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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALBERTO LOPEZ, Defendant and Appellant.	B232878 (Los Angeles County Super. Ct. No. TA112631)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ricardo R. O'Campo, Judge. Reversed in part, affirmed in part and remanded.

Richard D. Miggins, 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, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Jose Alberto Lopez of three counts of continuous sexual abuse (Pen. Code, § 288.5)[1] (counts 1, 7 & 11); two counts of aggravated sexual assault of a child (sodomy) (§ 269, subd. (a)(3)) (counts 3 & 5); forcible oral copulation (§ 288a, subd. (c)(2)) (count 6); oral copulation of a person under 14 (§ 288, subd. (c)(1)) (count 8); aggravated sexual assault of a child (rape) (§ 269, subd. (a)(1)) (count 9); and aggravated sexual assault of a child (sexual penetration) (§ 269, subd. (a)(5)) (count 10). With respect to all counts the jury found that appellant committed the offenses against more than one victim within the meaning of section 667.61, subdivision (c).

The trial court sentenced appellant to a total term of 135 years to life. The sentence consisted of consecutive 15 years-to-life terms in each count.

Appellant appeals on the grounds that: (1) the trial court erred in ruling that the offense in count 1 was not time barred; (2) appellant's punishment under section 667.61 (the one strike law) in counts 1, 7, and 11 violated constitutional provisions against ex post facto laws; (3) the trial court erred in not excluding appellant's confession obtained in violation of *Miranda*;[2] (4) the trial court erred in allowing the prosecution to play the recording of appellant's confession in Spanish; and (5) the trial court erred in denying the defense motion to exclude as irrelevant evidence a Kleenex box with customized wording.

FACTS

Prosecution Evidence

Appellant is the uncle of the three named victims in this matter: Jose S., Jose's cousin Rodrigo, and Rodrigo's sister, Esmeralda. Jose's sister, Z., testified as a witness under Evidence Code section 1108.

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1 All subsequent statutory references are to the Penal Code, unless otherwise indicated.

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

Counts 1, 3, 5, and 6: Crimes Committed Against Jose S.

Jose S. was 27 years old at the time of trial. In 1992, Jose lived in a two-bedroom apartment on Gundry Avenue in Paramount. Occupying the apartment were Jose's parents, his siblings, appellant, and appellant's family. Appellant had a wife and three children. Jose's parents slept in one bedroom, and appellant and his family slept in the other. Jose and his siblings, Z. and Oscar, slept on the floor in the living room.

Jose remembered seeing appellant come into the living room at night and put his hands under the sheets and touch Z.'s breasts and vagina. Jose did not tell his parents out of fear he would not be believed. Z. was a year older than Jose. Jose heard appellant threaten Z. that something would happen to her family if she said anything.

When Jose was nine, appellant told Jose to go to appellant's room to watch cartoons. Appellant pulled down Jose's pants and put his finger in Jose's anus. More than once, appellant told Jose that, if Jose said anything, appellant would take it out on his family. Appellant would touch Jose's chest and masturbate. He would push down Jose's head toward his penis, but Jose's mouth did not make contact. These sex acts occurred two or three times a week until Jose was 13. One time, appellant put his penis in Jose's anus.

When Jose was 13 years old, in late 1996 or early 1997, appellant told Jose not to go to a family party at his aunt's, but to stay and take some things down from cabinets. When they were alone, appellant touched Jose's chest and pulled down his pants. Jose struggled with appellant, and appellant threw Jose face down on the floor. Appellant penetrated Jose's anus. Jose told him to stop because it was hurting. Appellant's wife, Alma Lopez, walked in, but she did not do anything. Appellant just pulled up his pants, and Jose ran away.

That same year, on the occasion of another party, appellant told Jose to wait for him until everyone else had gone. Appellant said Jose had to be with him or else his family would be in danger. Appellant again touched Jose's chest and buttocks, and he

put his finger in Jose's anus. He then put his penis inside. Appellant wanted Jose to perform oral sex on him.

From the age of 15 until the age of 17, Jose did not see appellant because there was a problem between his family and appellant's family. They stopped talking to each other. When Jose was 17, the families were talking again. Appellant would come to Jose's house or pick him up at his job at a market. Appellant would take Jose to a swap meet parking lot and demand oral sex. If Jose refused, appellant would masturbate. On several occasions, Jose complied and orally copulated appellant. This happened two or three times a week. Jose did this to defend his family. He believed appellant could do something to them.

Appellant also came to Jose's house and told him he had to have sex with him. Jose's mother took his father to church three times a week and left Jose at home to take care of the apartment. On one occasion, Jose begged her to take him to church with her, because appellant was going to come to the house. His mother asked Jose the reason. He did not explain at first, but later began crying and told her everything. He was 19. Jose's mother told Jose's father, who told appellant's wife. Jose did not make a report to the police. His sister Z. had made a report about what happened to her and was told that nothing could be done. Jose believed the same applied to him.

In June 2010, Jose was contacted by Detective Steven French of the Los Angeles County Sheriff's Department. Jose told the detective about the incidents, and he later spoke with the prosecutor.

Jose's cousin and appellant's daughter, Aracely Lopez, threatened Jose two times. Jose made a police report of these incidents in June 2010. Aracely's threats occurred after Jose had spoken with Detective French. Jose learned in November 2010 that a Kleenex box with computer-printed words on it had been sent to his mother's house. One of the phrases was, "He who laughs last, laughs best." One phrase said they were all going to cry tears of blood. Jose's mother told him to call the police. These incidents made Jose fearful about testifying.

Count 7: Crimes Committed Against Rodrigo S.

