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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.

SAUL ANGEL VALENZUELA  
CORDOVA,

Defendant and Appellant.

B281121

(Los Angeles County  
Super. Ct. No. BA440176)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Brad Kaiserman, 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, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted Saul Angel Valenzuela Cordova (Valenzuela) of five sex offenses involving a child 10 years old or younger based on evidence that included his own statements to police. The trial court sentenced Valenzuela to state prison for a term of 80 years to life. He appeals, claiming the trial court prejudicially erred by admitting his statements because psychological pressure rendered his confession involuntary. Having reviewed the videotape and transcript of Valenzuela's police interview and interrogation, we conclude his confession was voluntary under the totality of the circumstances. Valenzuela also argues his conviction must be reversed because his counsel provided ineffective assistance at the hearing on the motion to exclude his confession. Finding no merit to these arguments, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Information*

Valenzuela was charged with one count of continuous sexual abuse of a child (Pen. Code,<sup>1</sup> § 288.5, subd. (a); count 1), two counts of oral copulation or sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b); counts 2 & 5), and two counts of sexual intercourse with a child 10 years old or younger (§ 288.7, subd. (a); counts 3 & 4).

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<sup>1</sup> All further statutory references are to the Penal Code.

B. *Prosecution Evidence*

At trial, R.O. (then 17) testified she had known Valenzuela—her “dad’s brother’s wife’s brother,” whom she had always called Saul—for as long as she could remember. When she was six years old, she regularly spent the night at her younger cousin Anthony’s house. Anthony’s mother was Valenzuela’s sister, and Valenzuela, on occasion, would also spend the night at the house. One night when Anthony’s mother was out of the room, Valenzuela grabbed R.O. and put her on his lap. Anthony was in the room, but he was watching television. With R.O. on his lap, Valenzuela placed her hand on his genitals and exposed his penis. She felt uncomfortable, jumped down, and went over to sit with her cousin.

When she was seven, Valenzuela pushed her into the bedroom, told her to sit on the bed, and removed her pants and underwear. He said, “It’s okay,” in Spanish, and inserted his penis into her vagina. He also put his mouth on her vagina and moved his tongue back and forth. After a noise made him stop, Valenzuela left the room. R.O. went into the bathroom and cried.

When she was nine, R.O. walked into the kitchen, and Valenzuela pulled her over to the corner. He put his hand under the back of her shirt, then moved his hand around to the front, and touched her breasts. He also rubbed her vagina over her clothing. R.O. told Valenzuela she heard her aunt coming which caused him to stop, and she walked away.

When she was between eight and 10, Valenzuela penetrated her by placing his penis in her vagina. She was too afraid to scream. Valenzuela told her repeatedly, “It’s okay.” He also put his finger in her vagina. When he tried to use two

fingers, he saw it was “really hurting [her],” and he stopped. He told her to put on her pants and he left the room.

On different occasions before she turned 10, Valenzuela touched R.O.’s breasts, buttocks and vagina over her clothing. Valenzuela also kissed her on one occasion, but she could not remember how old she was when that happened.

There were at least three times when R.O. touched his exposed penis with her bare hand. Two of those instances happened in the bedroom; she could not remember where the third instance occurred. She recalled she was about seven at the time.

When she was in fifth grade, she watched a video that explained she should tell someone if anyone touched her inappropriately; but she did not tell anyone at the time because she did not want to be judged or talk to a stranger about such things. Instead, she avoided being alone with Valenzuela. She stopped visiting and sleeping over at her cousin’s house. She did see Valenzuela, however, at family gatherings.

Later, when she was in sixth grade (and 12 or 13 years old), R.O. got a cell phone. Valenzuela called her and asked her to touch her vagina with her fingers. She refused and hung up. He continued to call, but she would not answer. She did not tell her parents about what had happened with Valenzuela because she believed she would be blamed for it. She started to isolate herself and, as she got older, began cutting her wrists.

