Filed 8/21/12 P. v. Bravoalvarado CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE E. BRAVOALVARADO, Defendant and Appellant.	B232385 (Los Angeles County Super. Ct. No. BA368337)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Nancy L. Tetreault, 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, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Jose E. Bravoalvarado guilty of two counts of sexual intercourse or sodomy with a child under 10. At trial, Bravoalvarado's statement about the crimes was admitted over his objection it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He now contends that his waiver of his *Miranda* rights was not voluntary, knowing and intelligent. He also contends that the testimony of a nurse practitioner, who merely reviewed the victim's medical records and did not personally conduct the examination, was admitted in violation of his Sixth Amendment rights, under *Crawford v. Washington* (2004) 541 U.S. 36. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution's case.*

On February 20, 2010, six-year-old J.G. and Bravoalvarado lived in the same apartment building. That evening, J.G.'s mother told her to go outside and get her brother. While outside, Bravoalvarado, who J.G. knew, grabbed her hand and took her to his car. After pulling down her pants and pulling down his pants partway, Bravoalvarado, in J.G.'s words, "put his middle part in my middle part." His "middle part" went inside her "butt." J.G. was on top of Bravoalvarado, facing away from him.

Two friends of J.G.'s father came near the car, and Bravoalvarado got out and spoke to them. Bravoalvarado returned to the car and put his "middle part" in J.G.'s "butt" again. He also put his "middle part" "a little bit" in her vagina. J.G. heard her mother calling for her, and he let her go. J.G. went home, but she did not tell her mother what happened until the next day.

J.G.'s mother testified that J.G. didn't say anything about what happened when she got home. The next morning, February 21, 2010, J.G. told her mother that Bravoalvarado took her to a car, where he wouldn't let her out. He pulled her clothes down and put his part on her parts. She also said that two guys they knew asked what they were doing, and Bravoalvarado said he had a girl. Bravoalvarado got out of the car, leaving her inside.

The men left, and Bravoalvarado returned to the car, where he again put his part on her private parts. He let J.G. go when her mother yelled for her. J.G.'s mother did not recall whether her daughter bathed after coming home on February 20. J.G. had not changed out of the clothes she wore the day before.

Sally Wilson, a family nurse practitioner at Santa Monica U.C.L.A. Rape Treatment Center, testified that the day after the assault, a nurse examined J.G. Wilson did not examine J.G.; rather, she was the clinic's coordinator and nurse supervisor. Although trained to do forensic sexual assault examinations, she primarily trains other nurses, supervises the clinic, and reviews the charts and photo documentation prepared by other nurses.

Wilson reviewed J.G.'s chart, which was completed during J.G.'s visit to the clinic. A state-mandated form, called CAL-EMA, was filled out during the visit. J.G. said she had urinated and defecated since the assault. J.G. had an acute pediatric examination consisting of a general medical history and physical, including a genital examination. J.G. had a pinkish-red area around her labia majora. The finding was not necessarily indicative of an assault, but it was consistent with J.G.'s description of what happened to her, which was that defendant "put his privates" on hers, pointing to her genital and anal areas. The finding is "nonspecific," meaning it could be caused by anything. Eighty percent of pediatric patients can report an act of penetration without exhibiting injuries associated with the acts described. It is also not unusual for patients reporting anal penetration to have no anal injuries.

After Bravoalvarado was arrested, he confessed to having "sex" with J.G. "[j]ust once," because he was "drunk and stupid." He said he took J.G. to his car. In the back seat, he pulled her pants down and put his penis in her. J.G. was on top of him. Some guys knocked on the window. He wrote letters to J.G. apologizing for having sex with her.

B. *Defense case*.

Detective Sandra Kipp for the Los Angeles Police Department Sexual Assault Unit Team interviewed J.G. one or two days after the incident. During the interview, J.G.

did not indicate that Bravoalvarado penetrated her anus. She said Bravoalvarado was behind her and she was "facing out the window" while in the front seat. He placed J.G. on his lap and put his penis in her vagina.