Rodrigo S. was 19 at the time of his testimony. In 2003, Rodrigo lived with his mother, his aunt, and his siblings in the back house of a lot on Gundry Avenue. Appellant lived in the front house on the lot with his wife, Alma, who is Rodrigo's aunt. Sometime in 2003, appellant entered Rodrigo's room and said he wanted to play. He touched his chest and private parts, first over his clothes and then underneath. Rodrigo told him to leave him alone and, after a while, appellant did so. Appellant told Rodrigo to wait—that he was going to like it. A few days later, Rodrigo went to appellant's house to buy candy that Alma was selling. Alma was not there, and appellant started touching Rodrigo on his chest under his clothes. He then touched Rodrigo's penis and buttocks under his clothes. Appellant pulled Rodrigo's pants down and kissed Rodrigo's ear. Rodrigo struggled, and appellant let him go.

A few months later, Rodrigo was living at a new house. When he was in the bathroom, appellant knocked on the door and said he had to use it. Rodrigo let him in, and appellant grabbed his neck and head and tried to put his penis in Rodrigo's mouth. Appellant let go when he heard someone approaching. Appellant told Rodrigo not to say anything or he would kill him or his mother.

When Rodrigo was beginning seventh grade, there was a fourth incident with appellant. Appellant followed Rodrigo as he walked home from school. Rodrigo went to the bathroom to wash his face, and he heard his brother open the door for appellant and say Rodrigo was in the bathroom. Appellant entered the bathroom and started touching him under his clothing on his back, chest, and penis. Appellant put his finger inside Rodrigo's anus, and Rodrigo told him to stop and that it hurt. Appellant told him to keep quiet. When Rodrigo said he would call the police and tell his brother, appellant responded that he would kill him and his brother. Appellant left.

Rodrigo later learned that Jose and Z. were making accusations of sexual abuse against appellant. At first Rodrigo told no one. After some time he told his Aunt Imelda.

Rodrigo later learned that his younger sister Esmeralda was also making accusations. Rodrigo then told his mother. He, his sister, and his mother made a report to the police.

Counts 8, 9, 10, and 11: **Crimes Committed Against Esmeralda S.**

Esmeralda S. was 13 at the time of trial. She remembered living in a house on Gundry in Paramount when she was four years old. She lived in the back house with her mom, three brothers, two aunts, an uncle, and three cousins. Appellant and his wife lived in the front house. On one occasion, appellant took Esmeralda to his house to get candy. He took her to his room, laid her on the bed, and pulled down her pants. He began touching her vagina. He then put his mouth on her vagina. When she told him to stop, he covered her mouth, but he made her touch his penis. He then put his penis in her vagina while still covering her mouth. He told her not to tell anyone, or her mom would get hurt. He stopped when a car entered the driveway. Esmeralda told no one. At a family picnic, appellant told Esmeralda to go in the car, where he put her on the backseat. He laid her down and pulled down her pants and underwear and put his mouth on her vagina.

Appellant performed this act more than five times. Esmeralda did not remember when appellant stopped, except that she was in school at that point. She never told anyone about these incidents because she thought no one would believe her, and she did not want her mother to be hurt.

Esmeralda saw appellant in 2010 and it brought back memories. It hurt her and she began misbehaving. She talked back to her mother, began skipping school, and began hurting herself. She tried to choke herself, and she cut her veins. One day Esmeralda's mother found out that Esmeralda was skipping school. When Esmeralda got home her mother said she was going to take her to the doctor to see if she was having sex or using drugs. Esmeralda started to cry and told her mother about what happened with appellant. Her mother went to the police station with her and Rodrigo and spoke with Detective French and the prosecutor. Esmeralda told the police there were 15 to 20 incidents of being raped by appellant and she tried to fight him off each time.

Esmeralda's mother, Maria C., once saw appellant with Esmeralda seated on his lap. She saw him touch her under her clothes. Maria took Esmeralda off him and said he was never going to touch her. Appellant said he was wiping her. Maria did not call the police because she did not see it again and because she was afraid people would say she was lying.

Uncharged Acts: Appellant's Sexual Acts on Z. S.

Z. S. was 28 at the time of trial. When Z. was about eight years old, she lived with her parents in Paramount. Appellant rented a room in the residence. At times Z. was left alone with appellant and other children. On one occasion, appellant put her down on the bed and began kissing her as he held her wrists. He let go of one of her wrists and touched her breasts. Appellant told her that if she said anything her family would be harmed.

Z.'s family moved to the apartment on Gundry Avenue and rented a room to appellant and Alma and their children. During the night, appellant would go into the bathroom and turn the light on. Then he would close the door and go to where Z. was sleeping. He touched her breasts and legs under her blanket. Then he would turn off the bathroom light and return to his room. After the first time, Z. twisted the blanket tight so appellant could not reach under them. At times, appellant did this three times a week. Z. did not tell anyone out of fear. After discovering what appellant had done to Jose, Z. and her mother tried to file a report, but the officer who came to the house did not want to file one.

In November 2010, Z. learned that a Kleenex box was mailed to her mother. Z. believed the box said, "It's the worst nightmare," and "gossiping bitches," and "The one that laughs last, laughs the best," and "They or you will be crying, I swear." Z. felt desperate when she learned of this because she was afraid someone was going to hurt her family.

Appellant's Statement and Other Evidence

Detective French is a child abuse investigator for the sheriff's department. In May 2010, Detective French interviewed Esmeralda and Rodrigo separately at their home. The interviews were not recorded. Rodrigo told the detective to speak with his cousins, Jose and Z., regarding appellant. Detective French then interviewed Jose and Z. separately. After each victim alleged that appellant had assaulted him or her, Detective French and his partner, Detective Claudia Garcia, arrested appellant. At the Lakewood sheriff's station, Detective Garcia interviewed appellant in Spanish, with Detective French present.

