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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO NOBELLA ROMERO, Defendant and Appellant.	2d Crim. B269580 (Super. Ct. No. 2012006854) (Ventura County)

Ernesto Nobella Romero appeals the judgment following his conviction by jury of one count of unlawful act with a child under 10 years old (Pen. Code, § 288.7, subd. (b); count 1),[1] and two counts of lewd act upon a child (§ 288, subd. (a); counts 2 and 3). The jury also found true the special allegations that the offenses were serious and violent felonies requiring sex offender registration (§§ 667.5, subd. (c)(6), 1192.7, subd. (c)(6), 290), and that appellant had substantial sexual conduct with the

[1] All statutory references are to the Penal Code unless otherwise stated.

victim while she was under 14 years old (§ 1203.066, subd. (a)(8); counts 2-3.)

The trial court sentenced appellant to 15 years to life in prison on count 1, plus a consecutive term of eight years, consisting of the midterm of six years on count 2 and a term of two years on count 3. Appellant was awarded 1,561 days of presentence custody credits.

Appellant contends the trial court erred in denying his motion to exclude his confession on the grounds that it was involuntary and the product of an unlawful custodial interrogation. We affirm.

FACTS

In 2012, appellant lived with his wife, Ruth Romero, and their children. Mrs. Romero babysat the victim, F.G., at their home. While it was still dark, F.G.'s parents would drop off then five-year old F.G. on the living room sofa at appellant's house. F.G. would fall asleep and then wake up while appellant was getting ready for work. Sometimes, while the other children and Mrs. Romero were sleeping or occupied in another room, appellant would sexually abuse F.G. Appellant touched her "chunde" (butt) with his penis, manually moved his "wiggly" penis as he touched her vagina and put his penis in her hand. F.G. told appellant to stop and pulled her hand away. A "lot of time" he put his penis in her mouth which caused her to throw up.

One day, while at home, F.G.'s mother, V.O., asked F.G. to play "horsey." F.G. got on top of her mother's back, but became upset. F.G. said appellant did that to her and described a bucking motion. F.G. explained that before appellant left for

work in the morning, he would take out his "weenie" and put it in F.G.'s hand, her mouth, her vagina and her butt.

F.G.'s parents took her to the hospital, where they spoke with police. The next day, a registered nurse examined F.G. and observed that she was well groomed except in her genital area. F.G. had some discoloration on her hymen that was consistent with sexual abuse.

Oxnard Police Detectives Luis McArthur and Ohad Katzman were assigned to F.G.'s case. The detectives interviewed F.G. on February 21, 2012. The next day, they went to appellant's workplace. After appellant drove into the yard, the detectives got out of their unmarked vehicle and approached him. They were wearing dress shirts, slacks and shoes. They wore their police badges and guns on their hips. McArthur asked appellant in Spanish if he would speak with them in private. Appellant responded that he "had some things to do," but agreed to talk to them at the nearby police station. Appellant declined a ride and stated he would drive himself. A short while later, appellant drove to the police station, behind the detectives. McArthur led appellant into an interview room. Appellant was not handcuffed or searched.

At the beginning of the recorded interview, McArthur assured appellant that he was not under arrest and that "he was free to leave at any time." The detectives said they had some questions for him, but that he was under no obligation to answer any of the questions. McArthur did not tell him where to sit and gave him the option of leaving the door to the room open. McArthur believed appellant was there willingly. McArthur did not take away appellant's phone during the interview and appellant took a couple of phone calls while he was there.

As a ruse, McArthur falsely told appellant that DNA evidence supported F.G.'s allegations that appellant put his penis in her mouth, that she sucked his penis, and that he put his penis in her vagina and in her bottom. Appellant agreed to give the detectives a buccal swab, which the detectives explained would be tested at the laboratory on premises. The police station had no such laboratory.

Katzman subsequently answered a phone call. He told appellant the DNA results were positive from F.G.'s vagina, mouth and bottom. Appellant insisted that "there's no penetration in her vagina," stating that he never "put[] it all the way in. . . ." Appellant explained "honestly, it was only a game" and he "only played with her" by putting his penis on the outside of her vagina. He stated he "never tried to put anything inside" and he "never showed [his penis] to her."

Appellant initially said he did not pull down F.G.'s underpants and that he was never undressed. He later stated that F.G. "never completely undressed" and "never . . . took off her clothes," but that he "lowered her pants a little bit, just to play with her," and lowered his pants "[j]ust to take out [his] penis."