The parties stipulated that Officer Shannon interviewed J.G. on February 20, 2010. J.G. said that Bravoalvarado grabbed her hand and walked her to his car, where he sat her in the center console area. He pulled down her pants and underwear, as well as his pants and underwear. Suddenly, he pulled his pants up and got out of the car, locking the doors. When he returned to the car, J.G. was in the back seat. Bravoalvarado placed J.G. on his lap so that they were sitting face to face and, after pulling down his pants and underwear, he inserted his penis into her vagina. J.G. said it hurt, but she was afraid to scream. Bravoalvarado grabbed J.G. by the hips and rocked her back and forth. When J.G. said she heard her mother calling, Bravoalvarado grabbed her by the back of the jacket and forced her out of the car. She didn't tell her mother what happened because he was afraid she would get in trouble.

II. Procedural background.

On March 23, 2011, a jury found Bravoalvarado guilty of two counts of sexual intercourse or sodomy with a child under 10 (Pen. Code, § 288.7, subd. (a)).[1]

On April 13, 2011, the trial court sentenced Bravoalvarado to 25 years to life on count 1 and to a concurrent 25 years to life on the second count.

DISCUSSION

III. *Miranda.*

A. *Additional facts.*

Los Angeles Police Officer Matthew Martinez and his partner drove to La Paz, Arizona, to pick up Bravoalvarado, who was in custody. They drove him back to Los Angeles, and during the four-hour drive, the officers mainly talked to each other, but Bravoalvarado joined in the conversation as well. Back in Los Angeles, Officer Martinez interviewed Bravoalvarado. The videotaped interview was in English, but defendant's

[1] All further undesignated statutory references are to the Penal Code.

primary language was Spanish. During that interview, the following exchange occurred regarding Bravoalvarado's *Miranda* rights:

"Officer Martinez: Jose, this is something whenever we do an interview to an investigation, I have to read you your rights, okay? Something that we do with everyone, and I want you to understand these. Okay?

"[Bravoalvarado]: Uh-huh.

"Officer Martinez: So I'm going to read these to you, and if you don't understand, you need to tell me, I don't understand. Okay?

"[Bravoalvarado]: Okay.

"Officer Martinez: So the first one I'm going to read you. It says you have the right to remain silent. Do you understand that? Do you—

"[Bravoalvarado]: I could stay quiet?

"Officer Martinez: Yeah. You could stay quiet if you want. Do you understand that?

"[Bravoalvarado]: Yes.

"Officer Martinez: Okay. Put yes right here. Okay. It says anything you say may be used against you in court. Do you understand that?

"[Bravoalvarado]: No.

"Officer Martinez: Okay. If you say something, that could be brought up in court.

"[Bravoalvarado]: Okay. Like I say something right here—

"Officer Martinez: If you go to court –

"[Bravoalvarado]: Okay.

"Officer Martinez: —it could be brought up in court. Do you understand that? Go ahead and sign yes. You have the right to the presence of an attorney before and during any questioning. Do you understand?

"[Bravoalvarado]: Yeah. I have a right to the presence of my attorney?

"Detective Durden: Uh-huh.

"Officer Martinez: Yes.

"[Bravoalvarado]: Yes, I understand.

"Officer Martinez: Any attorney, if you wish to have an attorney. Do you understand? If you cannot afford an attorney, one will be appointed to you. You will be given one free of charge before any questioning if you want. Do you understand that?

"[Bravoalvarado]: You guys give me a lawyer before you guys start with . . . my questions?

"Officer Martinez: Right.

"[Bravoalvarado]: Yeah.

"Officer Martinez: If you want. Even if you can't afford one. Do you understand that? I'm going to read it to you again, okay?

"[Bravoalvarado]: Uh-huh.

"Officer Martinez: If you cannot afford an attorney, one will be appointed to you free of charge before any questioning if you want.

"[Bravoalvarado]: Okay.

"Officer Martinez: Okay?

"[Bravoalvarado]: Yes.

"Officer Martinez: Put yes. And the last one is, do you want to talk about what happened? Do you want us to talk—tell us what we're here to investigate and interview you on and give you a chance to give your side of the story?

"[Bravoalvarado]: No, it's just talk what happened and—

"Officer Martinez: Do you want—I'm saying, do you want to talk [with] me? Is that fine?

"[Bravoalvarado]: Yeah.

"Officer Martinez: Okay. Just write yes right here and then sign your name, Jose.

"[Bravoalvarado]: Where?

"Officer Martinez: Just right here."

