Filed 7/31/12 In re Michael S. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re MICHAEL S., a Person Coming Under the Juvenile Court Law.	B229809 (Los Angeles County Super. Ct. No. VJ39637)
THE PEOPLE, Plaintiff and Respondent, v. MICHAEL S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Gary Y. Tanaka, Judge. Affirmed as modified.

Bruce Zucker, 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, Senior Assistant Attorney General, Mary Sanchez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Michael S. appeals from an order of the juvenile court in which he was found to be a ward of the court as described in Welfare and Institutions Code section 602. Following the denial of his motion to suppress evidence, the juvenile court found he committed a lewd act upon a child (Pen. Code, § 288, subd. (a)), forcible rape (*id.*, § 261, subd. (a)(2)), and a forcible lewd act upon a child (*id.*, § 288, subd. (b)(1)). The court calculated appellant's maximum term of confinement to be eight years for forcible rape and two years for committing a lewd act upon a child, and it stayed the term for forcible lewd act upon a child under Penal Code section 654. On appeal, appellant challenges the denial of his suppression motion. He also asserts that the juvenile court erred by calculating his maximum term of confinement to include time for both forcible rape and lewd act upon a child in violation of Penal Code section 654. We agree that Penal Code section 654 precludes confinement for both offenses and modify the court's order accordingly.

FACTS

On May 15, 2010, at approximately 1:00 p.m., Heaven H., a five-year-old girl, went with her mother, M. W., to visit M.'s grandmother in Paramount. When they arrived, appellant, who is M.'s then-13-year-old cousin, was already present at the residence.

M. subsequently left the residence with several family members, leaving Heaven behind with the grandmother and great-grandmother. She was gone from approximately 1:15 p.m. to 1:30 p.m. Upon her return to the residence, M. went to find Heaven. M. approached a closed bedroom door, opened it, and saw Heaven leaning over the bed with her panties and shorts down to her ankles. Appellant was in the room with her. When the door opened, appellant "jumped and tried to fix his pants." Appellant moved his right hand in a downward motion in his genital area.

M. asked appellant what had happened. Appellant denied doing anything to Heaven. M. then asked Heaven. Heaven shrugged her shoulders, appearing "shocked." M. took Heaven to the hospital for an examination. M. withheld permission for her daughter to undergo a forensic "SART" examination.

Heaven testified that she was alone in a room with appellant at her grandmother's house. When asked about what she was doing, Heaven replied that appellant "did it first" and "put his thing in there." Heaven indicated that appellant removed her clothing, including her underwear, and put his penis in her vagina. Heaven stated that appellant took down her pants and underwear, which ended up on the floor. She felt appellant's "thing" inside her body. She told appellant to stop.

Based on a report of M.'s account of the incident taken by Los Angeles County Deputy Sheriff Aleman the night Heaven was at the hospital, and a subsequent May 17, 2010 interview with Heaven, Detective Steve French of the Los Angeles County Sheriff's Department requested that Deputy Ryan Vienna go to appellant's residence to contact appellant and get a statement from him.

On May 18, 2010, Deputy Vienna visited the residence twice in order to talk to appellant. On the first occasion, appellant was not home. Deputy Vienna then received a call from a family member at the residence advising him that appellant was home and willing to speak to him. Upon his arrival, Deputy Vienna spoke with appellant's mother "at the threshold of the doorway." They both stepped inside the residence for a moment, and found appellant inside. Deputy Vienna then asked appellant to step outside so that they could talk. Appellant consented and stepped outside with Deputy Vienna.

Deputy Vienna subsequently put appellant in the back of his patrol car for questioning. Appellant was not handcuffed. Deputy Vienna then read appellant his *Miranda*[1] rights. Deputy Vienna asked appellant if he understood his rights and if he wanted to "talk about what happened really quick." Appellant responded that he

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

understood his rights and was willing to speak to the deputy without anyone else present. Deputy Vienna also read appellant a *Gladys R.*[2] admonition. Deputy Vienna indicated that appellant provided satisfactory answers to questions designed to determine whether appellant knew right from wrong.

Deputy Vienna then proceeded to ask appellant questions about the incident with Heaven. At the conclusion of the interview, Deputy Vienna arrested appellant for rape and other sexual offenses. Deputy Vienna did not have an arrest warrant.

