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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ABRAHAM RUIZ MAGDELENO, Defendant and Appellant.	B270852 (Los Angeles County Super. Ct. No. TA137231)

APPEAL from a judgment of the Superior Court of Los Angeles County, Pat Connolly, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Abraham Ruiz Magdeleno appeals from a judgment which sentences him to 25 years to life for having sexual intercourse with a child 10 years old or younger. Magdeleno contends his confession was not properly admitted because the police failed to adequately advise him of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) before his interrogation. We affirm the judgment.

FACTS

Magdeleno moved to Los Angeles from Mexico and lived with his wife's brother. His wife remained in Mexico with their two daughters. In 2009, Magdeleno was living with his brother-in-law's family, including his seven-year old niece, Isabel A. In all, seven people lived in a three bedroom house. Isabel shared a bedroom with her two siblings, her parents shared a room, and Magdeleno shared a room with Isabel's maternal uncle, Henry. Henry moved out in early 2009. In March of that year, after her birthday, Isabel noticed Magdeleno began to hug her and kiss her "a lot." The behavior escalated to touching her breasts and her bottom underneath her clothes. He also touched her vagina, both over and under her clothes.

Isabel often stayed home alone on Sundays with Magdeleno because her parents worked and she was too young to attend Sunday school with her siblings. One Sunday, Magdeleno was home alone with Isabel and he inserted his fingers in her vagina. Another time, he brought her into his room, laid her on his bed, took off her clothes, and tried to put his penis into her vagina. He stopped when she began to cry. He tried again approximately one month later. He stopped when she screamed and cried. He never touched her again. Magdeleno moved out approximately three months later.

Isabel began to exhibit emotional difficulties in 2013, culminating in a suicide attempt and temporary commitment to a mental hospital. In 2015, Isabel told her sister and parents that Magdeleno and Henry had both molested her in 2009. They reported it to the police. Magdeleno confessed to Los Angeles Police Department (LAPD) detectives that he touched Isabel's vagina with his finger. He also told the detectives that Isabel twice initiated a sexual encounter with him by getting on top of him and rubbing against him.

Magdeleno was charged by information in count 1 with committing a lewd act upon a child in violation of Penal Code[1] section 288, subdivision (a), in count 2 with continuous sexual abuse of a child in violation of section 288.5, subdivision (a), and in count 3 with sexual intercourse with a child 10 years old or younger in violation of section 288.7, subdivision (b).

At trial, the prosecution presented evidence of the abuse as described above, primarily through Isabel's testimony. Magdeleno's confession was translated from Spanish and a transcript was admitted into evidence along with the audio recording. The defense presented expert testimony on suggestibility and protocols in interviewing children. Magdeleno was found guilty of count 1 for committing a lewd act upon a child and count 3 for sexual intercourse with a child, but found not guilty of count 2 for continuous sexual abuse of a child. He was sentenced to 25 years to life on count 3, the base count, and a concurrent six years on count 1. Among other fines and fees, Magdeleno was ordered to pay $5,000 restitution. Magdeleno timely appealed.

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[1] All section references are to the Penal Code unless otherwise specified.

ANALYSIS

Magdeleno's appeal rests entirely on the admissibility of his confession to the LAPD. He contends the LAPD detectives interviewing him failed to sufficiently advise him of his *Miranda* rights. According to Magdeleno, the transcript from the interview showed he was led to believe that he could have counsel present during the interview only if he could pay for one or he would be provided with free counsel by the court later. Thus, he did not knowingly and intelligently waive his right to an attorney. We disagree. The record shows Magdeleno waived his right to an attorney by indicating he understood his right to have one present during the interview and nevertheless responding to the detectives' questions.

I. The Interview

Magdeleno was interviewed by LAPD detectives Stonich and Farias on July 25, 2015. The interview was conducted in Spanish and recorded. Magdeleno told the detectives this was the first time he was arrested, but he had lived in Los Angeles for 12 years. After preliminary questions regarding his identity and address, the detectives provided Magdeleno with a *Miranda* warning as follows:

> "[Detective Farias]: Before we start I have to read you your, uhm, your rights. Before we start talking about why you're here.
>
> [Magdeleno]: Let's see.
>
> [Detective Farias]: Okay. [¶] Okay, you have a right, a right not to talk. Do you understand?
>
> [¶] . . . [¶]
>
> [Magdeleno]: Yes.

[Detective Farias]: Okay . . . What you say can be used against you in court. Do you understand?
[Magdeleno]: Yes.
[Detective Farias]: Okay. You have a right to have an attorney here…present while we talk. Do you understand?
[Magdeleno]: Yes.
[Detective Farias]: Okay. If…you want an, an attorney, but you don't have money, the court will provide you one before we start talking. Do you understand?
[Magdeleno]: Yes.
[Detective Farias]: Okay. Uh, do you know, uhm…?
[Magdeleno]: And who is my attorney?
[Detective Farias]: [Background noise] Excuse me?
[Magdeleno]: Where's my attorney?
[Detective Farias]: We, we don't provide one, [the] court will provide you with an attorney.
[Magdeleno]: Oh, over there?
[Detective Farias]: Over there.
[Magdeleno]: Mm-hmm."

The detectives then began questioning Magdeleno about Isabel. Magdeleno initially denied touching Isabel. He subsequently admitted he was alone with her one day when her older siblings went to church. He was asleep and woke to find her in his bed. She told him she was scared and he told her to lie in the bed with him. He went back to sleep, but she got on top of him. She was naked and began to move around on top of him. He believed she learned it from her parents, who often had sex loudly at night. He stopped her and went outside with her,

making her coffee. Although he was erect, he did not believe he penetrated her because she would have bled. It happened a second time when Isabel came into his room while he was asleep. He told the detectives, "I would let her caress me." He stopped her when he "was more excited" and to the point of ejaculation. Magdeleno admitted he felt bad about what happened and moved out after the second incident.