Before trial, the defense moved to exclude defendant's statement, on the ground it was obtained in violation of *Miranda*, namely, it was not knowing, voluntary and intelligent. The court denied the motion:

"The court: . . . As I said, I have watched the video and I have listened to the interrogation and read along with the transcript prepared by the prosecution. A valid waiver of *Miranda* rights depends upon the totality of the circumstances. There is no question that that is what the court must consider. I felt in looking at the interview that Mr. Bravoalvarado had an excellent command of English. He was nodding at appropriate times. He—some of his responses are not reflected on the transcript the prosecution provided, but I certainly felt that he understood.

"The tonal quality of the interview was such that the officer—there were two detectives involved who were fairly low key. And certainly Officer Martinez, I believe is the man who was seated at the table with the defendant, was very low key in giving the rights and explained the rights to the defendant patiently, in my view.

"For instance, Martinez says to him, 'You could stay quiet if you want. Do you understand that?' The defendant said, 'Yes.' And it was clear to the court's view he understood that. When in response to Martinez saying—it says, 'Anything you say may be used against you in court. Do you understand that?' The defendant said, 'No.' Martinez, in my view, patiently explained to him, 'Well, okay, if you say something, that could be brought up in court.' And Bravoalvarado says, 'Okay. Like I say something like here.' Martinez says, 'If you go to court,' and then Bravoalvarado nodded and said 'Okay.'

"And it certainly seems to me—I take issue with your transcript that says shakes his head no. I'm not sure that's an appropriate statement to be made in a transcript. Shaking head is fine. I don't think that I should give any credit to an interpretation of what the head shake was in the transcript. I think that's argument and not appropriate for a transcript.

"But I felt that there was a knowing understanding of what he was being told by the officers. I did not feel there was any pressure. They did not say, do you waive your right to an attorney. They did say to him, 'Do you want to talk to us?' And he said, 'Yes.' And it seems to me that when I look at all the circumstances of the interview,

including the defendant's responses, that I felt that it was a valid interview and a valid waiver of his right to remain silent."

B. *Bravoalvarado's Miranda waiver was knowing, intelligent and voluntary*.

A custodial interrogation must be preceded by *Miranda* warnings and by the suspect's waiver of the rights embodied in those warnings. (*Miranda, supra*, 384 U.S. at pp. 478-479.) A suspect in custody must therefore be warned he or she has the right to remain silent and to have an attorney present and any statement may be used against him or her. A waiver of these rights must be knowing, intelligent and voluntary, and generally cannot be presumed from a silent record. (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *People v. Combs* (2004) 34 Cal.4th 821, 845.) "A confession is involuntary if it is 'not " 'the product of a rational intellect and a free will' " ' (*Mincey v. Arizona* (1978) 437 U.S. 385, 398), such that the defendant's 'will was overborne at the time he confessed.' (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) . . . Whether a statement is voluntary depends upon the totality of the circumstances surrounding the interrogation. (*People v. Neal* (2003) 31 Cal.4th 63, 79.)" (*People v. Smith* (2007) 40 Cal.4th 483, 501.) Any language difficulties encountered by the defendant are factors to consider when determining the validity of a waiver. (*United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 751-752.)

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." (*People v. Smith, supra*, 40 Cal.4th at p. 502.) "In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] If a statement is found to be involuntary, the statement and other evidence derived from it are inadmissible for any purpose." (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)

Bravoalvarado contends that his waiver of his *Miranda* rights was not voluntary, knowing or intelligent, because he was unfamiliar with the United States legal system and because he had limited proficiency in English. He relies on *U.S. v. Garibay* (9th Cir.

1998) 143 F.3d 534 (*Garibay*), where Garibay's confession was found to have been obtained in violation of *Miranda.* After custom agents found marijuana in his car, Garibay was arrested. When interrogating agents asked whether he understood English, Garibay answered " 'yes' " and indicated he understood his *Miranda* rights, which were read to him in English. (*Id.* at p. 536.)