On May 19, 2010, Detective French contacted appellant in juvenile hall. Appellant had been detained for 12 hours. With appellant's probation officer in the room, Detective French read appellant his *Miranda* rights and reviewed the *Gladys R.* admonition before speaking with appellant about the incident. While appellant never expressly waived his *Miranda* rights in the presence of Detective French, appellant signed a form that explained that he understood his rights.

Appellant told Detective French that "Heaven was the instigator, that she took off his clothes, that she grabbed his penis, and she put his penis on her back." After further interrogation, appellant told Detective French that he had placed his penis inside Heaven's vagina. He demonstrated to the detective that his penis penetrated Heaven's vagina by approximately one-quarter inch. Appellant stated he did this because "his body was going through changes" and that he "knew it was wrong" because it was "rape." Appellant stated that he did it just once, and when Heaven's mother walked into the room he "jumped up and turned around."

DISCUSSION

A. *The Suppression Motion*

Appellant moved to suppress all statements that he allegedly made after his arrest by Deputy Vienna, as well as any evidence obtained stemming from the arrest, pursuant

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[2] *In re Gladys R.* (1970) 1 Cal.3d 855.

to Welfare and Institutions Code section 700.1. The court denied the motion stating, "The court was not presented and is presently not aware of any cases, state or federal, that says the inquiry made by Deputy Vienna . . . with minor's mother to speak with minor and asking him to exit the premises violated the Fourth Amendment." The court further held that there was probable cause to arrest appellant. While appellant also contends his confession to Detective French should have been suppressed, he did not raise the claim to the juvenile court in the suppression hearing.

The applicable standard of review is expressed in *People v. Middleton* (2005) 131 Cal.App.4th 732: "In reviewing the denial of a motion to suppress, an appellate court defers to the trial court's express or implied findings of fact that are supported by substantial evidence, but must independently determine the relevant legal principles and apply those principles to the trial court's findings of facts to determine whether the search was constitutionally reasonable. [Citations.] '[T]he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court.' [Citation.] If factual findings are unclear, the appellate court must infer 'a finding of fact favorable to the prevailing party on each ground or theory underlying the motion.' [Citation.] However, if the undisputed facts establish that the search or seizure was constitutionally unreasonable as a matter of law, the reviewing court is not bound by the lower court's ruling. [Citation.]" (*Id.* at pp.737-738.)

1. Warrantless Arrest in the Home

The Fourth Amendment protects people, including juveniles, against arbitrary and unreasonable searches and seizures in their homes. (*People v. Middleton*, *supra*, 131 Cal.App.4th at p. 738; see *In re Scott K.* (1979) 24 Cal.3d 395, 402.) Appellant contends his warrantless arrest in his home was invalid, citing *People v. Ramey* (1976) 16 Cal.3d 263, which held "warrantless arrests within the home are per se unreasonable in the absence of exigent circumstances." (*Id.* at p. 276.) The *Ramey* court recognized two

exceptions to this rule: (1) "a bona fide emergency" and (2) "consent to enter." (*Id.* at p. 275.)

Here, the facts do not establish the existence of exigent circumstances or a bona fide emergency, given that Deputy Vienna and Detective French had time to obtain an arrest warrant had they decided to do so. Appellant argues that while Deputy Vienna did receive consent from appellant's mother to enter the premises, he exceeded the scope of the consent given by arresting appellant. We disagree.

Appellant correctly asserts that the right to enter a residence is limited to the scope of the consent given. The right to enter a residence for the purpose of talking with a suspect is not consent to enter and effect an arrest. (*In re Johnny V.* (1978) 85 Cal.App.3d 120, 130.) In *In re Johnny V.*, a minor's suppression motion should have been granted because the officer exceeded the scope of the consent from the homeowner to speak with the minor when he actually arrested him in the house. (*Id.* at p. 132.)

However, there are many cases distinguishable from *In re Johnny V.* that are more factually similar to the present case. As the juvenile court correctly stated, "in similar circumstances where police are asking a suspect to come out of the house and then subsequent to being brought out of the house that arrest takes place, there is not the violation of the Fourth Amendment discussed under *In re Johnny V.*"

In *People v. Tillery* (1979) 99 Cal.App.3d 975, 979-980, a warrantless arrest was permissible because, before the officers arrested the suspect outside of his home, the officers received consent to enter the home where the suspect voluntarily complied with the officers' request to step outside. (See also *People v. Trudell* (1985) 173 Cal.App.3d 1221, 1230-1231; *People v. Green* (1983) 146 Cal.App.3d 369, 377.) Here, Deputy Vienna did not go beyond the scope of consent given by appellant's mother to enter the premises because while Deputy Vienna was in the home, he merely asked appellant to step outside to talk.

