Filed 3/12/14 P. v. Luna CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JORGE ANTONIO LUNA, Defendant and Appellant.	B250331 (Los Angeles County Super. Ct. No. VA128190)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Vanessa Place, 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, Shawn McGahey Webb and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jorge Antonio Luna of numerous sexual assaults upon his 12-year-old daughter. On appeal, Luna contends his *Miranda*[1] rights were violated when he was interviewed by police a second time, two days after invoking his right to remain silent. We affirm.

FACTS AND PROCEDURAL HISTORY

Because the facts of the sexual assaults are not relevant to the issue on appeal, we set them out only briefly. Luna lived with his wife and three children, including the victim, 12-year-old J. While J.'s mother was working at night, Luna molested her on a weekly basis from September to December 2012. On December 23, 2012, Luna raped J. The incidents were discovered by J.'s mother on January 4, 2013, after she noticed a "hickey" on J.'s neck the morning following Luna's final assault. Then next day, Luna was arrested.

In a pretrial motion, defense counsel requested Luna's admissions to police about the crimes be suppressed. No live testimony was presented. Defense counsel represented the following facts, to which the prosecutor agreed as having occurred. Luna was advised of his *Miranda* rights on the day he was arrested. Though he invoked his right to remain silent, Luna did not request an attorney. Two days later, Officer Alpizar interviewed Luna. Alpizar again advised Luna of his *Miranda* rights, but this time Luna chose to talk about the case.

At trial, Officer Alpizar testified that Luna confessed to touching his daughter's vagina ten times, five of which were under the clothing. He also told Alpizar that he had had intercourse with J. on one occasion. Approximately one minute of a video of the interview was played for the jury.

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

Luna was convicted of one count of lewd act upon a child (count 1; § 288, subd. (a)), and eleven counts of forcible lewd acts upon a child (counts 2-11, 13; § 288, subd. (b)(1)). The jury was unable to reach a verdict on a single charge of aggravated sexual assault of a child (count 12; § 269, subd. (a)(1)); the count was dismissed. Probation was denied and Luna was sentenced to an aggregate term of 90 years in state prison.

Luna filed a timely notice of appeal.

DISCUSSION

Luna's Statements to Police Were Properly Admitted

Luna contends his convictions should be reversed because the second interview violated his rights under *Miranda, supra*, 384 U.S. 436 and *Michigan v. Mosley* (1975) 423 U.S. 96 (*Mosley*). We disagree.

Upon review of *Miranda* issues, 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. [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

The overarching constitutional standard is laid out in *Miranda*. Statements a defendant makes in a custodial interrogation may not be used as evidence against him unless the prosecution "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra,* 384 U.S. at p. 444.) After an individual indicates that he wishes to invoke his Fifth Amendment privilege, "[t]he interrogation must cease" because "without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice . . ." (*Id.* at pp. 473-474, fn. omitted.) *Miranda* left open the question of whether the police could ever resume questioning, which was taken up later in *Mosley*.

Mosley held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " (*Mosley, supra*, 423 U.S. at p. 104.) Mosley was arrested in connection with several robberies and properly *Mirandized*.

(*Ibid*.) When Mosley said he did not want to answer any questions about the robberies, the police officer questioning him promptly stopped. Two hours later, Mosley was again *Mirandized* and questioned by a different police officer about a different crime, a murder, to which he confessed. (*Ibid.*) Mosley argued his confession should be suppressed because he previously invoked his right to remain silent and the homicide investigators violated *Miranda* by questioning him again. (*Id*. at pp. 99-100.) The high court was not persuaded; it found the confession admissible.

Luna claims *Mosley* is distinguishable because it involved a second interview about a different crime. Established authority holds otherwise. In *People v. Warner* (1988) 203 Cal.App.3d 1122 (*Warner*) the defendant invoked his *Miranda* rights, but was questioned the next day by a police officer who was not aware he had invoked them. He confessed to raping his adopted daughter. (*Id*. at p. 1125.) The court held that Warner's confession was admissible under *Mosley*, despite the fact that he was questioned about the same crime. (*Id*. at p. 1130.) *Warner*, in considering *Mosley*, determined that "[t]he real issue is whether defendant's *Miranda* right to cut off the questioning was respected in the totality of the circumstances . . ." (*Warner, supra*, 203 Cal.App.3d at p. 1131; see also, *Grooms v. Keeney* (9th Cir. 1987) 826 F.2d 883, 886.) Factors to consider include whether the defendant was properly given his *Miranda* rights before the initial interrogation, whether the interrogation immediately ceased upon invocation of the right to remain silent, the reissuance of *Miranda* warnings before a second interview, the time between the two interrogations, the scope of the second interrogation, and whether the second interrogation was an attempt to "wear down" the suspect's resistance and make him change his mind. (*Mosley, supra,* 423 U.S. at pp. 104-106.)

In the case at hand, there was no suppression hearing and no witnesses testified. The facts we know are few and limited to those the attorneys agreed upon. Framed in this context, we know only that Luna was given the *Miranda* warnings at both the first and second interrogation; that he initially invoked his right to remain silent but then changed his mind two days later after being re-advised. We find these facts supported the

trial court's ruling that Luna's statements were admissible. Luna could have chosen to invoke his right to silence, as he did two days previously. Instead, when presented with a new set of warnings, he chose to speak with Officer Alpizar. The time between the first and second interrogation was two days. The time between questioning in *Mosley* was only two hours, and California courts have previously held overnight gaps between questioning to be more than sufficient, with gaps of as little as one hour to still be admissible. (*People v. Riva* (2003) 112 Cal.App.4th 981, 994 [one hour]; *Warner*, *supra*, 203 Cal.App.3d at p. 1130 [next day].) There is nothing to support the contention that Luna's right to cut off questioning was not "scrupulously honored."[2]

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.

[2] Luna also attempts to distinguish *Warner* based upon the unsubstantiated assertion that Officer Alpizar knew that Luna had previously invoked his right to remain silent. However, there is no support for this in record. The only statement Luna points to is an ambiguous sentence in a police report that was not admitted at the suppression hearing.