When R.O. was 16, her mother noticed her hesitation in filling out a questionnaire at a doctor’s appointment and asked her about it. R.O. would not answer, but, in July 2015, she told her older brother. Because R.O. and her brother had grown very close, R.O.’s mother asked him if he knew why R.O. was hurting

herself. He told his mother all he could say was that it had to do with Valenzuela. When R.O.'s mother went back to R.O. again, R.O. began to cry and told her mother Valenzuela had been touching her since she was very small, and Valenzuela had told her it was "normal." After telling R.O.'s father, they went to the police to make a report, and Valenzuela was arrested on September 26, 2015 (a Saturday).

On September 28, after reading the police report, Detective Robert Smey spoke with Valenzuela. The investigating officer, Irma Castillo, acted as a Spanish interpreter. The interview was videotaped. The jury watched the video recording and received a transcript of the conversations. As we will discuss in greater detail below, Valenzuela said he was sorry for having sex with R.O., admitted multiple instances of sexual conduct with her, and wrote her an apology, asking for her forgiveness. When the officers stepped out of the room, Valenzuela prayed out loud, stating he knew he was guilty.

### *C. Defense Evidence*

Valenzuela denied committing the offenses. He testified that when he was arrested, he thought the arrest had to do with his driving tickets. By the time he spoke with the detective two days later, he was "like the little dog that you leave inside the house all day" after you open the door. He said he had not bathed or brushed his teeth, his tooth was hurting, and he did not think he had eaten. In this situation, "anybody would respond anything"—"even . . . nonsense." He testified the detective and interpreter attacked him, talked non-stop and would not let him speak. He felt confused, "entrapped" and "bombarded." He believed the interrogation lasted almost an hour.

D. *People's Rebuttal*

Officer Castillo testified that neither she nor Detective Smey was working on September 26 (the day of Valenzuela's arrest) or September 27. She explained that whenever a suspect arrives at the station, before the booking process can begin, it is "mandatory" that he or she is brought before the watch commander who asks three questions: (1) Are you sick, ill or injured? (2) Do you know why you're here? (3) Do you have any questions for me? It is also mandatory for the jails to provide food for arrestees. Arrestees are provided with a toothbrush, access to showers, and the opportunity to use the telephone. The holding tank where arrestees are placed after booking has a phone with instructions explaining how to make three free calls within a certain radius of the jail.

E. *Verdict and Sentencing*

The jury found Valenzuela guilty as charged on all five counts. The trial court sentenced him to a term of 80 years to life in state prison, calculated as follows: 25 years to life on count 3 (§ 288.7, subd. (a)), 15 years to life on count 2 (§ 288.7, subd. (b)), 25 years to life on count 4 (§ 288.7, subd. (a)), and 15 years to life on count 5 (§ 288.7, subd. (b)), with sentence on each of these counts to run consecutively. The court sentenced Valenzuela to the middle term of 12 years on count 1 (§ 288.5, subd. (a)), but stayed the execution of sentence on this count. (§ 654.)

## DISCUSSION

### A. *The Video Recording of Valenzuela's Statements*

#### 1. *Statements Made Prior to Miranda<sup>2</sup> Advisements*

Detective Smey and Officer Castillo entered the interview room with Valenzuela. Detective Smey immediately removed Valenzuela's handcuffs, and they sat down.<sup>3</sup> Detective Smey asked Valenzuela for basic background information, such as his address and date of birth. They discussed Valenzuela's work in some detail. Valenzuela told them he worked in construction: plumbing, electrical, tiling, flooring, and painting. He was born in El Salvador and came to the United States in 2001. His sister lived nearby him, but his son lived in El Salvador.

Detective Smey told Valenzuela about his career and family, and said it was good to meet Valenzuela because he mostly talked with drug dealers, gangsters, prostitutes, and people who beat their wives. He could tell Valenzuela was a different person. "You're not like that."

