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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DOMINGO MANRIQUES, Defendant and Appellant.	B229277 (Los Angeles County Super. Ct. No. BA370308)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanka, Senior Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Domingo Manriques appeals from his conviction and sentence of continuous sexual abuse of a child under the age of 14 years. (Pen. Code, § 288.5, subd. (a).) Before this court he claims that the lower court erred in failing to grant his motion to suppress evidence of incriminating statements he made during a police interview because he had invoked his right to remain silent under *Miranda v. Arizona* (1966) 384 U.S. 436. Further, appellant contends that the trial court's order that he submit to a blood test pursuant to Penal Code section 1202.1 is unlawful. As we shall explain, the evidence in the record supports the court's denial of appellant's motion to suppress his incriminatory statements to police and any error with respect to the blood testing order was harmless. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Maria S., then 12 years old, confided to the principal of her school, that appellant, her stepfather, had repeatedly sexually molested her. According to Maria, the abuse occurred on occasions when Maria was alone with appellant. Appellant had first touched Maria inappropriately in 2003 when she was six years old. On that occasion, while sleeping together in the same room with Maria, appellant reached into Maria's bed and attempted to touch her vagina. Initially, Maria would stop appellant and he would return to his bed. Sometimes during the night, appellant would wake Maria up and force her to watch pornographic movies with him. Maria testified appellant threatened to hurt her family, especially her mother, if she told anyone about what was occurring.

When Maria was in the third grade, appellant drove her to and from school in his van. Maria recalled that on one occasion, appellant picked her up from school and drove her to a remote location. In the back of the van, appellant inserted his penis in Maria's rectum after she had tried to escape. This type of molestation occurred for about one year, two to four times a week. On other occasions, while they were alone at home, appellant inserted his penis in Maria's vagina and touched her when she got out of the shower. Maria eventually moved away with her mother and siblings.

Detective Sandra Kipp, the officer investigating this case, interviewed Maria at her new home. Maria was visibly upset and cried during the interview. Detective Kipp then

conducted an interview in Spanish with appellant on April 15, 2010. Appellant admitted touching Maria inappropriately and sexually, beginning when Maria was seven years old. He admitted to specific allegations and incidents and he concluded the interview by stating that his actions were "not that bad. I think . . . it's a child; this is a passing thing that happens and that's it."

The amended information charged appellant with two counts: continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)) and lewd acts with a minor (Pen. Code, § 288, subd. (a)). A hearing on the motion to suppress appellant's confession was held prior to trial. The trial court denied appellant's motion to suppress his confession. Following a seven-day jury trial, appellant was convicted of continuous sexual abuse of a child in count 2. The court sentenced appellant to 12 years in prison and ordered appellant to register as a sex offender and to submit to AIDS testing under Penal Code section 1202.1.

Appellant filed a timely notice of appeal from the judgment.

DISCUSSION

I. The Court Did Not Err in Denying the Motion to Suppress Appellant's Confession

Before this court appellant claims that the lower court erred in failing to suppress evidence of statements he made during his interview by police. Appellant argues that the police continued to question him after he invoked his right to remain silent, and therefore the court should have excluded his statements.

a. Factual Background

At the start of the interview, Detective Kipp introduced herself, advised appellant of his *Miranda* rights, and appellant stated that he understood his rights.[1] Detective Kipp then asked if appellant wanted to "talk about the reason why" he was arrested, and appellant responded that he did not know who was accusing him. After, Detective Kipp asked the following compound question: "Yes, but do you want to talk about the reasons

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[1] Detective Kipp read appellant his *Miranda* advisements in Spanish.

why we arrested you or you don't want to talk?" Appellant replied, "Uh, no." After appellant's response, Detective Kipp apparently realized she had asked a compound question and attempted to clarify appellant's response:

> Kipp: You don't want to talk about the . . . the reason why you're here?
>
> Appellant: Well, I know that [unintelligible] I think they're accusing me of sexual abuse, I think, right?
>
> Kipp: Yes.
>
> Appellant: Okay, and, then . . . but I don't know, I don't even know the person's name.
>
> Kipp: Okay. So what are you telling me? That you do want to talk or you don't want to talk?
>
> Appellant: Uh, yes/no, yes.
>
> Kipp: Yes?
>
> Appellant: Mhm.
>
> Kipp: Okay, just sign here saying that you understand your rights and you want to talk about the reasons why you're here.