Additionally, while it is well settled that warrantless entry into a house by ruse, stealth, or trickery would violate the Fourth Amendment (*People v. Reeves* (1964) 61 Cal.2d 268, 273), there is no evidence to suggest that Deputy Vienna used any type of

coercion or ruse to gain consent to enter the premises. Deputy Vienna only returned to the residence after he received a call from a member of appellant's family. Once at the residence, he asked appellant's mother for permission to talk with her son with the honest intent of asking questions to further the investigation.

Since Deputy Vienna properly gained consent to enter appellant's home, and appellant was arrested outside the home, there was no warrantless arrest inside the home in violation of the Fourth Amendment.

2. Invalid Search and Seizure

Appellant contends that the statements he made to Deputy Vienna and Detective French should have been suppressed because they were the product of an unlawful arrest stemming from an invalid search and seizure. Appellant argues that the search and seizure was invalid because he did not voluntarily leave his home with Deputy Vienna, and he was unlawfully detained in the back of his police car while he was being questioned. We disagree.

In determining "'whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

"'Police contacts with individuals may be placed into three broad categories ranging from the least intrusive to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty.'" (*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 819, quoting *In re Manuel G.*, *supra*, 16 Cal.4th at p. 821.) The validity of any particular temporary detention is a determination of fact by the trial court and, on appeal,

the question is whether the determination by the trial court is supported by substantial evidence. (*People v. Anthony* (1970) 7 Cal.App.3d 751, 760.)

Both parties agree that a consensual encounter would avoid Fourth Amendment scrutiny. "Unlike a detention, a consensual encounter between a police officer and an individual does not implicate the Fourth Amendment. . . . There is no Fourth Amendment violation as long as circumstances are such that a reasonable person would feel free to leave or end the encounter. [Citations.]" (*People v. Rivera* (2007) 41 Cal.4th 304, 309.) However, the parties disagree as to what standard should be used in determining whether appellant consented to leaving his house.

Appellant contends that he did not voluntarily leave the residence, because the circumstances were such that a reasonable 13-year-old child in his position would not have felt free to deny the deputy's request to step outside of the residence. The People argue that there was nothing coercive or unlawful about Deputy Vienna's conduct and that there was no Fourth Amendment violation, because a reasonable person would have felt free to leave or end the encounter.

The juvenile court's decision was made prior to *J.D.B. v. North Carolina* (2011) 564 U.S. ___ [131 S.Ct. 2394, 180 L.Ed.2d 310]. In *J.D.B.*, the court addressed the question whether the age of a child subjected to police questioning is relevant for purposes of a *Miranda* analysis. The case involved "a 13-year-old, seventh grade student attending class" at a middle school who was removed from class and then questioned by police. (*Id.* at p. ___ [131 S.Ct. at p. 2399].) The Supreme Court held that the age of the subject is relevant to the custody analysis of *Miranda*. (*Id.* at p. ___ [131 S.Ct. at pp. 2398-2399].) However, while the court was certainly concerned with coerced, false confessions from an innocent juvenile, it did not extend its discussion to Fourth Amendment consensual encounters. The court did, however, note that "even where a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults." (*Id.* at p. ___ [131 S.Ct. at p. 2404].)

Here, although we recognize that a child's age "'would have affected how a reasonable person'" in appellant's position "'would perceive [his] freedom to leave'"

(*J.D.B. v. North Carolina*, *supra*, 564 U.S. at p. ___ [131 S.Ct. at p. 2403]), substantial evidence supports a finding that even a reasonable 13-year-old in appellant's position would understand that he was voluntarily leaving the house with Deputy Vienna and that he was free to end that encounter at any time**.** As stated above, Deputy Vienna was not coercive when he asked appellant to step outside. Moreover, appellant did not take any actions to indicate to Deputy Vienna that appellant was not willing to speak to him.

Nevertheless, a consensual encounter may be inadvertently converted into a detention. The test considers all circumstances of the encounter. Specifically, a consensual encounter can evolve into a detention from any, or a combination of, the following: (1) "the presence of several officers," (2) "an officer's display of a weapon," (3) "some physical touching of the person," or (4) "the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 821.)