Valenzuela described his family and their plans, and began to cry. After a few moments, Detective Smey said, "Here's what I'll ask of you . . . I want you to be honest with me, okay?" "That's all." Valenzuela repeated, "That's all." The detective continued, "And I know you will, okay?" Valenzuela told him, "I've been really honest with everybody and I've never lied to anyone." Valenzuela cried quietly as he continued to talk about

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S. Ct. 1602, 16 L. Ed. 2d 694].

<sup>3</sup> The transcript the jury received included the certified translation of Spanish to English.

his son who was about to turn 15, and how he wished he could be with him in El Salvador for his party. He had not seen his son for over 10 years because he did not have immigration papers. The detective told him he was not an immigration agent, and he did not care about immigration issues.

Detective Smey told Valenzuela he could see Valenzuela was an honorable man—a family man and a hard worker. Detective Smey said Valenzuela was the type of person with whom he could share a beer and relax. Valenzuela responded the detective would be welcome at his house.

At this point, about 13 minutes into the interview, Detective Smey advised Valenzuela of his *Miranda* rights.

## 2. *Statements After Miranda*

After acknowledging he understood each of his *Miranda* rights, Valenzuela continued speaking with Detective Smey. Detective Smey asked if Valenzuela believed in God. Valenzuela responded that he did. The detective then said, “At the end of the day, when we stand before God[, w]e have to answer [for] the things that we’ve done[, g]ood and bad.” Detective Smey said his father used to tell him, “If you make a mistake[, o]wn up and be honest and get it off of your chest.”

The detective told Valenzuela he was going to show him and tell him about something, but said, “I don’t want you to say anything.” “I just want you to think about this.” The detective explained that it has “come to our attention in a report” that Valenzuela had known a girl named R.O. for a long time. “Oh, yeah, I’ve helped [her father] a lot,” Valenzuela volunteered.

The detective told Valenzuela that a long time ago, when R.O. was 9 or 10 years old, she told her parents a stranger had



grabbed her in an alley, and he was violent with her, hurt her and had sex with her. Her parents did not tell anyone at the time, but they took her to the hospital and retrieved DNA evidence. The detective asked Valenzuela if he knew what DNA was. Valenzuela said he had heard about it. The detective then told Valenzuela the police did not know who the DNA belonged to “[u]ntil today.” “It’s yours.” Valenzuela said nothing.

The detective said he talked to R.O., and she told him she had been so afraid at the time that she lied and made up the story about a stranger. She cried when she told the detective it was Valenzuela who would go to her uncle’s house when she was there, and he was the one who “accidentally” “[h]ad sex with her.”

Detective Smey told Valenzuela, “I want you to know that I know it’s you.” Detective Smey then recounted how the police collected the DNA evidence. He explained that when the officers came to Valenzuela’s house two days earlier and placed him in handcuffs, they tested Valenzuela’s skin cells that had rubbed off on the handcuffs and compared his DNA to the DNA from R.O.’s vagina. Detective Smey also told Valenzuela that after he shook hands with Valenzuela, he sent the DNA samples to the lab. The DNA tests results confirmed Valenzuela’s DNA was found in R.O.’s vagina. Detective Smey put a CD in front of Valenzuela and said the DNA results were all on the CD.

Detective Smey told Valenzuela he knew R.O. had a phone when she was little, and Valenzuela called to “talk to her about sexual things.” Those conversations were recorded on a computer. Detective Smey suggested he had listened to the recordings and “heard that [Valenzuela was] talking about sex to her.” Detective Smey continued and said he knew that, about a year ago, Valenzuela went to R.O.’s house and kissed her on the

mouth. R.O. recorded everything on her cell phone. She recorded Valenzuela kissing her and saying, “You have very soft lips.” The detective said, “it’s all here,” and pointed to another CD.