Appellant also turned F.G. over in order to touch her buttocks; however, he denied penetrating her there. He said, "I did it to her from behind, yes in the couch" and that it was "[l]ike horsey, like that, that I would do it like that."

Appellant insisted that he did not put his penis in her mouth and that he tried "for her not to see my parts." Katzman asked appellant if he would submit to a lie detector test. Appellant refused, but then said he played with F.G. by putting his finger in her mouth.

At that time, McArthur said in English, "I think we're good," and told Katzman that they should advise appellant of his *Miranda*[2] rights. Katzman left to find a Spanish advisement card.

Appellant said he felt "stupid [] because well, you think that at not harming someone physically, you think everything is okay, right." He continued to insist that he "didn't do anything to her, I didn't rape her, I didn't [] force her . . . ." He said he had never played like that with another little girl, but that F.G. "wakes things up that you don't even want – darn this little girl."

McArthur attempted to put appellant at ease. They talked about eating sunflower and pumpkin seeds, about appellant's tattoos, about the cost of renting appellant's house, about his wife coaching soccer, and about how appellant knew McArthur from his public appearances, until appellant's phone rang. When appellant discovered it was a wrong number, McArthur told appellant that Katzman was talking to the laboratory technician to try to reconcile finding appellant's DNA in F.G.'s mouth. Appellant then admitted that he put his penis "only on her lips."

When Katzman returned to the room, he told appellant he was suspected of having committed child sexual abuse and explained his rights. After McArthur reiterated appellant's rights, appellant said, "I don't think there's anything more to say." The interview lasted two and a half hours.

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

At trial, appellant testified that he was "very stressed" during the interview and that he lied to police about touching F.G. inappropriately.

DISCUSSION

Appellant contends the trial court erred in denying his motion to exclude his confession because it was obtained in violation of his right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution. He also claims the confession was involuntary. We conclude the motion was properly denied.

A. Motion to Exclude the Confession

Prior to trial, the prosecution filed a motion in limine seeking to admit the statements appellant made during his pre-arrest interview with McArthur and Katzman. Appellant moved to exclude the evidence.

At the hearing on the motions, the trial court viewed the recorded DVD video of appellant's interview and the English translation of the interview.[3] The trial court determined that "*Miranda* was not required at the beginning of [the] interview. This did not have the features of custodial interrogation that would have required the invocation of the *Miranda* rule." It further concluded that "a reasonable person in [appellant's] position would not have understood that he was under arrest and would have understood that he was free to go at any time. There's no indication that he tried to do that. That's an important factor in other cases. Somebody tries to go and [the

[3] We take judicial notice of the DVD recording, which we obtained from the trial court's file. (See Evid. Code, §§ 452, subd. (d), 459.) Like the trial court, we have reviewed both the recording and the English translation.

police] say, nah, stay here. Nothing like that happened." To the contrary, at one point McArthur asked appellant if he was "okay" and wanted to continue. Appellant responded, "I'm okay."

The trial court also found that the DNA ruse did not render the statement involuntary or require a *Miranda* warning. It described the interview as "a soft interrogation" which was "conversational," but "persistent," with a tone and demeanor that never got to the "angry, point-your-fingers-at-the-person, . . . really-get-intense with them phase." The court concluded: "[L]ooking at the totality of the circumstances, was the DNA ruse, along with all the other factors such that, at that point in time, he was enduring custodial interrogation so that the objectively reasonable person would feel that he was under arrest, the answer is no."

The trial court found the end of the interrogation "the most problematic," where it became apparent that the detectives were going to arrest appellant. It correctly noted, however, that custody is not based on the officers' subjective opinion, but on how an objectively reasonable person in the defendant's position viewed the circumstances. The court stated that had the officers told appellant that they were going to arrest him and that he had to stay, or had they locked the door and told him to sit down, "an objectively reasonable person in [appellant's] position would think, okay, I'm under arrest now, [and] that would have triggered *Miranda.* That didn't happen." Having concluded that *Miranda* was not required at any point before the arrest, and also that the confession was not involuntary, the court denied appellant's motion to exclude the statements.