Here, when Deputy Vienna put appellant in the back of his police car, the consensual encounter became an investigatory detention. A reasonable person would not have felt free to end the encounter with Deputy Vienna once he was put in the back of a police car, with the doors closed and locked. While the encounter did become a detention, it did not qualify as an arrest until appellant was handcuffed, because merely detaining a suspect for purposes of making limited investigative inquiries is not unreasonable and does not constitute an arrest. (*People v. Anthony*, *supra*, 7 Cal.App.3d at pp. 760-761.)

However, because an investigative detention allows police to determine whether suspicious conduct is criminal activity, such a detention must be reasonable and limited in duration, scope and purpose. (*People v. Celis* (2004) 33 Cal.4th 667, 674.) Here, appellant's investigatory detention was permissible and reasonable under the circumstances. Deputy Vienna furthered his investigation by asking appellant reasonable questions based on information made available to him by Detective French and Deputy Aleman, including the police reports taken from Heaven and her mother at the hospital.

The juvenile court found that after Deputy Vienna completed his investigative questioning, he had probable cause to arrest the appellant "based on the totality of the information." We agree.

A police officer may arrest a minor without a warrant if the officer has probable cause to believe that the minor committed the offense. (Welf. & Inst. Code, § 625, subd. (a); *In re Samuel V.* (1990) 225 Cal.App.3d 511, 513.) "'Probable cause for an arrest is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. . . . Probable cause may exist even though there may be some room for doubt. . . . The court and not the officer must make the determination whether the officer's belief is based upon reasonable cause. . . . The test in such case is not whether the evidence upon which the officer made the arrest is sufficient to convict but only whether the prisoner should stand trial.' [Citations.]" (4 Witkin, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 25, p. 222; see also Pen. Code, § 836, subd. (a).) On appeal, we apply the substantial evidence review to the trial court's finding of historical facts, but determine probable cause de novo. (*Ornelas v. United States* (1996) 517 U.S. 690, 696-697 [116 S.Ct. 1657, 134 L.Ed.2d 911]; *People v. Alvarez* (1996) 14 Cal.4th 155, 182.)

On independent review of whether probable cause existed to arrest appellant, we conclude that there was. As the juvenile court concluded, the police reports taken by Deputy Aleman, along with the information presented by Detective French, gave Deputy Vienna a legitimate basis for establishing probable cause to arrest appellant. The report taken from M. the night Heaven was at the hospital indicated that M. opened a closed bedroom door and saw appellant jump and try to fix his pants while Heaven was leaning over the bed with her panties and shorts down to her ankles. Detective French's subsequent interview of Heaven indicated that appellant removed her clothing, and that after she felt appellant's "thing" inside her body, she told appellant to stop. Deputy Vienna had all of this information from the reports at the time he was questioning appellant in the back of his patrol car.

As the juvenile court noted, "[a]dditionally, it was the testimony of Deputy Vienna notwithstanding the denials of certain questions by [appellant] while he was being questioned in the patrol car, that those denials in and of themselves did not negate [the deputy's] belief and conclusion that . . . there was probable cause to arrest [appellant]." In light of the evidence from M. and Heaven, we agree that Deputy Vienna had probable cause to arrest appellant. Therefore, the juvenile court properly denied appellant's suppression motion on that basis.

3. Waiver of *Miranda* Rights

Appellant contends that his confession to Detective French violated his Fifth Amendment and parallel California Constitutional rights (Cal. Const., art. I, § 15), because he did not voluntarily, knowingly and intelligently waive his rights under *Miranda*. We disagree.

While neither appellant nor the People mentioned it in their briefs, appellant's Fifth Amendment claim is subject to forfeiture due to his failure to raise the issue to the juvenile court. As a general rule, the failure to raise a claim of a constitutional violation in the admission of evidence at trial forfeits the claim on appeal. Appellant "must make a specific objection on *Miranda* grounds at the trial level in order to raise a *Miranda* claim on appeal.' [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 854.) However, a reviewing court may still consider the issue; the forfeiture rule is not automatic. (See *ibid*. ["Notwithstanding [appellant's] failure to identify in the trial court self-incrimination theories . . . we consider them here."].) Thus, despite appellant's failure to raise his Fifth Amendment claims in the juvenile court, we nevertheless elect to review appellant's claims on the merits.