Detective Smey told Valenzuela to think about all of these things. “This is your life.” He told Valenzuela to imagine a train coming down a mountain with no brakes, and at the bottom there is a sharp turn, and right there, there is a little house with all of the people you love inside—the people who love you and rely on you to be honest and to have integrity. He said the “only thing that matters is that you tell the truth to us,” and that was the “only way to put the brakes on this train.” If he did not, “[i]t’s going to jump the tracks” into the house and hurt everyone you know. The detective said the evidence—the audio recordings and DNA evidence—did not lie.<sup>4</sup>

Detective Smey told Valenzuela he was the one who writes the reports, and “what matters is that you’re honest. That’s all.” The detective said he had met “monsters” who wake up in the morning with the priority of kidnapping a girl, raping her and setting her on fire. “That’s not you.” “No, you’re like me.” “I’m a man, I’ve done things I’m not proud of. But like my father used to say: ‘Bobby, if you screw up,’ ‘Own up, be honest.’ And start clean and fresh.”

“I know what happened,” the detective reiterated. “I just don’t know why it happened.” “I know you’re not a monster like that. So I think that you just made a mistake,” “a one time mistake” and “you’re sorry, that’s what I want to know.” When

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<sup>4</sup> Detective Smey, however, lied about the evidence on the CDs. In fact, the police did not have any DNA evidence or audio recordings.

Valenzuela's response was unintelligible, Detective Smey asked again. "Are you sorry that you had sex with R.O.?" Valenzuela answered, "Yes."

If not, the detective continued, that would mean you wanted to hurt her. "You didn't want to hurt her, right?" "No," Valenzuela answered. "You didn't want to hurt her, it was just a moment . . . of passion, right?" Valenzuela answered, "Yes." Then Valenzuela asked, "Can I say something?" He told the officers he wanted to change his life. "[I]t's something that I do want to change, like you said." "Your father would say all of that, but I don't have my father close to me. No, . . . I'm not bad."

Detective Smey responded, "Let me ask you. If R.O. were sitting here her right in front of you right now, what would you say to her?" Valenzuela said, "I would ask her to forgive me. I would get on my knees and ask for forgiveness" for "all the damage she's living with."

Asked what he was sorry about, Valenzuela answered, "Touching her in places where I shouldn't," adding that he "never tried to hurt her or threaten her." He said it was tradition in his country to give money to buy sweets, but "maybe that's why it got ugly."

"Okay," the detective said, "how did it start?"

Valenzuela said, "I don't know how it started." "I think she was playing." "Sometimes girls are really curious." At the time, Valenzuela was sleeping in his nephew's bedroom in the middle of the house and he thought R.O. liked the room because her cousin's toys were there. The girl and the boy would get inside the covers and everything "so it all happened and you know it's something really ugly."

Detective Smey related that R.O. said Valenzuela started by touching her private parts over her clothes. Valenzuela said, “yes,” “when she would get inside the blankets,” he would “hug her and . . . touch” her. The detective recounted that R.O. said Valenzuela had touched her vagina, buttocks and breasts over her clothing. Valenzuela responded, “Yes, I was a fool. . . . All of that.” Detective Smey said he understood. “[Y]ou were sexually aroused.” “Yes,” Valenzuela agreed.

When the detective asked Valenzuela if he remembered the first time he had sex with R.O., Valenzuela said “[i]t wasn’t sex[;] I would just touch her and I’d get aroused and I’d go alone into the bathroom.” Detective Smey said, “No, no, . . . you’ve already told me that you had sex with her.” “I know you did . . . [b]ecause she told me.”

The detective asked where was the first time he had sex with R.O. Valenzuela asked, “The last . . . time?” When the detective repeated that he was asking about the first time, Valenzuela told him: “[Y]es, the first time it was like that” in the rear bedroom at his sister’s house.