During the hearing on the motion to suppress, the court considered the argument of counsel and viewed the video of the interrogation to observe appellant's body language during the questioning. The court stated that the question asked by Detective Kipp that preceded appellant's "Uh, no" response was ambiguous and the detective properly asked appellant additional questions to clarify whether he wanted to invoke his right to remain silent. Further, the court noted that after the follow-up questions, appellant spoke with the detective and signed a written waiver of his *Miranda* rights. Thereafter, the court denied appellant's motion.

b. Analysis

Whether a suspect has invoked his right to counsel or right to remain silent is a question of fact to be determined in light of all the circumstances. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) In reviewing the admissibility of a statement

allegedly obtained in violation of the defendant's constitutional right to remain silent, we accept the trial court's factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128.) However, we review independently, based on the undisputed facts and those properly found by the trial court, whether the challenged statements were legally obtained. (*Ibid.*)

"To protect the Fifth Amendment privilege against self-incrimination, a person undergoing a custodial interrogation must first be advised of his right to remain silent, to the presence of counsel, and to appointed counsel, if indigent." (*People v. Stitely* (2005) 35 Cal.4th 514, 535, citing *Miranda, supra,* 384 U.S. at pp. 444, 467-473, 478-479.) "As long as the suspect knowingly and intelligently waives these rights, the police are free to interrogate him. [Citation.] However, if, at any point in the interview, the suspect invokes his rights, questioning must cease. [Citations.] Statements obtained in violation of these rules are inadmissible to prove guilt in a criminal case." (*Stitely, supra,* 35 Cal.4th at p. 535.)

However, the suspect's invocation of his or her *Miranda* rights must be clear and unequivocal. In *Stitely,* the California Supreme Court explained that, "[i]n order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must *unambiguously* ' assert his right to silence or counsel.'" (*Stitely, supra,* 35 Cal.4th at p. 535, quoting *Davis v. United States* (1994) 512 U.S. 452, 459.) The *Stitely* court further explained that "[i]t is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda, supra,* 384 U.S. 436, either to ask clarifying questions or to cease questioning altogether. [Citation.] Of course, such an approach may disadvantage suspects who, for emotional or intellectual reasons, have difficulty expressing themselves. However, a rule requiring a clear invocation of rights from someone who has already received and waived them 'avoid[s] difficulties of proof' [citation], and

promotes 'effective law enforcement.'" (*Stitely, supra,* 35 Cal.4th at p. 535.)

In *Stitely,* defendant who had been advised of and then waived his *Miranda* rights remarked, "I think it's about time for me to stop talking," and then stated, "Okay," in response to the questioning detective's advisement, "You can stop talking." (*Stitely, supra,* 35 Cal.4th at p. 534.) Upholding admission of the entire interview at trial, the Supreme Court held the defendant did not clearly and unambiguously invoke his *Miranda* rights after he waived them. (*Stitely, supra,* 35 Cal.4th at p. 536.)

Contrary to what appellant claims, appellant demonstrated that he understood each of his *Miranda* rights and Detective Kipp then asked appellant if he wanted to discuss the reasons why he was arrested. Appellant did not directly respond to the question and instead stated that he was not certain who was accusing him. Detective Kipp then attempted to follow-up by again asking clarifying questions to ascertain whether appellant was invoking his right to remain silent. The question Detective Kipp asked, however, was compound provoking appellant's answer of "Uh, no" and it was not clear which question he was answering. Detective Kipp then asked additional questions to determine whether appellant wanted to talk about the charges. Rather than exercising his right to silence, appellant continued to inquire about who was accusing him.

From the transcript of the interrogation it is clear that Detective Kipp asked several questions to determine whether appellant wanted to talk about the situation leading to his arrest. The questions were compound and confusing. Appellant gave a number of ambiguous responses—"Uh, yes/no, yes," "Mhm"-- and also asked questions about the identity of his accusers. Reviewing only the transcript, it does not appear that appellant unequivocally invoked his right to remain silent during the interrogation, and in fact subsequently acknowledged in writing that he understood his *Miranda* rights and wanted to speak about the situation. There is no indication from the transcript that Detective Kipp engaged in coercive tactics or intentionally attempted to confuse or trick appellant to obtain a waiver of his *Miranda* rights. The lower court had the benefit of observing the videotape of the interrogation showing appellant's body language during the questioning, and thus, was in the best position to determine whether appellant's

statements had been obtained in violation of his rights. Based on the evidence before us we hold that the court did not err in denying appellant's motion to suppress.[2]

