-217.)

It was similarly said here that the "court" was paying Dr. Gomez's fee. The prosecutor, however, never expressly referred to "taypayers" paying it. Nothing in the prosecutor's argument implied that the jurors themselves would be financially responsible for Dr. Gomez's compensation. (*People v. Gray, supra*, 37 Cal.4th at p. 216.) Moreover, placed in context, the prosecutor's statements about Dr. Gomez

boiled down to that he was willing to say anything for his fee, and therefore he was not credible. The prosecutor did not improperly appeal to the jurors' passions, prejudices, and self-interest, and therefore she did not commit misconduct under either federal or state law. Because we conclude that no misconduct occurred, defendant's claim of ineffective assistance of counsel based on a failure to object similarly fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746; *People v. Cleveland* (2004) 32 Cal.4th 704, 746.)

V. Admissibility of video of J. dancing.

Over defendant's objection of lack of foundation, the trial court admitted video of J. dancing. The court did not abuse its discretion by admitting the evidence.

A writing must be authenticated before it may be received in evidence. (Evid. Code, § 1401.) "Authentication" means "(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) Evidence Code sections 1410 through 1421 list various methods of authenticating documents, for example, by the testimony of a subscribing witness or a handwriting expert. These methods, however, are not exclusive. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372 [rap lyrics were authenticated by their location in the defendant's bedroom and by their reference to his gang and gang moniker].) "Circumstantial evidence, content and location are all valid means of authentication." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.) A trial court's finding that sufficient foundational facts have been presented to support admissibility is reviewed for abuse of discretion. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001.)

Here, circumstantial evidence, content and location were sufficient, in the trial court's discretion, to authenticate the video. Detective Salazar testified that cameras and cell phones were found in the garage where defendant lived and where J. frequently stayed. Detective Diane McNair retrieved data from the items, including the video of J. dancing. The girl in the video could clearly be identified as J., dancing in what appeared to be defendant's room. A man's voice, identified by Detective Salazar as defendant's,

said, "a ver." Based on where the recording devices were found (defendant's room), Detective McNair's testimony, and the content of the video, the trial court did not abuse its discretion by finding that the video was sufficiently authenticated.

VI. Testimony of J.'s social worker.

The trial court excluded evidence that defendant didn't want to take care of J. while she was in foster care. Defendant argues that excluding this evidence was prejudicial error. The Attorney General concedes that the evidence was admissible but argues that its exclusion was harmless.

Dalila Sandoval, J.'s social worker, testified for the defense. When asked if defendant said he was willing to take the children, the prosecutor objected, and, at sidebar, defense counsel explained that she expected the People to argue that defendant wanted to take care of J. Sandoval, however, indicated in her report that defendant refused to do so. The trial court sustained the prosecutor's hearsay objection.

As the Attorney General concedes, defendant's statement that he did not want to take care of J. was admissible under the state of mind exception to the hearsay rule (Evid. Code, § 1250) or as an inconsistent statement (Evid. Code, § 1202). Under Evidence Code section 1250, evidence of a statement of the declarant's then existing state of mind is not made inadmissible by the hearsay rule when offered to prove the declarant's state of mind or the evidence is offered to prove or explain acts or conduct of the declarant. Under Evidence Code section 1202, "[e]vidence of a statement . . . by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement[.]" By way of defendant's statement to detectives, evidence was introduced that defendant was willing to care for J. J.'s mom also testified that defendant told her he wanted to take care of J. Evidence to the contrary, that defendant said he was *not* willing to care for J., showed his state of mind and it was inconsistent with his statement to detectives and to Mildred.

Defendant argues that the exclusion of this evidence was prejudicial, under the standard in *People v. Watson, supra*, 46 Cal.2d 818, that is, whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. Notwithstanding that J. gave conflicting stories about what happened and the absence of physical evidence, it is not reasonably probable a verdict favorable to defendant would have been rendered had the evidence been admitted, in light of defendant's statement to detectives that he sexually abused J. As to the strength of defendant's statement, the jury heard Dr. Gomez's testimony that called into question its veracity, but the jury clearly credited J. Any error in excluding the social worker's testimony was harmless.