Valenzuela said everyone would always go there and cook and he would “always play, . . . always go and do things, but . . . I mean, it’s terrible because she was a minor and I was an adult.” “Things don’t get understood,” he said; “[t]here were things [he] wouldn’t start,” but he would “end up doing that.” Valenzuela then said he was on the bed, but “[n]ot . . . in a normal way, but like, on the edge.” He said R.O. would lower her pants and underwear—“she’d look for it and say ‘Now, now, now!’” When the detective asked if that was when Valenzuela put his penis in R.O.’s vagina, he said, “Yes, but I wouldn’t penetrate her.” The detective interjected, “I know you, I know you did. . . . Stop,

stop.” He told Valenzuela, “You’re doing good”; “[y]ou told me almost all the truth[, b]ut not all of it”; “[c]ome a little further with me . . . on this.” Pointing to the CD he said contained the DNA evidence, Detective Smey said, “I have this here, inside of her vagina. So I know you put your penis in her vagina.” “Now, be honest, tell me the truth, look at me in the eye.”

Then he asked again, “You put your penis in her vagina, yes?” Valenzuela said, “Mhm.” The detective said, “Out loud, tell me. Yes or no. Yes.” Valenzuela said, “Yes,” and in his own words, acknowledged he had put his penis in R.O.’s vagina. Asked if he had ejaculated inside her, he said, “No, no, always, no. I never do that.”

The detective asked how many more times Valenzuela had sex with R.O. Valenzuela said, “It wasn’t many.” He said he did not remember the dates, but “I think it was like two times, it was just two times.” He said the last time was three or four years earlier, in the backyard of R.O.’s house, and described what had happened in great detail.

Valenzuela explained that R.O.’s father had a house with a stone statue of Michelangelo in the back that he was restoring and painting. R.O. knew Valenzuela was working there, and she would come over. He said she was older at that time, and he “wanted . . . her to feel the trust, like the normal trust of an adult person . . . [t]hat she’s known for a while.” He was working on the statue and “to bring her closer [he] said: ‘you can do the stone if you like,’” “[m]ixing the colors and everything.” He thought she may have “felt like, like a certain satisfaction being there.” The detective responded: “[Y]ou’re saying she liked your company,” and Valenzuela said, “Possibly.” Valenzuela said he felt alone because he did not have his son with him so he did not

have any one to caress or hug, and he “felt something ugly, ugly in the way that her dad always had problems with drugs.” He said R.O.’s father and brother both smoked marijuana “so it’s an unbearable picture to watch.”

Valenzuela said when it was almost dark, he and R.O. had sex on a chair in the backyard of her father’s house. He explained he “started to fall for it.” “[Y]ou don’t know what’s happening.” “It’s like . . . something . . . that’s being put for you.” He said she knelt down and put herself in a sexual position (which he demonstrated) and “lowered everything.” He said he was behind her and put his penis in her vagina.

Detective Smey thanked Valenzuela for telling him everything, and asked if Valenzuela had put his mouth on her vagina. He answered, “Yeah, yeah, because she also told me to,” “[b]ecause she was always watching videos.” He said he kissed and licked her vagina on a sofa in the living room at her house when the family had gone out. “They’d always leave her alone.”

Detective Smey asked Valenzuela if he remembered calling R.O. on her cell phone, and he said he did, adding that they “always” talked about sex and “the things [he] wanted to do to her.” He also volunteered they had similar conversations in person when he would see her without her phone. The detective commented, “That’s very difficult” “to resist.”

Next the detective asked if Valenzuela remembered what had happened the year before when he went to R.O.’s house and kissed her. Valenzuela explained R.O.’s father owed him money, but he was not “taking her as payment.” When he saw R.O. the last time, he asked her how she had been, but she was quiet. Valenzuela said he touched her hair and told her it was “nice.” He told her she was a young woman and she was going to be able

to study. He went to the liquor store and Starbucks to get juice and coffee for R.O. and her younger brother. When he returned, she was watching television. When her father arrived, Valenzuela told her he was leaving and kissed her “close to her mouth.”

