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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL MORALES, Defendant and Appellant.	2d Crim. No.B281597 (Super. Ct. No. VA141156) (Los Angeles County)

Gabriel Morales sexually abused his young niece, E. He confessed to the crimes when questioned by detectives. A jury convicted appellant of sexual intercourse/sodomy and oral copulation/sexual penetration of a child under age 10. (Pen. Code, § 288.7, subds. (a), (b).) He was sentenced to 25 years to life in prison.

Although appellant was admonished with his *Miranda* rights and acknowledged that he understood them, he contends that the interrogating officer did not seek or obtain an express

waiver of those rights.[1] We conclude that the trial court's finding of implied waiver is supported by substantial evidence. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

E.'s Testimony

E. was 10 years old when she testified at trial in 2016. Between ages six and eight, E. frequented the home of her grandmother, where appellant lived. During one of these visits, E. was alone in a room with appellant. He pulled down her pants and "put his penis in my butt and a little bit inside," she testified. It was painful. She felt "a pounding, like a hitting," then "wetness." Afterward, she went home and did not tell anyone what happened.

On a second occasion, before she turned eight, E. was again alone with appellant at her grandmother's home. She testified that he pulled down her pants, put "his penis in my vagina," and "moved back and forth." The "pounding" hurt. She felt wetness and saw appellant's penis.

E. became scared of appellant and no longer wanted to visit her grandmother's home. She told her mother about appellant's conduct. Deputies interviewed E. when she was nine years old. She told them that appellant touched her vagina and anus. A physical examination of E. did not show signs of sexual abuse.

Appellant's Interview

Appellant was interviewed at a sheriff's station. The detectives read appellant his *Miranda* rights and he said that he

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436, 478-479.

understood them.[2] The jury heard a recording of the interview and received a transcript of it.

During the interview, appellant told detectives that he has attended college for three years and is studying nursing. He confessed to touching E.'s "private parts" when she was six or seven years old and he was 18, while they were alone in his bedroom. The transcript contains this exchange:

"[Detective:] Now, you said you touched her private parts. So tell me where on her private parts.

"[Appellant:] Like her ass.

"[Detective:] You touched her ass?

"[Appellant:] And, um, do I have to say it?

"[Detective:] Yes, if you don't mind, because I need to make sure there is no misunderstanding. So you touched her ass and where else?

"[Appellant:] Uh, her pussy.

"[Detective:] Okay. You touched her pussy?

"[Appellant:] Yeah.

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[2] "[Detective:] . . . [B]efore I can tell you everything and we can discuss the case and I can give you the opportunity to tell me your side of the story, I have to read you your rights. Okay? . . . So if you understand just say yes and if you don't you can say no. Okay? But I need you to tell me out loud, just so that there is no miscommunication. Do you understand? [¶] "[Appellant:] Yes. [¶] "[Detective:] Yes? Okay. Uh, you have the right to remain silent. Do you understand? [¶] "[Appellant:] Yes. [¶] "[Detective:] Anything you say may be used against you in court. Do you understand? [¶] "[Appellant:] Yes. [¶] "[Detective:] You have the right to an attorney during questioning. Do you understand? [¶] "[Appellant:] Yes. [¶] "[Detective:] If you cannot afford an attorney, one will be appointed for you before any questioning. Do you understand? [¶] "[Appellant:] Yes."

"[Detective:] That's fine. Um, so we're talking about her vagina?

"[Appellant:] Yeah.

"[Detective:] Her pussy, vagina, her ass, her butt. Okay. And what did you touched her ass and her vagina with?

"[Appellant:] That day, it was my, my, my hand.

"[Detective:] So you touched her pussy with your hand?

"[Appellant:] Yeah. And my, my penis.

"[Detective:] And your penis?

"[Appellant:] Yeah, I think.

"[Detective:] Yes.

"[Appellant:] But just the tip. . . . [¶] . . .

"[Detective:] Okay. How far inside did you put your penis?

"[Appellant:] Just like this.

"[Detective:] That's like two inches or so?

"[Appellant:] Yeah."

Appellant stated that his penis was inside of E. for a minute or two, and he did not ejaculate. He recalled one instance of penetrating E.'s vagina with his penis and three instances of touching her vagina with his fingers or hands, but denied putting his penis in "her butt." Appellant described E.'s face as being "in shock" when he penetrated her; he thought that she felt pain.

Appellant told detectives that he tried to reach out for help by telling his mother and brother (E.'s father) about his marijuana use and sexual abuse of E., but they did not want to listen to him.

Appellant's Defense

Appellant testified and denied touching E.'s private parts. When arrested, he was attending nursing school. He has no prior criminal record.

Appellant felt intimidated by the detectives and did not understand their questions during his interview. They did not tell him any particulars about E.'s accusations, such as where she was touched, yet appellant was able to tell them specifics about touching her butt and inserting his penis two inches into her vagina. Appellant gave them this information because he was fearful.

Numerous witnesses testified to appellant's good character and his propriety and tenderness with children.