Appellant admitted to several acts of touching the victims inappropriately. He admitted fondling Rodrigo and Jose. Appellant said he told his wife about touching Rodrigo and Jose and had apologized to her. He admitted touching Esmeralda, but he was playing with her. When later asked if everything Esmeralda said was true, appellant said, "Yes, why would I say it's not, yes?" He said it had been weighing on his conscience a long time. He admitted touching Z. Appellant told the detectives that he had Rodrigo orally copulate his penis, which Rodrigo later confirmed. Appellant initially denied any penetration with Esmeralda, but he said he rubbed her vagina. The detectives told appellant that they had evidence from Esmeralda's medical examination, which was a ruse. Appellant stated that he put his mouth on her vagina "more than once." Appellant said Jose was about 10 when he started to fondle him and that he fondled his penis. In response to Detective Garcia's question, "[D]id you put your penis in [Jose's] butt?," appellant said: "Yes, I did put it, how could I not?"

None of the victims was asked to undergo a sexual assault examination. Malinda Wheeler, a trained sexual assault nurse examiner, explained that it was very difficult to determine whether a girl was a virgin during adolescence due to the body's natural healing and development. With children, a sexual assault examination should be conducted within months of the sexual activity. Otherwise, it is very difficult to determine if there was any injury, since children heal extensively. Wheeler stated that

she would not expect to see any injuries during a sexual assault examination of a 12-year-old girl who was raped by an adult male initially at age four, and repeatedly until age five or six.

Defense Evidence

Imelda Saenz is appellant's sister-in-law (his wife's sister). Z. is Saenz's niece. Saenz had known Z. her entire life. Saenz said that Z. lies a lot. Jose also lies a lot. Their reputations were "problematic." Rodrigo's father is Saenz's brother. Rodrigo is not honest at all, and neither is Esmeralda. As for appellant, Saenz believes "everything about him." There had never been an occasion when she thought something bad was happening between him and the children in the family. Saenz believed that appellant might lie if surrounded by police officers, or by even one officer. She testified she would not change her opinion of appellant even if she heard him say that he rubbed Esmeralda or that he fondled Jose's penis.

Appellant did not testify.

DISCUSSION

I. Statute of Limitations on Count 1; Ex Post Facto Claim in Counts 1, 7, and 11

A. Appellant's Argument

Appellant contends that count 1 was time barred because the section 800 six-year statute of limitations lapsed at the latest on December 31, 2001, almost 10 years before the information was filed. In addition, the trial court erred in applying section 667.61 to count 1 in order to find that section 800 was not applicable to the offense due to the offense being punishable by a life sentence. According to appellant, this finding constituted an ex post facto violation, and the conviction in count 1 must be reversed.

Appellant also argues that sentencing appellant under section 667.61 in counts 1, 7, and 11 violated the ex post facto clauses of the state and federal Constitutions. The offense charged in these counts—a violation of section 288.5—was not added to the list of offenses punishable under section 667.61 until November 20, 2006. The dates of commission of the offenses in counts 1, 7, and 11 all precede November 20, 2006.

B. Relevant Authority

Section 800 provides: "Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more or by imprisonment pursuant to subdivision (h) of Section 1170 for eight years or more shall be commenced within six years after commission of the offense."

Section 799 provides in pertinent part, "Prosecution for an offense punishable by . . . imprisonment in the state prison for life . . . may be commenced at any time."

Section 667.61, subdivision (b) provides in pertinent part that, "[e]xcept as provided in subdivision (a), (j), (l), or (m), any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." Continuous sexual abuse of a child in violation of section 288.5 is listed at subdivision (c)(9) of section 667.61. Subdivision (e)(4) of this section lists as one of the circumstances that "[t]he defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

Ex post facto laws are those that "retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; accord, *People v. Alford* (2007) 42 Cal.4th 749, 755.) Both the California and the United States Constitutions prohibit ex post facto laws. (Cal. Const., art. I, § 9; U.S. Const., art. I, § 10, cl. 1.)

We apply the de novo standard of review. (*Bullard v. California State Automobile Assn.* (2005) 129 Cal.App.4th 211, 217 [retroactivity of a statute is reviewed de novo]; see also *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1448.)

C. Proceedings Below

Counts 1, 7, and 11 charged appellant with continuous sexual abuse of a child in violation of section 288.5, subdivision (a). The victim in count 1 was Jose S., and the conduct was alleged to have occurred between January 1, 1992, and December 31, 1995. The victim in count 7 was Rodrigo S. and the conduct was alleged to have occurred

between January 1, 2003, and December 31, 2004. The victim in count 11 was Esmeralda S., and the conduct was alleged to have occurred between January 13, 2004, and August 20, 2004. The information against appellant was filed on August 24, 2010.

At the close of testimony, defense counsel argued to the trial court that Jose said there was no oral copulation before he turned 15. Jose also said he first reported the offenses in 2002, when he was 19. At that point the People had one year to bring charges in the counts involving Jose (counts 1-6). The prosecutor replied that he was relying on section 801.1 to proceed on Jose.[3]

At a hearing on the defense motion, the trial court dismissed the counts involving oral copulation and Jose (counts 2 & 4) under section 1118.1 leaving counts 1, 3, 5, and 6 to dispute regarding the time bar. The prosecutor argued that there was no issue with respect to the life counts with Jose as a victim, which were counts 3 and 5. The trial court ruled that counts 3 and 5 would remain. It found that there was no statute of limitations bar because they were life crimes both at the time of trial and when the incidents were alleged to have occurred between 1996 and 1997.

