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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE FLORES,

Defendant and Appellant.

B236384

(Los Angeles County
Super. Ct. No. TA114989)

APPEAL from a judgment of the Superior Court of Los Angeles County.
John T. Doyle, 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, Lawrence M. Daniels, James William Bilderback II and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jose Flores of committing a lewd act upon a child in violation of Penal Code section 288, subdivision (a)¹ (count 4). The jury found true the allegation that the victim was under 18 years of age at the time of the commission of the offense and that prosecution was commenced prior to the victim's 28th birthday pursuant to section 801.1, subdivision (a). The trial court imposed the upper term of eight years in prison.

Defendant appeals on the ground that his conviction must be reversed because the trial court admitted into evidence a constitutionally improper confession.

FACTS

Defendant was convicted of only one of seven counts of violating section 288, subdivision (a)—a count involving his daughter, A. We nevertheless include facts relating to the other six counts in order to place defendant's confession in context.

Prosecution Evidence

C.F., defendant's oldest child, was 32 years old at the time of trial and has four children: C., Ch., W., and B. C.F. testified at trial that when she was seven or eight years old defendant touched her inappropriately. Defendant took her to bed with him, forced her legs open and "[had] sex with [her]." His penis entered her vagina "just a little bit." This occurred several times, but the abuse stopped when C.F. was 10 or 11 years old. In another incident he touched her vagina as she lay on the floor. She did not tell anyone in her family about the abuse. C.F. told a friend about it when she was 15 or 16 years old.² She did not tell her sister A. about the abuse until just before C.F. went to the police to report the abuse defendant committed on C.F.'s daughter, C. C.F. saw her sister A. at a baby shower and told her that their father had touched C., and she was going to go home

¹ All further references to statutes are to the Penal Code unless stated otherwise.

² The friend, Juana G., testified at trial that C.F. told her about being molested by defendant.

and call the police. A. later sent C.F. a text message and said, “Sister, he did the same to me.”

Defendant’s daughter A. was 22 years old at trial and had always lived with her parents. Defendant touched A. inappropriately when she was a child. The first incident occurred when she was nine, and defendant asked her to lie with him under a blanket on the couch. Defendant touched her vagina, kissed her lips, and engaged in sexual intercourse with her for approximately 10 minutes. She felt no sensation or pain. Afterwards he told her not to say anything because her mother would get mad. On the following day, defendant was driving a car while A. sat in the backseat. Defendant reached over with his hand and touched her vagina over her underwear. When they got home, defendant had intercourse with A. again on the couch. Approximately five minutes after concluding that episode, defendant stopped A. in the kitchen doorway and had intercourse with her again.

A. did not disclose the abuse until she was 14 or 15, when she told a boyfriend. She disclosed the abuse to her sister C.F. in an October 2010 text message when C.F. told her about the incident with A.’s niece, C. A. went to the police to make a report at the same time as C.F. and C.

C. was 13 at the time of trial. When she was 11 or 12 years old, defendant touched her breast area under her shirt when she was using the computer in her Aunt A.’s room. When she was 10 or 11, defendant grabbed her hand and put it on his penis over his clothing. C.F. learned of C.’s accusations from the pastor of C.F.’s church. C. confirmed to C.F. that defendant had touched her.

B., C.F.’s son, was 10 years old at the time of trial. He remembered being touched in a bad way by defendant. B. was watching a video game when defendant touched B.’s “wiener.” Defendant squeezed it and B. told him to stop. Defendant was laughing when he squeezed B.’s penis, and B. thought defendant was joking.³

Defendant was arrested on October 24, 2010, after C.F. and A. made their reports at the Century Sheriff Station. On the following day, Los Angeles County Sheriff's Department Detective John Carlin and Deputy Sheriff Cindy Sanchez interviewed defendant. Sanchez acted as an interpreter during the interview, which was recorded and transcribed. The recording of defendant's interview was played for the jury, and the jurors received copies of the transcript.⁴ Detective Carlin acknowledged that he employed various ruses during his interview with defendant.

Defense Evidence

Defendant testified that he believed the accusations were made against him because his wife and "them" wanted to get him out of his house. Defendant's wife refinanced their house without telling defendant. At some point she wanted him out of the house, and he demanded half of the money. Approximately three years later, he was accused of these crimes and arrested.

Defendant never touched C. He touched B.'s penis outside his clothes as a form of affection, similar to touching his chin. It was not meant in a sexual way. Defendant did not know what A. was talking about when she said he touched her while he drove a car. He acknowledged that he once masturbated while A.'s back was toward him as she sat in his lap. A. did not see what he was doing. He could not explain why he did it, but it was not with sexual intent toward A. His penis might have touched between A.'s legs while he masturbated, but he did not remember. If his penis touched between A.'s legs it would not have been on purpose.