In finding that Garibay's waiver of his *Miranda* rights was valid, the district court made findings of fact that the appellate court later found were erroneous. Contrary to the district court's finding, the interrogating agent never offered Garibay the option of conducting the interrogation in Spanish, and Garibay did not refuse such an offer. (*Garibay*, 143 F.3d at p. 538.) The agent assumed that Garibay was sufficiently proficient in English to understand and waive his rights without a Spanish-speaker's assistance. (*Ibid.*) The agent admitted he rephrased questions when Garibay did not seem to understand what was said. (*Ibid.*) There was also evidence that Garibay's primary language was Spanish and he understood only a "few things" in English, having received D+ grades in 11th and 12th grade English and having never graduated. (*Id.* at p. 537.) Except for the interrogating agent, every witness at the suppression hearing (a clinical psychologist, the probation officer who prepared the presentence report, and Garibay's former high school counselor and football coach) testified they always spoke Spanish to Garibay at his request. (*Id.* at p. 538.) The evidence was undisputed that Garibay was "borderline retarded" with "extremely low verbal-English comprehension skills." (*Ibid.*) Under the totality of circumstances, the Ninth Circuit concluded that his waiver was not knowing and intelligent based on the absence of a written waiver; the failure to give Garibay his *Miranda* rights in Spanish; the lack of a translator's help; the need for repeated explanations of his rights; and his lack of prior experience with the criminal justice system. (*Garibay*, at pp. 538-539.)

This case is distinguishable from *Garibay*.[2] At no time while Officer Martinez, the interrogating officer, was going over Bravoalvarado's *Miranda* rights or during the subsequent interview did Bravoalvarado say he needed an interpreter or otherwise indicate he did not understand English. Instead, the record shows that Bravoalvarado understood English and his *Miranda* rights. Officer Martinez began the interview by telling Bravoalvarado to say something if he did not understand, to which Bravoalvarado said, "Okay." Bravoalvarado demonstrated he understood what was being said to him, because when the officer said he had the "right to remain silent," Bravoalvarado replied, "I could stay quiet."

Bravoalvarado, however, initially did say he did not understand the advisement that anything he said could be used against him in court. But when Officer Martinez explained that if Bravoalvarado said something it could be brought up in court, Bravoalvarado said he understood. Similarly, after being told he could have an appointed attorney, Bravoalvarado repeated, "[y]ou guys give me a lawyer before you guys start with . . . questions?" When the officer twice repeated he could have an attorney free of charge, Bravoalvarado replied, "Okay." When Officer Martinez asked Bravoalvarado if he wanted to talk about what happened, Bravoalvarado ambiguously replied, "No, it's just talk what happened . . . ." The officer clarified, "I'm saying, do you want to talk [with] me? Is that fine?" Bravoalvarado said, "Yeah." Therefore, unlike in *Garibay*, Bravoalvarado repeatedly said he understood his rights. Only one time did he say he didn't understand something, at which time Officer Martinez went over the right with him. Throughout this exchange, Bravoalvarado signed a written waiver. The remainder of the interview also shows that Bravoalvarado understood English. Moreover, Bravoalvarado, unlike Garibay, did not produce evidence of his alleged inability to understand English. Instead, Bravoalvarado's probation report indicates he has lived in the United States for about 11 years, since 1999.

---

[2] We have reviewed the videotape and written transcript of Bravoalvarado's February 2010 interviews.

In any event, that a defendant has some difficulty with English does not render a waiver of *Miranda* rights invalid. (*United States v. Bernard S.*, *supra*, 795 F.2d at p. 752 [even though the defendant clearly had some difficulties with English and required an interpreter at trial, his waiver of his *Miranda* rights was valid because he studied English through the seventh grade and, most importantly, he said he understood each of his rights after they were explained to him].)

We therefore conclude that Bravoalvarado's waiver of his *Miranda* rights was knowing, intelligent and voluntary.

IV. Bravoalvarado was not prejudiced by the admission of Nurse Wilson's testimony.

Nurse Practitioner Wilson testified at trial about the results of J.G's sexual assault examination. Nurse Wilson, however, did not personally conduct or otherwise participate in that examination; she merely reviewed the documentation about the examination. Bravoalvarado now contends that admitting her testimony violated his Sixth Amendment right to confront witnesses, under *Crawford v. Washington*, *supra*, 541 U.S. 36.[3] We do not decide whether admission of her testimony violated *Crawford*, because we conclude that any error in admitting Nurse Wilson's testimony was harmless.[4]

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" (U.S. Const., 6th Amend.) Under the Confrontation Clause, out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. (*Crawford v.*

---

[3] Defense counsel did not object, under *Crawford*, to Nurse Wilson's testimony, arguably forfeiting this issue. To obviate the ineffective assistance of counsel claim, we will address the issue.