II. The Trial Court Proceedings

Prior to trial, defense counsel moved to suppress evidence of Magdeleno's confession under section 1538.5. A defense expert testified to the circumstances surrounding Magdeleno's custodial interrogation. She explained the detective conducting the interview had poor Spanish language skills which could create stress and mental depletion. This could have led to suggestibility where some people, like Magdeleno, may answer, "yes" to a question they do not understand simply because they wish to comply. She opined that "at least in the transcript, it shows that it's unclear whether he understood that there was a lawyer present or that he was going to get a lawyer. He asked twice about a lawyer." The trial court denied the motion, finding the *Miranda* advisements were given as required and finding Magdeleno's questions about a lawyer did not constitute an invocation of his rights to one.

III. Applicable Law

"To protect the Fifth Amendment privilege against self-incrimination, a person undergoing a custodial interrogation must first be advised of his right to remain silent, to the presence of counsel, and to appointed counsel, if indigent. [Citation.]

As long as the suspect knowingly and intelligently waives these rights, the police are free to interrogate him. [Citation.]" *(People v. Stitely* (2005) 35 Cal.4th 514, 535 citing *Miranda, supra,* 384 U.S. at pp. 467-479.)

A suspect " 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' [Citation.] '[A] reviewing court . . . 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.' [Citations.]" (*People v. Cunningham* (2015) 61 Cal.4th 609, 646.) Waiver of the right to counsel is implied where a suspect indicates he understands his rights and subsequently gives statements to the police. (*People v. Medina* (1995) 11 Cal.4th 694, 752.) Statements obtained in violation of *Miranda* are inadmissible to prove guilt in a criminal case. (*Ibid.*)

The voluntariness of a defendant's waiver and his subsequent confession must be established by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63.) In reviewing a motion to suppress under *Miranda*, we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. (*People v. Boyer* (1989) 48 Cal.3d 247, 263, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824.) However, we must independently determine from the undisputed

facts, and those properly found by the trial court, whether the challenged statements were inadmissible. (*Ibid*.)

IV. Analysis

Magdeleno asserts "he was told that while he could have a lawyer present at questioning ('here') if he liked, he would only get a *free* lawyer in court ('there')." Accordingly, he understood "that counsel would only be provided 'in court,' so that whatever abstract ability [he] might have had to have a lawyer with him during the police interview, this was rendered toothless by the proviso that a free lawyer would not be given him until he went to court."

The record belies Magdeleno's complaint. Magdeleno indicated he understood that if he wanted an attorney "but [did not] have money, the court will provide . . . one *before we start talking*." (Italics added.) His subsequent questions about an attorney merely confirmed that "the court" "over there" would provide him with an attorney, not the police. Neither Magdeleno's questions nor the detective's answer contradicted or nullified the *Miranda* admonition provided by Detective Farias before the interrogation.

Our conclusion is supported by the U.S. Supreme Court's opinion in *Duckworth v. Eagan* (1989) 492 U.S. 195 (*Duckworth*) and the California Supreme Court's opinion in *People v. Smith* (2007) 40 Cal.4th 483 (*Smith*).

In *Duckworth*, the suspect was given a *Miranda* advisement that read, in pertinent part, "You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be

appointed for you, if you wish, if and when you go to court." (*Duckworth, supra*, 492 U.S. at p. 198.) "The Court of Appeals thought this 'if and when you go to court' language suggested that 'only those accused who can afford an attorney have the right to have one present before answering any questions.'" (*Id.* at p. 203.) The Supreme Court disagreed, reasoning the "'if and when you go to court'" statement simply anticipated a question a suspect might be expected to ask after receiving *Miranda* warnings. Thus, the advisement only accurately explained how the appointed counsel process operated. (*Id.* at pp. 203-204.) Read in context, the "'if and when'" language satisfied *Miranda.* (*Id.* at p. 204.)

The California Supreme Court upheld the efficacy of a similar *Miranda* warning in *Smith, supra,* 40 Cal.4th at page 483. There, "[d]uring the *Miranda* advisement process, defendant asked Detective Kimura how long it would take to get an attorney appointed. Before Detective Kimura could answer, defendant told him that he could wait until 'next week sometime.' In response, Detective Kimura said, 'Maybe, yeah.'" (*Id.* at p. 503.) The defendant argued his confession was inadmissible because the detective "lied" about the availability of counsel. The Supreme Court found the detective "did not actively mislead defendant." (*Id.* at p. 503.) Instead, the defendant received and understood the *Miranda* advisements and the detective "merely responded equivocally" to the defendant's misunderstanding about how long it would take to have counsel appointed. There was "no authority for the proposition that a suspect who has received and understood the *Miranda* advisements cannot properly waive his Fifth Amendment rights if he labors under

any misapprehension of the mechanics of when and how counsel is appointed." (*Ibid.*)

Here, there is no dispute the initial *Miranda* advisement was adequate. Magdeleno instead contends the detective's answer to his subsequent questions about having counsel appointed served to nullify the initial warning. As in *Duckworth*, the detective's answer to Magdeleno's questions was merely an accurate explanation of the appointment process: the police did not provide attorneys to suspects, the court did. Even if Magdeleno was "under any misapprehension of the mechanics of when and how counsel is appointed," the *Smith* opinion tells us that it did not render his waiver ineffective.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.