With respect to count 1, the prosecutor changed tack and argued that, since section 667.61, added in 1994, made the offense in count 1 a life case, count 1 was not time barred. However, the time frame of count 1 had to be narrowed so that the continuous sexual abuse began in 1994 rather than 1992. The trial court agreed and ruled that count 1 would reflect a beginning date of January 1, 1994, and an end date of December 31,

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3 Section 801.1 provides: "(a) Notwithstanding any other limitation of time described in this chapter, prosecution for a felony offense described in Section 261, 286, 288, 288.5, 288a, or 289, or Section 289.5, as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object, that is alleged to have been committed when the victim was under the age of 18 years, may be commenced any time prior to the victim's 28th birthday. [¶] (b) Notwithstanding any other limitation of time described in this chapter, if subdivision (a) does not apply, prosecution for a felony offense described in subdivision (c) of Section 290 shall be commenced within 10 years after commission of the offense."

1995. The offense would then fit in the time frame of the enactment of section 667.61, which took effect in 1994.

D. Sentence Incorrect

When section 667.61 was enacted in 1994, the offense of continuous sexual abuse of a child in violation of section 288.5 was not listed in subdivision (c). It was not added until 2006. (Stats. 2006, ch. 337, § 33, p. 2639.) Appellant's offense in count 1 became time-barred at the end of 2001 under section 800, before the offense was included in section 667.61, subdivision (c). Therefore, count 1 must be reversed because the statute of limitations expired.[4]

Appellant could not be sentenced under section 667.61 for counts 7 and 11 either. Both of these offenses were committed before 2006 when the crime of continuous sexual abuse of a child was added to section 667.61. Therefore, they are not crimes carrying a life sentence, but rather, subject to a sentence of 6, 12, or 16 years. (§ 288.5, subd. (a).)

Unlike the offense in count 1, however, the offenses in counts 7 and 11 are not time-barred. Both counts were alleged to have occurred in 2004. In 2006, before the statute of limitations had expired under section 800, the pertinent portion of section 801.1 became effective. As noted, section 801.1 provides that prosecution for a felony violation of section 288.5 that is alleged to have been committed when the victim was under the age of 18 may be commenced at any time prior to the victim's 28th birthday. Both Rodrigo and Esmeralda were under the age of 20 at trial. Resentencing is required in these counts.

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[4] The pertinent portion of section 801.1 was also enacted after the offense in count 1 became time-barred. (Stats. 2005, ch. 479, § 2, p. 3791.)

II. Appellant's Confession and *Miranda*

A. Appellant's Argument

Appellant contends his taped confession was obtained in violation of the core holding of *Miranda*. Appellant argues he was not properly advised of his right to counsel during questioning, and he did not knowingly and intelligently waive his rights.

B. Relevant Authority

Our Supreme Court has held: "'In reviewing constitutional claims of this nature, it is well established that 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.' [Citation.]" (*People v. Thomas* (2011) 51 Cal.4th 449, 476.)

C. Proceedings Below

The trial court considered the defense motion to suppress appellant's statement and the People's response. The trial court also considered the transcripts of appellant's interview provided by the defense and the People.[5] The trial court stated that everyone

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[5] The pertinent part of the transcript reads as follows:

"French [Detective French]: All right we are on tape, it's eleven-thirty on June 3rd, we are gonna be talking to Mr. Jose Lopez, [appellant] . . . The interview is gonna be conducted by . . . Detective Claudia Garcia.

"JLopez [appellant]: Now . . .

"Garcia [Detective Garcia]: Yes, we'll talk to you right now . . . Which one?

"JLopez: The right.

"French: . . . .

"Garcia: Are you comfortable?

"French: . . .

"Garcia: You have the admonishment?

"French: . . . I'm looking for it . . . I have any more.

"Garcia: It has . . . well . . . .

"French: We don't need it, I mean we can just . . . advise him . . . .

"Garcia: It should be . . . .

"French: I know . . . oh really?

"Garcia: Yeah . . . I have it in here.

"JLopez: . . . .

"French: It's okay, you know what . . . Just tell 'im – just tell 'im you know by heart don't you?

"Garcia: Yeah.

"French: Oh wait

"Garcia: Okay, I'm going to give you your . . . waiver of . . . rights okay? You have the right to remain . . . silent. Do you understand?

"JLopez: Mmm-Hmm . . .

"Garcia: You have to . . . when I ask you a question, say yes or no verbally okay? . . . not with gestures, you have to say yes or no. You have the right to remain silent, do you understand? . . . what . . . .

"French: Is that yes?

"Garcia: Say, you have to say verbally okay? You have the right to remain silent. Do you understand?

"French: Is that yes?

"JLopez: . . .

"Garcia: . . . You have to say yes . . . .

"JLopez: Yes . . . yes.

"Garcia: Yes, okay let's start again.

"JLopez: Yes.

"Garcia: Okay? You have the right to remain silent. Do you understand?

"J.Lopez: Yes.

"Garcia: Whatever you say now, could be used against you in court, do you understand?

"JLopez: Yes.

"Garcia: Okay, if you don't have . . . money for an attorney the court will give one to you while before [sic] we start, do you understand? Do you want to talk to us without your attorney here present?

"JLopez: I don't have an attorney.

"Garcia: Okay, but . . . you do understand me, right?

"JLopez: Yes.

"Garcia: Okay, as I told you, the court will give you . . . if you don't have the money, the court will give you one . . . .

"JLopez: Yes.

"Garcia: You understand me, okay? Do I begin?

"French: What you need?