Procedural History

Appellant was charged in count 1 and count 4 with sexual intercourse or sodomy with a child under age 10 (Pen. Code, § 288.7, subd. (a)); in count 2 with oral copulation or sexual penetration with a child under age 10 (*id.*, subd. (b)); and in count 3 with continuous sexual abuse (Pen. Code, § 288.5, subd. (a)). He pleaded not guilty. The trial court denied a pretrial motion to suppress his confession.

The jury convicted appellant on counts 1 and 2 and found true allegations that E. was under the age of 14 and appellant had substantial sexual conduct with her. He was acquitted of the remaining counts. Appellant requested a new trial, arguing that his confession was illegally obtained.

The trial court denied appellant's motion for a new trial. He was sentenced to a prison term of 25 years to life on count 1. A concurrent term of 15 years to life was imposed on count 2.

DISCUSSION

Claiming "police misconduct" and "overreaching," as well as being "slower than other individuals that are his age," appellant asked the trial court to exclude his confession. The court read the transcript and observed that "all of the conversation flows

normally. There's no repetition of questions. All the answers are responsive and appropriate." Further, appellant attends college. The court invited defense counsel to show that appellant did not understand his rights. Counsel argued that the detective "puts words in my client's mouth" about the crimes. The court replied that the argument goes to the weight of the evidence, not to its admissibility.

Persons cannot be compelled in criminal cases to be witnesses against themselves. (U.S. Const., 5th Amend.) *Miranda* warnings "ensure that an accused is advised of and understands the right to remain silent and the right to counsel." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 383 (*Berghuis*).) Here, appellant did not invoke his right to cut off questioning by saying "unambiguously" that "he wanted to remain silent or that he did not want to talk with the police." (*Id*. at pp. 381-382.)

Though appellant did not invoke his right to end questioning after hearing his *Miranda* rights, his statements to detectives are inadmissible at trial unless the prosecution can establish that he waived his rights (1) knowingly, with full awareness of the rights and the consequences of abandoning them, and (2) voluntarily, as the product of free and deliberate choice rather than coercion, intimidation or deception. (*Berghuis*, *supra*, 560 U.S. at pp. 382-383; *People v. Davis* (2009) 46 Cal.4th 539, 585-586.)

Appellant did not expressly waive his rights. Nevertheless, a waiver "may be implied through '[his] silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" (*Berghuis*, *supra*, 560 U.S. at p. 384.) "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner

inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." (*Id.* at p. 385.) Thus, even without an express waiver, a defendant who is read his *Miranda* rights, confirms that he understands them, and actively participates in the conversation with detectives without physical or psychological pressure has knowingly, voluntarily and intelligently waived his rights. (*People v. Parker* (2017) 2 Cal.5th 1184, 1216.)

The record shows that appellant impliedly waived his right to remain silent. After the *Miranda* advisement, he participated in the conversation and never asked for the questioning to stop or to consult with an attorney. The evidence supports a finding that his statements were not obtained through coercion, intimidation or deception. The transcript shows that the detectives treated appellant respectfully and sympathetically. They invited him to tell them what happened "in your words." The questioning was brief: appellant was not "worn down" by aggressive tactics, trickery or deceit. (*People v. Whitson* (1998) 17 Cal.4th 229, 248-249.)

Examining the totality of the circumstances, including the background, experience and conduct of the accused (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375), we determine that there is no basis to conclude that appellant misunderstood his rights. The trial court asked defense counsel to elaborate upon appellant's ability to comprehend. Counsel described appellant as "slower than other[s]" his age. However, any claim of an intellectual deficit is belied by appellant's lack of special education classes while growing up; his years in college; his maturity in aspiring to a career in nursing; and his employment at a restaurant. Appellant may have been nervous or

embarrassed during his interview, but he was not uncomprehending.

Appellant cites cases that are factually distinguishable. In one, *People v. Whitson*, *supra*, 17 Cal.4th at p. 236, the accused was "borderline retarded," had attention-deficit disorder, and was intermittently unconscious during questioning while recovering from a head wound. Despite these disabilities, the court found an implied waiver of Whitson's right to remain silent. (*Id.* at pp. 249-250.) Appellant cites *In re Roderick P.* (1972) 7 Cal.3d 801, 803, concerning a "14-year old mentally retarded child" convicted of manslaughter. The court pointed to his "unrefuted retardation and immaturity" in concluding that he did not validly waive his *Miranda* rights. (*Id.* at p. 811.)

In contrast to the cited cases, the evidence does not show that appellant was suffering from a mental or physical infirmity. His responsive, fluid answers, both during his interview and at trial, demonstrate his alertness, comprehension and intelligence.

Appellant was not misled into thinking that the detectives were investigating a drug crime. At the outset, the detectives said that they were investigating things that "your niece" reported that appellant had done to her when she was six or seven years old. Their questions only addressed the details of the sexual abuse.

Late in the interview, appellant blamed his misconduct on "being, uh, a stupid teenager back then and I, I know I'm not supposed to do that," on being bullied, and on smoking marijuana because it "gets you crazy." Appellant's rationalizations for his misconduct did not vitiate his valid waiver of his right to remain silent.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

John A. Torribio, Judge

Superior Court County of Los Angeles

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.