Detective Smey then asked Valenzuela: “[I]f you could write out an apology to her, would you?” Valenzuela told him “Yes.” The detective said, “Good[,] I’m glad.” Valenzuela said, “But all of that is for me, for my improvement, right?” The detective said, “Mhm.” The interpreter/investigating officer told him, “Yeah. And so you can find peace and you feel lighter, see?” The detective handed Valenzuela a form, telling him “it just says: ‘tell your story.’”

Valenzuela began writing and started sobbing. After about two minutes, the detective asked Valenzuela why he was crying, Valenzuela answered: “I feel like the worse. I feel like a bum. I feel awful. I never meant to hurt her. I wish I could just disappear.” Detective Smey said, “I know.” Valenzuela continued: “I don’t want this to be happening in my life, sometimes I pinch myself and I want to wake up.”

Valenzuela continued writing for a few more minutes, and when he stopped, the interpreter asked if she could read the statement so the detective could know what he had written. Valenzuela said he would read it: “[R.O.], I want to ask for your forgiveness for everything I’ve caused in your life. You know I have always, always admired you and respected you a lot. I’m so ashamed, I feel like the worst living being. Forgive me. Understand my bad instincts but I would’ve never done it. You’ve all needed me so much, and look where I’ve ended up because of my, my foolishness. I want to ask for your forgiveness

from the bottom of my heart. [R.O.], forgive me, I'm asking in the name of my son whom I love so much, and I wouldn't want him to go through the same thing.” Valenzuela then signed and dated his statement.

Detective Smey said, “I understand.” Valenzuela told him: “You should've been a priest. I have a lot of friends who are priests.” The detective thanked Valenzuela for telling the truth. Shortly thereafter, Detective Smey and Officer Castillo said they would be back, and left the room.

After sitting in silence for a minute, Valenzuela began to pray: “Lord, bless me, Father, and get me out of here. I know I'm guilty. Get me out . . . I'm not a bad person. Lord, blessed Father . . . . Forgive what I've done, forgive me. . . . Forgive me, Jesus.” He was quiet for another 10 minutes before continuing: “Help me, Lord. Help me, Father. Help me, Lord.” Then, a few minutes later, he prayed: “Father, Holy Father. . . . I know you're my Lord Jesus. . . . But why with these feelings and thoughts, sir? What for? . . . Forgive me, Lord. . . . I am your pure creation too, my Lord Jesus. Love me, sir, for feeling your light. Be big in my heart. . . . Forgive me, sir. I'm asking for your forgiveness, [R.O.], Guillermo. . . . I'm repentant, forgive me . . . . Forgive me, everyone.” He alternated between praying out loud and silence until the detectives returned and removed him from the room.

B. *Trial Court Proceedings—Valenzuela's Motion To Exclude*

Valenzuela moved to exclude his statements from trial on the following grounds: (1) his statements were “coerced as the police ‘softened him up’ prior to the interview”; (2) he did not understand his *Miranda* rights; and (3) he was “unsophisticated



to the point that he did not understand what was occurring.” The motion was based entirely on the contents of the videotaped recording of Valenzuela’s interview and interrogation.

The trial court reviewed the audio and visual recording, along with the transcript. The court found Valenzuela was advised of his *Miranda* rights and “appeared to freely and voluntarily engage in a discussion with Detective Smey.” The court rejected the argument Valenzuela was “unsophisticated to the point that he was incapable of comprehending the overall situation of his interview.” The court noted: “It appears that the defendant throughout gave rational responses to questions that were being posed.” Finally, rejecting the argument Valenzuela’s statements were the product of coercion, the court stated, “[t]he fact that . . . Detective Smey was being friendly, pleasant, or at one point apologetic to the defendant regarding having to handcuff him does not equate to coercion. Similarly, the fact that the detective engaged the defendant in conversation regarding other topics, such as the T-shirt the defendant was wearing, his family, or was touching the defendant in order to soothe the defendant’s emotions, does not constitute inappropriate conduct on behalf of the police. Likewise, the fact that the detective, after Mirandizing the defendant, advised the defendant of his ethical and/or religious obligation to be truthful does not amount to police misconduct. . . . Additionally, it is not inappropriate for police officers to utilize a ruse as a tactic during an interrogation.”