"Garcia: Do you have any questions about . . . .

"JLopez: . . . .

"Garcia: . . . your rights?

agreed it was a custodial setting. The People argued that appellant was advised he could have an attorney "while—before we start" and that this clearly meant "before we start." In addition, the detective followed up by saying, "Do you want to talk to us without your attorney here present," which was another advisement that he had the right to have an attorney there. The defense argued there was no evidence of a knowing, voluntary and intelligent waiver of rights. Appellant's statement, "I don't have my attorney" was not a knowing and intelligent waiver.

The trial court was concerned with the fact that the officer did not separately state that appellant had a right to an attorney during questioning and that appellant had a right to a court-appointed attorney if he could not afford one. The prosecutor agreed that the officer had conflated these two rights. He argued that, according to the case law, as long as the warning implicitly conveyed to the defendant that he had a right to a lawyer based on everything that was said to him, it was a valid advisement.

The trial court, relying on *People v. Stewart* (1968) 267 Cal.App.2d 366, 378 (*Stewart*)[6] found that appellant was *not* advised of his right to counsel during questioning but only specifically advised of his right to counsel should he not be able to afford one. It denied use of the statement in the People's case-in-chief.

Later that day, the trial court asked the People for the audio recording of appellant's statement and the transcripts. The court wished to listen for the pauses and inflections and, in general, the manner in which things were stated. After listening to the audio, the trial court asked the parties to stipulate that "mientras" means "while" and

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"JLopez: No, about the rights, I don't, I just want to know why I'm here."

6 In *Stewart*, the defendant was told he could have his attorney "'here,'" he "'had a right to have the Public Defender appointed in case he couldn't afford an attorney; and that if he didn't want the Public Defender to be appointed, that he could pick an attorney and this attorney would be appointed by the Court for him.'" The *Stewart* court held that the warning was inadequate because it did not inform the defendant that "counsel would be provided to be present at the interrogation." (*Stewart*, *supra*, 267 Cal.App.2d at p. 378, fn. 16.)

"antes" means "before," which was exactly as the transcript indicated. The trial court stated that, having evaluated the transcripts and listened to what was said and, more importantly, how it was said, it was changing its ruling and allowing appellant's statement into evidence. The trial court no longer found the advisement to be ambiguous and believed it was not ambiguous to appellant.

At this point, defense counsel decided to have appellant testify. When asked if the officers told him at any time that he had a right to an attorney "during or before they were interrogating" him, appellant said he thought they did tell him. When asked if they told him that an attorney would be appointed for him before questioning began, appellant said, "no." He said he did not understand if the attorney would be given to him "here or over there." When asked if he requested an attorney, appellant replied, "I asked them if—I told them if they could give it to me." Counsel showed appellant a note appellant had written him earlier which said, "Later on I asked for an attorney, and they didn't give him to me." Appellant said he was having medical problems with diabetes at the time of the interrogation. He said the officers told him to say "yes" to the questions. He understood the officer's question regarding whether he understood what she said to be referring to her Spanish rather than what she was telling him. He said he did not understand that he could have a lawyer present with him but, "when she told me that, I said I wanted one." He was not told that if he could not afford an attorney one would be appointed for him free of charge before any questioning. He did not recall if he was told he had the right to remain silent. Appellant insisted that Garcia told him to answer "yes" to every question. He then said he did not recall because his sugar was so altered.

After hearing argument, the trial court reiterated that the transcript in conjunction with the audio recording resolved any ambiguity the court had seen at first. Appellant's testimony confirmed there was no ambiguity and convinced the court beyond a reasonable doubt that appellant knew his rights. The trial court did not find credible appellant's claim that he asked for an attorney. Nowhere in the transcript or the audio was there a statement that left room for such an interpretation. The court found that

appellant was advised of his rights and that he understood his rights. When asked if he understood, the officers were not asking about Detective Garcia's Spanish, because Detective Garcia asked about "your rights."

D. Ruling Correct

Since there was conflicting testimony, "'we must accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 383-384.) We believe the transcript and audio recording provide substantial evidence that appellant was given his *Miranda* warnings and that he understood them. Thus, even if we believed portions of appellant's testimony, we must accept the trial court's resolution of the conflicts and its credibility evaluations. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.) However, having reviewed the transcript and audio recording of the statement, we conclude that appellant gave a knowing, voluntary, and intelligent waiver of his rights.

First, we disagree with appellant's suggestion that Garcia and French commanded appellant to answer "yes" to all questions. Appellant testified that this occurred, but a common-sense reading of the transcript does not allow for this possibility. Two detectives recording an interview would hardly order a suspect to answer "yes" to the questions dictated by *Miranda*. The logical interpretation of this aspect of the recording is that appellant persisted in nodding his head in affirmance, despite being told several times to answer by voice, and the detectives kept reminding him. It would not have been "appropriate," contrary to appellant's suggestion, for the detectives to put whatever nods or shakes of the head appellant made into their own words. It was appellant who had to give these answers in his own voice. Furthermore, Detective Garcia testified that appellant was gesturing and nodding "yes." She wanted to get it on tape that he understood and said "yes" or "no" to the questions.

Appellant goes on to utilize the detectives' insistence that appellant voice his answers to assert that appellant's will was overborne. He claims that the atmosphere during the questioning was so police-dominated that his statements were involuntary and

inadmissible. Appellant cites the factors that appellant was interrogated by Garcia for over an hour at the police station and that he had previously had minimal contact with the criminal justice system. We believe an interrogation of over an hour is not overlong by any standard. The fact that appellant had only one prior drug offense in 1994 does not make him a complete innocent with respect to the criminal justice system. We have already rejected appellant's argument that the detectives' orders to respond by voice rather than gestures was overbearing conduct. Therefore, we reject appellant's claim that the totality of the circumstances of the interrogation shows a lack of a knowing and intelligent waiver of *Miranda* rights.