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[2] In reaching this conclusion we also reject appellant's argument that his confession was the product of a two-step custodial interrogation in which incriminating statements were elicited without a *Miranda* waiver to coerce a confession. In *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*), the police woke defendant at 3:00 in the morning, arrested her for murder, and took her to the police station. Defendant was questioned for 30 to 40 minutes until she confessed. (*Id.*, at pp. 604-605.) After a short break, defendant was given *Miranda* warnings, signed a waiver, and asked the same questions until she confessed again. (*Ibid.*) The interrogating officer "testified that he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.' He acknowledged that Seibert's ultimate statement was 'largely a repeat of information . . . obtained' prior to the warning." (*Id.*, at p. 606.) The Supreme Court held that the interrogation procedure did not comply with *Miranda* and that defendant's postwarning statements were inadmissible. (*Id.*, at p. 604.) "The object of the interrogation was to question first, [and] render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them after the suspect had already confessed" (*Id.*, at p. 611.) The court stated the following factors should be considered to determine "whether *Miranda* warnings delivered midstream could be effective to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [round of questions], the continuity of the police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." (*Id.*, at p. 615.)

Seibert is inapposite because there was no deception, coercion, or coordinated interrogation strategy to extract a confession. Appellant was questioned after receiving a complete *Miranda* advisement. Police did not engage in a two-step interrogation process here. Detective Kipp initially asked appellant identifying questions, such as identifying members of his family, past and present residences, work location, and prior arrest history. *Seibert* concerned the admissibility of a second, repeated confession after the defendant had confessed and was then advised of *Miranda* rights. From the record it is clear that Detective Kipp followed the requirements of *Miranda* and did not question appellant about his arrest until appellant indicated that he wished to talk. This is not a case in which *Miranda* warnings came "midstream" as part of a "coordinated and continuing interrogation" to get appellant to repeat a prewarning statement. (*Missouri v. Seibert, supra,* 542 U.S. at pp. 613 & 615.) The trial court found, and we agree, the videotaped statement was voluntary and admissible.

II. The Trial Court's AIDS Testing Order Did Not Result in Prejudicial Error.[3]

Penal Code section 1202.1 requires the trial court to order designated persons "to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction." (Pen. Code, § 1202.1, subd. (a).) Among those designated are persons convicted of continuous sexual abuse of a child in violation of Penal Code section 288.5, "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim[.]" (Pen. Code, § 1202.1, subd. (e)(6)(A).) The statute directs a court ordering such testing to "note its finding on the court docket and minute order if one is prepared." (Pen. Code, § 1202.1, subd. (e)(6)(B).)

The trial court did not specifically articulate its reasons for the AIDS testing order on the record as it was required to do under Penal Code section 1202.1, subdivision (e)(6)(B). We conclude, however, that any error with respect to this matter is harmless. Here, there was ample evidence to suggest the transfer of bodily fluids. Appellant's confession and Maria's testimony presented various instances of sexual intercourse and sodomy. On at least one occasion, appellant rubbed his penis against Maria's vagina and then inserted the tip of his penis in her rectum. On another occasion, appellant's penis was inserted into Maria's vagina. Based on the evidence adduced at trial, there is sufficient evidence to support a finding of transfer of bodily fluid and to support an order for AIDS testing. Accordingly, the court's order requiring testing was supported by the

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3 At the sentencing hearing, defense counsel failed to object to the order for AIDS testing. However, as the Attorney General concedes, forfeiture principles do not apply to a claim of insufficient evidence to support a finding of probable cause to order AIDS testing under Penal Code section 1202.1, a point established by the California Supreme Court's decision in *People v. Butler* (2003) 31 Cal.4th 1119. As stated in *Butler*, "a defendant may challenge the sufficiency of the evidence even in the absence of an objection. Without evidentiary support the order is invalid." (*Id.* at p. 1123.) Appellant's challenge thus is not forfeited.

evidence before it and the court's failure to "note its finding on the court docket and minute order if one is prepared" did not result in prejudice requiring reversal of the order.

DISPOSITION

The judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**