Based on the totality of circumstances, the court denied the motion.<sup>5</sup>

C. *Standard of Review and General Legal Principles*

1. *Standard of Review*

Generally, “[w]e review independently a trial court’s determinations as to whether coercive police activity was present and whether the statement was voluntary. [Citation.] We review the trial court’s findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, for substantial evidence. [Citation.] ‘[T]o the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence.’ [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

However, when “[t]he facts surrounding an admission or confession are undisputed to the extent the interview is tape-recorded, . . . the issue [of voluntariness is] subject to our independent review.” (*People v. Linton* (2013) 56 Cal.4th 1146, 1177, citing *People v. McWhorter* (2009) 47 Cal.4th 318, 346 [““When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court’s determination of voluntariness””]; see also *People v. Wall* (2017) 3 Cal.5th 1048, 1066 [“Although we rely on the trial court’s

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<sup>5</sup> On appeal, Valenzuela does not challenge the trial court’s ruling that he knowingly and voluntarily waived his *Miranda* rights.

factual findings to the extent they are supported by substantial evidence, where, as here, ‘[t]he facts surrounding an admission or confession are undisputed to the extent the interview is tape-recorded,’ those facts as well as the ultimate legal question are ‘subject to our independent review’.”.) Because Valenzuela relied exclusively on the audio-video recording and transcription of his statements as the basis for his motion to exclude, we conduct an independent review of the recording and the trial court’s ruling.

## 2. *Applicable Law*

“A criminal conviction may not be founded upon an involuntary confession. [Citation.]” (*People v. Scott* (2011) 52 Cal.4th 452, 480.) The prosecution bears the burden of establishing by a preponderance of the evidence that a defendant’s confession was voluntarily made; whether a confession was voluntary depends upon a totality of the circumstances. (*Ibid.*) “The question is whether the statement is the product of an “essentially free and unconstrained choice” or whether the defendant’s “will has been overborne and his capacity for self-determination critically impaired” by coercion. [Citation.]” (*People v. Williams* (2010) 49 Cal.4th 405, 436 (*Williams*); accord, *People v. Cunningham* (2015) 61 Cal.4th 609, 645 (*Cunningham*) [a statement is made involuntarily when the accused’s “abilities to reason or comprehend or resist were in fact so disabled that he [or she] was incapable of free or rational choice”], quoting *In re Cameron* (1968) 68 Cal.2d 487, 498; see also *Mincey v. Arizona* (1978) 437 U.S. 385, 398 [98 S.Ct. 2408, 57 L.Ed.2d 290] [a coerced confession is not the ““product of a rational intellect and a free will””], quoting *Townsend v. Sain* (1963) 372 U.S. 293, 307 [83 S.Ct. 745, 754 L.Ed.2d 770].)

When evaluating the voluntariness of a statement, courts consider (1) the nature and extent of police coercion, (2) the length, location, and continuity of the interrogation, as well as (3) the maturity, education, physical condition, and mental health of the defendant. (*Cunningham, supra*, 61 Cal.4th at pp. 642-643; *Williams, supra*, 49 Cal.4th at p. 436 [“Relevant considerations are “the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity” as well as “the defendant’s maturity [citation]; education [citation]; physical condition [citation]; and mental health””]; see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [93 S.Ct. 2041, 36 L.Ed.2d 854] [voluntariness turns on the “totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation”]; accord, *People v. Jones* (1998) 17 Cal.4th 279, 296.) No single factor is dispositive. (*Williams*, at p. 436.)

“In assessing allegedly coercive police tactics, “[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.” [Citation.]’ [Citation.]” (*Williams, supra*, 49 Cal.4th at p. 436; accord, *People v. Smith* (2007) 40 Cal.4th 483, 501.) “A confession is not involuntary unless the coercive police conduct and the defendant’s statement are causally related.” (*Williams*, at p. 437; accord, *Cunningham*, 61 Cal.4th at p. 643, citing *People v. Jablonski* (2006) 37 Cal.4th 774, 814 [the police misconduct “must be . . . the “proximate cause” of the statement in question, and not merely a cause in fact”].)