Appellant next reiterates his principal argument below that the detectives failed to advise appellant he had a right to have an attorney present during questioning, citing *Miranda*, 384 U.S. at page 473. He contends that the warnings given to appellant did not contain a recognizable version of each of the four warnings required, since it was missing a warning of this key constitutional right. Appellant argues that the trial court's interpretation of the key phrase containing the words "while" and "before" was unreasonable.

In *People v. Bradford* (2008) 169 Cal.App.4th 843 (*Bradford*), cited by appellant, the court stated that, "[a]lthough courts have permitted officers some latitude in the manner in which the *Miranda* warnings are delivered, we are unaware of any post-*Miranda* decision that has permitted the admission of a defendant's statements in the absence of a showing that a recognizable version of each of the four warnings was provided to the suspect." (*Bradford*, at p. 852.) In that case, detectives failed to advise the defendant that his statements could be used against him in court. (*Id*. at p. 850.) The People argued that the defendant's statement was properly admitted in any event because "defendant's comments during the interrogation—for example, a reference to incriminating himself—showed that he was aware that his statements could be used later, despite the failure of the detectives to so advise him." (*Id*. at pp. 850-851.)

In order to agree with the trial court's finding in the instant case, we need not stretch as far as the People's argument in *Bradford*. The dialogue between Detective Garcia and appellant shows only a minor overlap (rather than a conflation) of appellant's right to have an attorney present and the right to have an attorney appointed for appellant. Indeed, *Bradford* itself recognized that imperfect warnings have been held to satisfy the *Miranda* requirements to the degree that the evidence of the statements was admissible at trial. (See *Bradford*, *supra*, 169 Cal.App.4th at pp. 852-853.)

In *Duckworth v. Eagan* (1989) 492 U.S. 195, for example, discussed in *Bradford*, the interviewing officers told the defendant before his first questioning that an attorney would be appointed for him if he could not afford one "'if and when'" he went to court. (*Duckworth*, at pp. 197-198.) The officers failed to mention that the appointment could be made before any interrogation. (*Id*. at p. 198.) A second warning was given about 29 hours later, which stated in pertinent part that if appellant did not hire an attorney, one would be provided for him. (*Id*. at p. 199.) The *Duckworth* court concluded that the warnings, taken as a whole, adequately conveyed the right to counsel during an interrogation. (*Id*. at pp. 203–204.)

In *People v. Nitschmann* (1995) 35 Cal.App.4th 677, the officers told the defendant he had a right to consult an attorney, but they did not specifically say that the defendant could consult the attorney *during* the interrogation. (*Id*. at p. 681.) The court affirmed admission of the confession because the colloquy between the police officers and the defendant demonstrated that he recognized his right to have counsel present during questioning. (*Id*. at p. 682.)

In *People v. Samayoa* (1997) 15 Cal.4th 795, also cited in *Bradford*, the defendant was advised his statements could be used against him, but this warning might have omitted the words "'in court.'" (*Samayoa*, at pp. 828, 830.) The court affirmed admission of the evidence of the defendant's statement, concluding that the language reasonably conveyed the defendant's *Miranda* rights. (*Samayoa*, at p. 831.) The court stated, "As the United States Supreme Court has observed, the prophylactic *Miranda*

warnings are '"not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected"' [citation], and the warnings therefore need not be given in the exact form described in that decision [citation]. Thus, a reviewing court need not examine a *Miranda* warning for accuracy as if construing a legal document, but rather simply must determine whether the warnings reasonably would convey to a suspect his or her rights as required by *Miranda*. [Citations.]" (*Samayoa*, at p. 830.)

In this case, the record clearly shows the warnings given appellant reasonably conveyed his rights. Appellant was advised first that if he did not have money for an attorney, the court would "give one to [him] one while [pause] before we start, do you understand? Do you want to talk to us without your attorney here present?" Next, (after appellant said he did not have an attorney), Detective Garcia said, "Okay, but you do understand me, right?" Appellant said he did. Next, Detective Garcia advised, "Okay, as I told you, the court will give you—you if you don't have the money, the court will give you one . . . ." Appellant said, "Yes." Garcia then asked, "You understand me, okay? Do I begin?" and "Do you have any questions about about your rights?" Appellant said he had no questions about his rights. In sum, appellant was advised that he had the right to have an attorney present during questioning, and he was advised twice that he did not have to pay for an attorney. We conclude his statement was properly admitted.

Finally, appellant argues that the error was not harmless beyond a reasonable doubt. He asserts that a fair reading of the record shows the importance of the confession to the verdict. According to appellant, the confession tied the case together and cannot be parsed out from other evidence and found inconsequential. Although we need not reach this issue, we believe the jury would have found the victims' testimony convincing even without the confession to some of the acts. The three victims and Z. revealed that appellant had a disturbing pattern of behavior with the children in his family. He took advantage of their proximity and familial relation to prey on them. They were easily manipulated into being alone with him, and the threats to their families would appear all

the more real to a child because he was part of that family. Appellant's argument is without merit.

III. Spanish Recording

A. Appellant's Argument

Appellant argues that he was deprived of his constitutional right to due process and a fair trial when the trial court played the audio recording of his confession, which was largely in Spanish. According to appellant, this signified that some of the jurors likely received different evidence than the others. He contends that his trial counsel's failure to object or to ask the trial court to inquire if any members of the jury understood Spanish constituted ineffective assistance of counsel.