³ No charges were brought against defendant based on this incident.

⁴ The contents of defendant's interview are discussed *infra*.

DISCUSSION

I. Defendant's Argument

Defendant argues that his interrogation was designed to circumvent *Miranda*,⁵ and his confession was therefore involuntary. Defendant was led to believe that the case against him was already established, that whatever he said during the interview was of no judicial consequence, and that the only goal was to hear defendant's side of the story and ensure that such incidents did not happen again. The trial court incorrectly focused on whether a tangible benefit was offered to defendant to confess rather than recognizing that defendant was promised a benefit of confidentiality, i.e., that his statements would not be used against him.

II. Proceedings Below

Just prior to trial, the trial court heard defendant's motion to exclude his statement on the grounds that "there were promises made . . . to defendant." Defense counsel confirmed that he was referring to two particular instances in the interview where he believed the detective had made a promise to defendant.

The trial court stated it had read defendant's entire statement, and the court listed the cases it had researched. The trial court observed that promising something to a defendant does not render a statement involuntary unless the promise is sufficient inducement to be the motivating cause of the confession. The court found that the officer made no express or implied promise to defendant that induced defendant to make the statement, and it denied the motion.

III. Relevant Authority

"In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.' [Citation.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.) The courts must consider the

⁵ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

totality of circumstances in determining whether a statement was voluntary. (*People v. Williams* (1997) 16 Cal.4th 635, 661.) In addition to any police coercion, the totality of the circumstances includes such factors as the length of the interrogation, its location, and the defendant's maturity, education, physical condition, and mental health. (*People v. Massie*, at p. 576.)

A confession is also involuntary if it was motivated by an express or implied promise of leniency or benefit to the accused. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.) Any threat or promise made during an interrogation must be causally related to the incriminating statement, such that the threat or promise was the direct cause of the statement in question and not merely a cause in fact. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) The use of deceptive statements during an interrogation does not invalidate a confession unless the deception is "of the type to induce an innocent man to implicate himself in the crime." (*People v. Watkins* (1970) 6 Cal.App.3d 119, 125.) No single factor is necessarily dispositive, including the presence of threats or promises, in determining voluntariness. (*People v. Williams*, *supra*, 16 Cal.4th at p. 661; *People v. Massie*, *supra*, 19 Cal.4th at p. 576.)

A confession may be involuntary even if *Miranda* warnings have been given. (*Dickerson v. United States* (2000) 530 U.S. 428, 444; *Miller v. Fenton* (1985) 474 U.S. 104, 110.) However, "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.'" (*Dickerson v. United States*, at p. 444.)

We review the trial court's findings as to the circumstances surrounding the confession under the substantial evidence test, but we independently review the trial court's finding as to the voluntariness of the confession. (*People v. Carrington* (2009) 47 Cal.4th 145, 169.)

IV. Confession Voluntary

Our independent review of the circumstances of the confession leads to the conclusion that defendant did not choose to confess because his will was overborne. (See *People v. Carrington, supra*, 47 Cal.4th at p. 169.) There was no evidence that the confession was induced by intimidation, coercion, or a promise by the detectives.

Defendant's interview lasted two hours. (Peo. exh. No. 17.) It began with introductions and Detective Carlin's requests for background information from defendant. Defendant was asked if he had eaten and if he wanted water.⁶ Defendant said he had been able to rest and eat while in jail, then amended this to say "not very well." He said he had high blood pressure and had not been given his medication. Detective Carlin said he would make sure that this was brought to the attention of the jail staff. Detective Carlin ascertained that the deputies who had arrested defendant had read him his rights, and the detective again read defendant his rights.

Detective Carlin told defendant that he worked with situations that involved problems within families. He said he had already conducted his investigation, had conducted interviews and tests, and defendant was the last person with whom he had to talk. Detective Carlin then stated, "*Okay, uhm. So, and whatever we discuss here, right now, I'm not going to run and go tell everybody after this.*" (Emphasis added.) Defendant was asked if he understood, and he said he did. Detective Carlin said he was not there to judge defendant but to get his side of the story. Detective Carlin said he already knew what happened and just wanted to make sure it did not happen again. Defendant said he understood. Detective Carlin said he knew defendant was a good man who had worked hard and did not want to let his family down.

Defendant began to explain what had happened and said he used to drink a lot. He made a mistake with his daughter, but he never did with his granddaughter. After

⁶ Defendant appears to have had the opportunity to eat, and he responded that he had not eaten a lot.