[4] This issue—whether a defendant is denied his or her Sixth Amendment right of confrontation when a nurse practitioner testifies to the results of a sexual assault examination and the report prepared by another nurse— is currently on review in the California Supreme Court. (*People v. Gutierrez* (2009) 177 Cal.App.4th 654, rev. granted S176620, Dec. 2, 2009.)

Washington, supra, 541 U.S. at pp. 68-69.) *Crawford* left open what statements (other than prior testimony at a preliminary hearing or testimony before a grand jury or at a former trial and statements made in police interrogations) are testimonial in nature.

People v. Geier (2007) 41 Cal.4th 555, held that *Crawford* did not require excluding a DNA report, admitted through the testimony of a laboratory director who cosigned the report but who did not perform the analysis. The court concluded that the analyst's report was not testimonial, because the report was a "contemporaneous recordation of observable events rather than the documentation of past events," in which the analyst had "recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Id.* at pp. 605-606.) Also, the report was generated as part of the analyst's employment, not for the purposes of incriminating the defendant, and was not accusatory, since DNA analysis can lead to incriminatory or exculpatory results. (*Id.* at p. 607.) Finally, the accusatory opinion rendered in the case, that the DNA profiles matched, "were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness," the lab director. (*Ibid.*)

Geier, however, has been called into question by *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305,[5] which clarified that affidavits showing the results of a forensic analysis performed on seized substances were testimonial; therefore, the affidavits could not be admitted in lieu of in-court testimony unless the analyst was unavailable and had previously been subject to cross-examination. Most recently, in *Bullcoming v. New Mexico* (2011) __U.S. __ [131 S.Ct. 2705], the United States Supreme Court examined whether the Confrontation Clause "permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." (*Id.* at p. 2710.) The court concluded that such "surrogate testimony" did not meet the constitutional

---

5 A second issue on review in *Gutierrez* is how *Melendez-Diaz* affects *Geier*.

requirement imposed by the Confrontation Clause, and that the defendant was entitled to be confronted with the analyst who signed the certification, unless the analyst was unavailable and the defendant had a prior opportunity to cross-examine him. (*Ibid*.)[6]

We need not decide what the outcome should be under *Geier* and recent United States Supreme Court authority. Even if Nurse Wilson's testimony was erroneously admitted here, the error was harmless beyond a reasonable doubt under the test in *Chapman v. California* (1967) 386 U.S. 18, 24. J.G. testified that Bravoalvarado took her to his car, where he assaulted her. She also said that he briefly left the car, because two men came by. Moreover, Bravoalvarado confessed. His confession confirmed portions of J.G.'s story, namely, that he took her to his car and that some guys came by while he was in the car with J.G. The versions of what happened that J.G. told to her mother, officers, and the nurse were largely consistent, with J.G. consistently saying that Bravoalvarado put "his privates" on her privates.

Nurse Wilson's testimony added little to this. Although J.G. had a pinkish-red area on her labia majora consistent with J.G.'s rendition of events, Nurse Wilson also said it was a "nonspecific finding," meaning that anything could have caused the discoloration.

We therefore conclude that any error in admitting Nurse Wilson's testimony was harmless beyond a reasonable doubt.

---

[6] Only Justice Scalia joined Justice Ginsburg's *Bullcoming* opinion in full. Justice Sotomayor, who joined in all but part IV of the opinion, wrote a concurring opinion "to emphasize the limited reach of the Court's opinion." (*Bullcoming v. New Mexico, supra*, 131 S.Ct at p. 2719.) Justice Sotomayor agreed that the certification was testimonial, but she wrote to "highlight some of the factual circumstances that this case does *not* present." (*Id.* at pp. 2721-2722.) She observed that the case was not one "in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. . . . It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here [the witness] had no involvement whatsoever in the relevant test and report." (*Id.* at p. 2722.) Justice Sotomayor also noted that the case was not one in which an expert witness rendered an independent opinion about underlying testimonial reports that were not themselves admitted into evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.