B. Relevant Authority

We review the trial court's decision for abuse of discretion only. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

C. Proceedings Below

Prior to the playing of the audio recording to the jury, the trial court stated for the record that the audio was redacted as agreed upon by counsel. There was a stipulation that the jurors would not be instructed regarding the redactions. The trial court noted that the parties had agreed that, since the audio was in Spanish, the trial court would not instruct them that the audio is the evidence. They had also all agreed that the audio was still evidence because the jury needed to take into account the oral "demeanor" of the speaker in its credibility assessment. The jury would be instructed that it was to accept the translated version as shown in the transcripts as true.

Before the recording was played, the trial court instructed the jury in pertinent part that, "the audio contains both English and Spanish; the majority is in Spanish. The audio is evidence for you to consider for the purposes of the inflection of the voice, anything that you may see as valuable as to the credibility of the speaker. . . . [Y]ou are to accept

the translated transcripts as true, but you are to consider the Spanish only if that helps you in assessing the credibility of the speaker. . . . The English version or the English translation of what is spoken in Spanish is the evidence that you are to consider as true and correct as what is spoken, not the contents as true, but what is spoken, and that is the correct translation of the Spanish."

D. Evidence Properly Admitted

We conclude that appellant's argument flies in the face of standard practice in the receipt of testimony provided by non-English speakers. By a parity of reasoning, a Spanish-speaking juror would receive "different" evidence than a non-Spanish speaking juror whenever an interpreter was required to interpret for a witness. If appellant's argument were considered valid, it would be impossible in this diverse society to empanel a jury without engaging in prohibited juror screening based on ethnicity. There is no reason to believe that Spanish-speaking persons on a jury would have any more difficulty in following the court's instruction that they must accept the translation of a Spanish speaker's interview than jurors generally who are told that they must decide the case upon the evidence presented rather than using any knowledge or information of their own.

In a case dealing with a juror's reinterpretation of a portion of the defendant's testimony, it was held that it is misconduct for a juror to rely on his or her own translation instead of the interpreter's translation. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303-304.) The *Cabrera* court determined, however, that the presumption of prejudice arising from such misconduct was rebutted because the retranslated portion was irrelevant to the issues in the case. (*Id*. at p. 305.) In the instant case, any presumption of prejudice was also rebutted, based on the totality of the circumstances. There was an official translation of appellant's interview, and some of the words were unintelligible. There is no reason to believe that these unintelligible words would be intelligible to a different Spanish speaker than the official translator. Nor is there any reason to believe that the official translator made gross errors in the translation such that the English

translation differed significantly in meaning from the Spanish. Moreover, there was no evidence that a Spanish speaker discussed a differing interpretation with other jurors. Therefore, appellant suffered no prejudice from the fact that some of the jurors in his case may have understood the original Spanish. (See, e.g., *In re Malone* (1996) 12 Cal.4th 935, 964 [defendant suffered no prejudice when "externally derived information was substantially the same as evidence and argument presented to the jury in court"]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 354-355 [an appellate court will not presume error from a silent record concerning whether, during deliberations, the jury improperly carried into the jury room a paper used by the prosecution at trial that was not admitted into evidence].)

Finally, prior to the testimony of the first Spanish-speaking witness, the trial court instructed the jury that it must evaluate and listen only to the interpretation in English of what was spoken because it understood that some of the jurors might speak Spanish. The trial court instructed the jury to ignore the statements made in Spanish and listen only to the interpreter's testimony. Absent any indication to the contrary, we are required to presume the jurors understood and followed these instructions with respect to the recording as well. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

Appellant's argument is without merit.

IV. Admission of Kleenex Box

A. Appellant's Argument

Appellant contends there was no valid basis for admitting evidence about a Kleenex box with customized wording that could be interpreted as a threat. The evidence implicated appellant's due process right to a fair trial because it was unreliable, irrelevant, and unduly prejudicial. The prosecutor offered no foundation connecting the Kleenex box to appellant's case, and the evidence had the improper purpose of portraying appellant as a bad and dangerous person.

B. Relevant Authority

Only relevant evidence is admissible. (Evid. Code, § 350.) Unless prohibited by statute, all relevant evidence is admissible. (Evid. Code, § 351.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The standard of relevance embodied in Evidence Code section 210 is a very broad one. (*People v. Scheid* (1997) 16 Cal.4th 1, 16.) It is the judge's duty to limit the evidence to that which is relevant and material. (§ 1044.) "Evidence of threats to a witness is generally admissible on either or both of two theories. First, it is relevant on the question of the witness' credibility." (*People v. Lybrand* (1981) 115 Cal.App.3d 1, 11.)

A trial court's discretion to exclude or admit relevant evidence under the criteria of Evidence Code section 352 must not be disturbed on appeal unless there is a showing that the court used its discretion in an "'arbitrary, capricious or patently absurd manner.'" (*People v. Rodrigues*, *supra,* 8 Cal.4th at p. 1124.)

C. Proceedings Below

Prior to trial, the prosecutor informed the court that someone had mailed a customized Kleenex box to Jose's mother at her home. The prosecutor explained that one can go to the Kleenex website and have a box with custom writing sent to someone. The box sent to the home of Jose's mother said in Spanish "Gossiping Bitches." It was sent "from your nightmare." It also said, "He who laughs last laughs loudest. You will be crying soon." Jose's brother was home when the box was delivered and he told Jose about it over the telephone. Jose's mother and father and Z. were made aware of it. Jose called the police, and the police took custody of it.

The defense stated that its investigation revealed that the box was sent to Oscar, one of Jose's brothers, by a girlfriend who had broken up with Oscar. Appellant was in custody when the box was apparently ordered and sent.