Detective Carlin repeated his reassuring words about everybody making mistakes, he asked defendant which daughter he was talking about. Defendant answered, “[A.]” Detective Carlin said he had already spoken to A. and knew some of the things that had happened, but he had to know why. Defendant said, “Well, what happens is . . .” when he was interrupted by Detective Carlin, who said, “*just let me remind you that, uhm, whatever you say here is just between us three right now. I’m not going to out and run and tell everybody . . . after this.*” (Emphasis added.)

Defendant related to Detective Carlin that, from what he could remember, he was drinking and watching television when A. came and sat next to him, and he touched her. But he did not rape her. This occurred when A. was seven or eight. When asked to explain, defendant said he touched her on top. He touched her legs “and that,” but not her private parts. When asked what else happened, defendant replied, “Nothing, I masturbated there, next to her.” A.’s back was toward him as she sat on his leg and watched television. He was just holding on to her. Then he left her. Defendant then told the detective about his financial disputes with his wife.

For the rest of the interview, Detective Carlin relentlessly tried to persuade defendant to admit to the incident with A. in the car, the two alleged instances of sexual intercourse with her that same day, forcing A. to put her hand on his penis, the alleged incidents with C., the allegations made by C.F. and the sexual nature of the incident with B. Defendant was steadfast in his denials.

The fact that defendant admitted to only one instance of abuse and vehemently denied the rest supports the conclusion that there was no nexus between defendant’s admission and any police promise. Had this alleged promise truly been the motivating factor, defendant would not have hesitated in admitting something more. Reading the transcript and listening to the interview clarify absolutely that the two instances where Detective Carlin said he was not going to run out and tell everybody did not induce defendant’s incriminating statements about the masturbation incident. Although the detective continually insisted that defendant’s kids would not lie, that they only wanted

defendant to say he was sorry, that they only wanted to know it would not happen again, and that the detective already knew what happened, defendant adamantly maintained his innocence of all other accusations.

Furthermore, defendant did not make his admission immediately after Detective Carlin's remark that he would not tell everybody. After Detective Sanchez translated that remark, Detective Carlin asked defendant if he understood. Then, Detective Carlin told defendant he was not there to judge but to find out what happened, although in a less succinct manner than our summary. After the translation, Detective Carlin asked if defendant understood what they were saying so far. Defendant said he did. Detective Carlin then said that he already knew what had happened but he wanted to make sure it did not happen again. This was translated twice, since defendant did not understand the translation. This type of dialogue continued on for eight pages of the transcript before defendant began to explain what he did with A. Then, he was *interrupted* as he began his confession because Detective Carlin wanted to interject again that he was not going to run out and tell everybody. Clearly these references to Detective Carlin's discretion were not the impetus for defendant's confession. It was obvious from the transcript and recording that defendant wanted to unburden himself, and at one point he stated, "this is also helping me as, as relief, because I feel a little more . . . unburdened from the weight" Defendant did not hesitate to refer repeatedly to the masturbation incident throughout the interview while being accused of other acts and denying them.

In addition, the circumstances of the interview reveal no coercion, no prolonged interview, and no intimidation of any kind. Defendant was 54 years old and had a high school education. He had no reported mental illness, and his physical health issues did not seem to be a problem at that time. Although he indicates an inability to speak English, he had a certified interpreter. (See *People v. Williams*, *supra*, 16 Cal.4th at pp. 660-661 [reciting factors to be considered in determining the voluntariness of a confession]; cf. *People v. Neal* (2003) 31 Cal.4th 63, 83-84 [confession by 18-year-old man with low intelligence and history of neglect and possible abuse was involuntary

under the circumstances; he had been held in custody for more than 24 hours without food, water, or toilet facilities and was repeatedly denied an opportunity to speak with an attorney[.]) The detectives conducting the interview employed a normal conversational tone. They did not sound intimidating, threatening, or overbearing, even when Detective Carlin had to reassert control of the interview because defendant became agitated at the number of accusations against him.

Finally, as respondent points out, any error was harmless beyond a reasonable doubt, since defendant admitted the masturbation incident in his testimony. (See *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1409-1410 [the defendant's voluntary testimony is part of the "remainder of the evidence" in evaluating the prejudicial impact of the erroneous admission of a confession].)

Under all of these circumstances there is no basis to conclude defendant's statements were either coerced or untruthful rather than made of his own free will. (Cf. *Mincey v. Arizona* (1978) 437 U.S. 385, 398-399.) No evidence was presented at trial that compels any contrary conclusion, and the trial court did not err in admitting the statements into evidence.

DISPOSITION

The judgment is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