In reviewing appellant's claim that his *Miranda* rights were violated, we defer to the trial court for resolution of factual disputes and inferences, and its determination of the credibility of witnesses in deciding whether the trial court's findings are supported by substantial evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) Under *Miranda*, for an appellant's statements to be admissible against him, he must have knowingly and

intelligently waived his right to remain silent, and must have been clearly informed that any statement he does make may be used as evidence against him, and that he has the right to the presence and assistance of counsel. (*Miranda v. Arizona*, *supra*, 385 U.S. at p. 479.)

Appellant contends that his statements should have been suppressed because Detective French did not receive an express waiver of appellant's *Miranda* rights prior to interrogation in juvenile hall. The People argue that Detective French was not required to obtain an express waiver of *Miranda* rights from appellant prior to his interview at juvenile hall. We agree with the People.

A valid waiver of suspect's *Miranda* rights may be express or implied. (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) A suspect's willingness to answer questions after demonstrating an understanding of his or her *Miranda* rights has been held to be sufficient to constitute an implied waiver of such rights. (*Ibid.*)

Here, before the interrogation, appellant signed a form indicating that he understood his *Miranda* rights after Detective French read appellant his *Miranda* rights and explained to appellant that his signature was indicative of his understanding of those rights. When he continued to answer Detective French's questions, appellant impliedly waived his *Miranda* rights. Appellant failed to raise any objection whatsoever that he did not feel comfortable continuing the interrogation. Thus, the evidence supports the juvenile court's finding that appellant impliedly waived his *Miranda* rights before Detective French interrogated him in juvenile hall.

4. Voluntariness of Confession

Appellant further claims that the juvenile court should have considered his age when assessing the voluntariness of his confession, given the deceitful methods used by the detective. The People argue that Detective French's interrogation was in no way "coercive," and the confession was voluntary. Again, we agree with the People.

Acknowledging "that the inherently coercive nature of custodial interrogation 'blurs the line between voluntary and involuntary statements,'" the Supreme Court

established the *Miranda* warnings to safeguard the constitutional guarantee against self-incrimination. (*J.D.B. v. North Carolina, supra,* 564 U.S. at p. ___ [131 S.Ct. at p. 2401], quoting *Dickerson v. U.S.* (2000) 530 U.S. 428, 435 [120 S.Ct. 2326, 147 L.Ed.2d 405].) With the waiver of those rights, a confession procured by the employment of coercive or fraudulent tactics is only excluded if those tactics were calculated to produce false statements. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1097.)

Appellant relies on testimony by Dr. Mark Costanzo, a social psychologist, that certain methods used by Detective French to get the desired confession were coercive to a 13-year-old and therefore, the confession was involuntary.

"The test for determining whether a confession is voluntary is whether the questioned suspect's 'will was overborne at the time he confessed.' [Citation.] 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions.' [Citation.]" (*People v. Cruz, supra,* 44 Cal.4th at p. 669.) When evaluating the voluntariness of a statement, no single factor is dispositive. (*People v. Williams* (1997) 16 Cal.4th 635, 661.) Relevant considerations include "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the [appellant's] maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*Id.* at p. 660.)

As previously discussed, in the *J.D.B.* case, the Supreme Court held that a juvenile suspect's age must be taken into account when considering the *Miranda* custody analysis. (*J.D.B. v. North Carolina, supra,* 564 U.S. p. ___ [131 S.Ct. at pp. 2402-2403].) However, the court made it clear that a juvenile suspect's age differs from other personal characteristics that, even when known to officers, have no discernible relationship to a reasonable person's understanding of his freedom of action. (*Id.* at p. ___ [131 S.Ct. at p. 2404].) While a child's age will not always be a determinative, or even a significant, factor in every case, "[i]t is, however, a reality that courts cannot simply ignore." (*Id.* at p. ___ [131 S.Ct. at p. 2406].) Therefore, when considering if the tactics used by

Detective French in appellant's interrogation were such that his free will was overborne at the time he confessed, we take appellant's age into account.

Notwithstanding our decision to use appellant's age as a non-determinative factor in determining if Detective French used coercive tactics, we agree with the juvenile court that "the statements made by [appellant] during the course of his interview were not involuntary for purposes of a violation of his constitutional rights." The juvenile court was not persuaded that Detective French coerced appellant into making the admission, because there was no evidence that appellant was worn down, upset or reaching out for help during the interrogation. While the evidence showed appellant did not eat for 12 hours, it does not demonstrate what he was doing during those hours or if he was even hungry.