The trial court agreed with defense counsel that the box had nothing to do with appellant. It found, however, that it had everything to do with the credibility of "the witness." It was for the jurors to determine what weight to give it. The court intended to admonish the jurors that the statement was being used only to explain the state of mind of the witness, if the jury found that it affected that state of mind. The court intended to admonish that it was in no way attributable to the defendant, and they were not to consider it as such. The trial court stated that if Z. felt a threat was made to her, it had a bearing on her credibility also. Before Jose testified about the box, the trial court admonished the jury that the statements made to Jose, about which he would testify, were to be considered only in regard to Jose's state of mind and any bias or credibility on Jose's part.

Jose testified that he heard about something odd being mailed to his mother's house. His mother told him that a box had been sent to the house with words on it that had been written by a computer. At this point the trial court again admonished the jury that the statement made by Jose's mother was not being admitted for the truth of the statement but for the jury to consider it for the state of mind of the witness and for any bias or prejudice. Jose said his mother told him some of the words on the box and told him to call the police. Jose stated that the incident made him fearful about testifying. He thought something might be done to him on the street.

Z. testified that in November 2010 she learned of a strange package that was mailed to her family. She recited some of the phrases from the box and said it made her feel "desperate." She was afraid "they were going to come and do something to us." The trial court instructed the jury that, "Ladies and gentlemen, as I indicated earlier, what the witness just stated about this Kleenex box and what she believes it states, is not used to prove the truth of that statement but for you to consider only if it does help you as to the witness's state of mind and judging that witness's credibility, bias, or prejudice. This statement is not to be attributed to the defendant in any way. And you are not to use it

against the defendant in any way. Again, the only use of this statement is only to evaluate the state of mind and the credibility of this witness."

D. Evidence Properly Admitted

Appellant claims that, since the trial court ruled that the box was in no way attributable to appellant, it follows that its use as evidence was irrelevant and inadmissible. He also complains there was no foundation as to who sent it and to whom. Even if there was minimal relevance, the trial court abused its discretion under Evidence Code section 352 because the evidence did not prove or tend to prove any element of the charged crimes. Rather, it was a piece of evidence designed to inflame the jury.

We disagree. Evidence that a witness is afraid to testify or that he is testifying despite fear of retaliation is relevant and admissible on the issue of the witness's credibility. (Evid. Code, § 780; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588.) Moreover, the jury is entitled to be apprised of not only the witness's fear, but also of pertinent facts that would enable it to evaluate that fear, as long as the limitation of Evidence Code section 352 is observed. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 (*Olguin*).)

In *Olguin*, a threat was made to a witness to a gang shooting named Robert Ulloa. (*Olguin*, *supra*, 31 Cal.App.4th at p. 1367.) Ulloa testified that he received an anonymous call from someone who said "they knew where he lived and he had better watch his back." (*Id*. at p. 1368.) The caller would not give her name, saying "'Don't worry about it. Go, Southside Gang.'" Later, the Spanish word for "'rat'" was spray-painted on Ulloa's driveway. (*Ibid*.) The trial court allowed Ulloa to testify to these acts and admonished the jury that the evidence could only be used for its "'relevance, if any, to the witness'[s] state of mind, attitude, actions, bias, prejudice, lack of presence thereof.'" (*Ibid*.) The *Olguin* court held that the evidence of the threats was relevant and admissible. (*Id*. at pp. 1368-1369.) "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for

testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim . . . ." (*Ibid*.)

The situation here is not unlike that in *Olguin*. The box received at Jose's family home, like the threat to Ulloa, was not directly linked to the defendant on trial. There was no suggestion that the evidence reflected a consciousness of guilt on the part of the appellant. The prosecutor did not argue that appellant initiated the threat, or that the threat was evidence of appellant's guilt. There was no attempt to impute the origin of the threat to appellant's family. Additionally, the evidence of the threat was not offered for the truth of the matter asserted. The evidence "was strictly limited to establishing the witness's state of mind." (*Olguin*, *supra*, 31 Cal.App.4th at p. 1368.)

The introduction of the threat evidence did not violate Evidence Code section 352. "'[P]rejudicial'" within the meaning of Evidence Code section 352 "is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) A court's weighing of these factors is sufficiently shown if the record allows a reviewing court to infer an implied finding in this regard. (*People v. Padilla* (1995) 11 Cal.4th 891, 924, disapproved on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823.) The trial court clearly believed the probative value of the testimony would outweigh any prejudicial effect. The entire defense rested on an attempt to paint the victims as untruthful, placing their credibility at issue. Defense counsel pointed out that there was no corroboration of the victims' testimony and told the jury that all of the witnesses "lied to you under oath." Counsel stated that "just because you tell a lie enough times, it never ever becomes true, ever." On the other hand, nothing in the testimony suggested that appellant was connected with the making of the threat, and the trial court expressly admonished the jury

several times that the threat was not attributed to appellant and was not to be held against him. The trial court gave limiting instructions each time the evidence of the Kleenex box was introduced. In addition, the trial court instructed the jury at the end of trial that, "[d]uring the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (CALCRIM No. 303.) The jury is presumed to follow instructions and obey the law. (*People v. Holt*, *supra*, 15 Cal.4th at p. 662.) These admonitions clearly sufficed to eliminate any potential prejudice. The evidence of the threat from an unknown individual was properly admitted, and there was no due process violation.

DISPOSITION

The judgment is reversed in count 1. The sentences in counts 7 and 11 are vacated and the matter is remanded for resentencing in accordance with this opinion. In all other respects the judgments are affirmed.

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

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