VII. Instructional error.

Defendant next contends that his state and federal constitutional rights to a jury trial, confrontation, and due process were violated, because the jury was instructed with CALCRIM No. 330.[8] We disagree.

The jury was instructed: "You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. In evaluating the child's testimony, you should consider all the factors surrounding that testimony, including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember, and communicate. While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child."

Defendant argues that the instruction restricts the factors relevant to assess credibility and lowers the prosecution's burden of proof by boosting a child's credibility. As defendant concedes, several cases have rejected the same constitutional challenges to

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[8] Although respondent argues appellant forfeited this claim by failing to object, defendant may properly raise the issue under section 1259, which provides in part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.)

CALJIC No. 2.20.1, CALCRIM No. 330's predecessor. (*People v. McCoy* (2005) 133 Cal.App.4th 974; *People v. Gilbert* (1992) 5 Cal.App.4th 1372; *People v. Jones* (1992) 10 Cal.App.4th 1566; *People v. Harlan* (1990) 222 Cal.App.3d 439.) *McCoy* summarized the three later cases: *Harlan* "held that the instruction neither excessively inflates a child's testimony nor impermissibly usurps the jury's role as arbiter of witness credibility nor violates the accused's right to confront a child witness nor 'require[s] the jury to draw any particular inferences from a child's cognitive ability, age and performance as a witness. Rather, it instructs the jury to consider such factors in evaluating a child's testimony.' [Citation.]" *Jones* "held that the instruction 'presupposes that the jury must make a determination of credibility, but only after considering all the factors related to a child's testimony, including his [or her] demeanor, i.e., how he or she testifies on the stand,' all without ' "foreclos[ing] independent jury consideration of the credibility of a child witness." ' [Citation.]" *Gilbert* "held that CALJIC No. 2.20.1 neither ' "lessen[s] the government's burden of proof" ' nor ' "instructs the jury to unduly inflate the testimony of a child witness" ' [citation]: 'The instruction tells the jury not to make its credibility determinations solely on the basis of the child's "age and level of cognitive development," but at the same time invites the jury to take these and all other factors surrounding the child's testimony into account. The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom " 'traditional assumptions' " may previously have biased the fact[-]finding process. Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result.' [Citation.]" (133 Cal.App.4th at p. 979.)

We agree with this reasoning. CALCRIM No. 330 instructs the jury to "consider all of the factors surrounding [a child's] testimony," and to "consider the child's ability to perceive, understand, remember, and communicate." It advises that the witness's testimony should not be discounted "merely because" the witness is a child who may behave differently from an adult. CALCRIM No. 330 does not require jurors to ignore a child witness's limited cognitive ability and her ability to perceive, understand, remember

and communicate details. Accordingly, we reject defendant's constitutional challenge to CALCRIM No. 330.

VIII. Attorney fees.

The trial court ordered defendant to pay $5,000 in attorney fees. Defendant contends, and the Attorney General concedes, that the order must be reversed.

Section 987.8, subdivision (b), provides that where, as here, a defendant is provided legal assistance, the trial court may, after notice and a hearing, make a determination of the defendant's present ability to pay. (See also § 987.8, subd. (g)(2)(B) ["Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense"].) Although a trial court's finding of the defendant's present ability to pay may be implied through the content and conduct of the hearings, any finding of ability to pay must be supported by substantial evidence. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398.)

From defendant's statement to detectives and the probation report, there was evidence he was employed by a bakery and sent money to Mexico to support his house and family, but there was no evidence of his income or assets at the time he was sentenced. The attorney fees order must therefore be reversed, because there was insufficient evidence to support it.

DISPOSITION

The order requiring defendant to pay $5,000 in attorney fees is reversed. The clerk of the superior court is directed to modify the abstract of judgment and to forward the modified abstract of judgment to the Department of Corrections. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.