Further, the juvenile court was not convinced by Dr. Costanzo to change its opinion that the interview conducted by Detective French "survived constitutional scrutiny." The tape-recorded interrogation and testimonies by appellant and Detective French are substantial evidence supporting the juvenile court's finding of these facts.

We also agree that Detective French did not use any coercive methods that would be reasonably likely to produce a false statement, even from a 13-year-old. Detective French advised appellant that "honesty is the only way to go here." As the People point out, there are many cases approving of such language. (See, e.g., *People v. Carrington* (2009) 47 Cal.4th 145, 168-169; *People v. Hill* (1967) 66 Cal.2d 536, 549; *Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 494.)

Detective French also told appellant that he had gotten his DNA on Heaven, and that the doctors had checked Heaven's vagina and could tell that something had gotten inside of her. While this was certainly a coercive tactic used by Detective French, "'[l]ies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' [Citations.] Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 182.) False statements that incriminating evidence has been found are

permissible, and resulting confessions are upheld in the absence of the use of other coercive tactics. (*Ibid*.)

Here, the false statements made by Detective French were unlikely to have produced a false confession by appellant. Appellant demonstrated at multiple times during questioning that he understood what he did to Heaven was wrong, even when he was not prompted to do so by the untrue statements made by the detective. There was no evidence of threats or pressure tactics or promises of leniency that would have induced him to lie when confronted with the false statements. Therefore, based on the totality of the circumstances during the investigative questioning, the misrepresentation by Detective French would not likely have produced a false confession from a reasonable 13-year-old.

In sum, appellant's confession was voluntary and, therefore, properly admitted. Therefore, appellant's suppression motion was appropriately denied.

B. ***Maximum Term of Confinement***

The court calculated appellant's maximum term of confinement as 10 years: the high term of eight years for count 2, forcible rape; one-third the middle term of six years, two consecutive years, for count 1, lewd act upon a child; and, pursuant to Penal Code section 654 (section 654), it stayed the sentence for count 3, forcible lewd act upon a child.

Appellant contends that the juvenile court erred in calculating the maximum term of confinement as ten years instead of eight years because count 1 and count 2 merge pursuant to section 654, given that he only committed one sexual act. The People counter that the juvenile court properly set the maximum term because the appellant committed two separate sexual acts.

The relevant part of section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." (§ 654, subd. (a).) The

section protects against multiple punishment for "multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison, supra,* 48 Cal.3d at p. 335.) Thus, "if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*)

"Whether the defendant entertained multiple criminal objectives is a factual question for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to sustain them." (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730.) In reviewing the juvenile court's findings, we view the evidence "in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

In the present case, we reject the People's argument that appellant's intent and objective in engaging in lewd conduct with Heaven was completely separate from the later rape. While "'[m]ultiple criminal objectives may divide those acts occurring closely together in time,'" there is no substantial evidence to conclude that appellant had two separate criminal objectives. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 67; *People v.*

Bradley (1993) 15 Cal.App.4th 1144, 1157, disapproved on another ground in *People v. Rayford* (1994) 9 Cal.4th 1, 18-22.)

Detective French testified that appellant told him that "Heaven was the instigator, she took off his clothes, she grabbed his penis, and she put his penis on her back." The People argue that this was the first of two sexual acts, with the intent "to engage in lewd conduct with Heaven, which was completely separate from the later rape." The People acknowledge, however, that "[o]bviously, appellant willingly participated in this first act, as a five-year-old girl could not have 'forcibly' removed the clothing of a 13-year-old male."

If appellant's self-serving statement to Detective French is discredited, then what remains is the contradictory statements in the police reports and in the testimony of Heaven and her mother, which indicate that appellant was the instigator, and that he removed Heaven's clothing before he put his penis inside of her vagina. Additionally, appellant told Detective French that he had placed his penis inside Heaven's vagina. He did this because "his body was going through changes" and he "knew it was wrong" because it was "rape."

There is no substantial evidence to support the finding that appellant harbored independent criminal objectives when he removed Heaven's clothing, and when he penetrated her vagina with his penis. Therefore, since appellant's course of conduct was indivisible with one criminal objective, count 1 and count 2 merge pursuant to section 654. His maximum term of confinement therefore is only that prescribed for the rape.

DISPOSITION

The order is modified to provide that appellant's maximum term of confinement is eight years. As modified, the order is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.