B. Non-Custodial Interrogation

A defendant's confession must be excluded from evidence if it was obtained during a custodial interrogation and the officers did not inform the defendant of his *Miranda* rights. (*Miranda*, *supra*, 384 U.S. at pp. 444-445.) The question of whether a defendant was in custody for *Miranda* purposes is a mixed question of fact and law that we review independently. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112-113.) To the extent the facts are disputed, we apply the substantial evidence standard to the trial court's factual findings regarding the circumstances of the interrogation. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400 (*Leonard*).) Here, the facts are largely undisputed since they are preserved in the form of a DVD recording of the interview. This leaves for our independent review the question of whether "'a reasonable person in [appellant's] position would have felt free to end the questioning and leave.'" (*Ibid.*)

This issue is judged by an objective test. Where, as here, the defendant has not been formally arrested, the question is whether a reasonable person would believe his or her freedom of movement was restricted to the degree associated with arrest. (*Leonard*, *supra*, 40 Cal.4th at p. 1400; *California v. Beheler* (1983) 463 U.S. 1121, 1125.) Some of the specific factors relevant to this determination involve the physical facts of the interrogation and its setting: how long the interview lasted; where the interview took place (e.g., in the defendant's home or in an interview room at a police station); whether there were physical restraints on the defendant's movement; how many officers were present; and whether the defendant was arrested at the end of the interview. Other factors pertain to the likely

psychological impact of the circumstances on a reasonable person. (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) No one factor controls, and the determination is made based on the totality of the circumstances. (*People v. Morris* (1991) 53 Cal.3d 152, 197, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Here, the factors that weigh in favor of a finding that appellant was in custody include the fact that the interview took place at the police station, in a room behind a closed door, with two detectives questioning appellant. The detectives made clear that appellant was a suspect and were persistent with their questioning, insisting they already knew the truth and had DNA evidence to prove it. They also arrested appellant at the end.

Weighing against these factors is the fact that appellant voluntarily left his workplace and drove to the police station. The detectives, who were dressed in street clothes, told appellant he was not under arrest, was free to leave, and did not have to answer the questions propounded to him. Appellant said he understood this. The detectives did not handcuff appellant or otherwise restrain him. The DVD recording of the interview confirms there was no physical barrier that would have prevented appellant from leaving the interview at any time. The detectives were seated throughout the interview except when entering or leaving the room, and they had offered to leave the door open. Although they accused appellant of sexually abusing F.G., they never raised their voices, used an angry or intimidating tone, or struck physically domineering or menacing

postures. Also, appellant was allowed to answer his cell phone during the interview.

In our view, the balance of these factors tips against a determination that appellant was in custody. An objective person might find some pressure to confess under these circumstances, but we do not conclude that such a person would have felt he or she could not terminate the interview and leave at any time prior to the arrest. (See *People v. Moore* (2011) 51 Cal.4th 386, 402-403.)

C. Voluntary Confession

Any involuntary statement obtained by a law enforcement officer from a criminal suspect through coercion is inadmissible under the federal Constitution. (*People v. Dykes* (2009) 46 Cal.4th 731, 752.) The fundamental test for voluntariness is whether the "defendant's will was overborne" by the circumstances surrounding the taking of the statement. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *Dickerson v. United States* (2000) 530 U.S. 428, 434; *People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.) This test "takes into consideration 'the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation.' [Citation.]" (*Dickerson*, at p. 434.) Because the facts surrounding appellant's confession were tape-recorded, the issue is subject to our independent review. (*People v. Linton* (2013) 56 Cal.4th 1146, 1177.)

Here, a consideration of all relevant factors compels a finding of voluntariness. As discussed above, there was nothing particularly coercive about the conditions of the interview. Although it took place at the police station, appellant travelled there on his own volition, and he was not handcuffed or

restrained. Appellant's interactions with the detectives were calm and measured at all times. At two and a half hours, the interrogation was not unduly long. (See, e.g., *People v. Hill* (1992) 3 Cal.4th 959, 981 [eight-hour interview was not automatically coercive], overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1049, fn. 13.) Moreover, the detectives' use of ruses constituted a legitimate form of police interrogation. (See *People v. Mays* (2009) 174 Cal.App.4th 156, 165 ["Police officers are . . . at liberty to utilize deceptive stratagems to trick a guilty person into confessing"].)

Our review of the DVD recording also reveals no objective appearance of coercion, either in appellant's physical appearance or in the detectives' conduct. As the trial court aptly observed, "there simply isn't a showing that would permit [the court] to conclude that this gentlemen's [sic] free will was overcome so that these were coerced statements." For these reasons, we conclude the confession was voluntary and that the trial court did not err in denying the motion to exclude appellant's pre-arrest statements.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Matthew P. Guasco, Judge
Superior Court County of Ventura

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