““Once a suspect has been properly advised of his [or her] rights, he [or she] may be questioned freely so long as the

questioner does not threaten harm or falsely promise benefits.”” ( *People v. Carrington* (2009) 47 Cal.4th 145, 170.) Investigators are permitted to ask tough questions, exchange information, summarize evidence, outline theories, confront, contradict, and even debate with a suspect. ( *Ibid.* ) They may accuse the suspect of lying ( *People v. Enraca* (2012) 53 Cal.4th 735, 755) and urge him or her to tell the truth ( *People v. Tully* (2012) 54 Cal.4th 952, 994).

“Even if deceptive comments are made, their use ‘does not necessarily render a statement involuntary. Deception does not undermine the voluntariness of a defendant’s statements to the authorities unless the deception is “‘of a type reasonably likely to procure an untrue statement.’” [Citation.]” ( *People v. Hensley* (2014) 59 Cal.4th 788, 813.) “It is well settled that ‘mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.’ [Citation.]” ( *People v. Belmontes* (1988) 45 Cal.3d 744, 773, overruled on another ground in *People v. Cortez* (2016) 63 Cal.4th 101, 118.)

#### D. *Valenzuela’s Statements Were Properly Admitted*

Valenzuela argues his statement to the police should have been excluded because his interrogation was the product of the same type of psychological coercion criticized in *In re Elias V.* (2015) 237 Cal.App.4th 568 ( *Elias V.* ). Valenzuela rests his entire argument on the application of *Elias V.* to the present case. Valenzuela’s reliance is misplaced because Valenzuela’s case is strikingly different from *Elias V.*

*Elias V.* involved the interrogation of a 13-year-old juvenile whose uncorroborated statements suggested his culpability in a lewd and lascivious act on a child under the age of 14. (*Elias V.*, *supra*, 237 Cal.App.4th at p. 570.) In *Elias V.*, the school principal escorted Elias out of class and brought him to a small room where the detective was waiting. Elias had no prior experience with the police. The detective directed Elias to sit across from her, next to the principal. A second police officer stood behind him, and a third officer was stationed at the door. The detective accused Elias of improperly touching his friend's three-year-old sister. (*Id.* at pp. 574, 581.) The detective's "accusatory interrogation" in the small room "was dominating, unyielding and intimidating" (*id.* at p. 586), with "relentless" questioning insisting on Elias's guilt. (*Id.* at p. 582.) The detective rejected his repeated denials and ignored his explanation that while he was playing a video game with his friend he had simply helped his friend's sister unzip her pants. (*Ibid.*) The detective confronted Elias with false evidence, telling him the alleged victim had explained "perfectly" how he had touched her, and a witness (the alleged victim's mother) had walked in and had seen him touching the victim's vagina. (*Ibid.*) The detective also threatened to subject Elias to a lie detector test against his will. (*Id.* at p. 584.)

At the end of her questioning, the detective employed the "so-called 'false choice' strategy" (*Elias V.*, *supra*, 237 Cal.App.4th at p. 586). She presented Elias with two possible explanations for the sexual touching: either he acted out of "natural 'curiosity'" or he touched the alleged victim because "any normal person in his shoes would find [doing so] 'exciting.'" (*Id.* at pp. 584-585.) The detective said both were "completely 'understandable.'" (*Id.* at

p. 584) “Elias agreed to the more acceptable alternative that he was merely ‘curious,’ thereby admitting the felonious act.” (*Id.* at p. 585.) The trial court denied Elias’s motion to exclude, emphasizing the fact that Elias had asked questions a couple of times during the “very short” (20-minute) interview. This “give and take in the conversation” led the trial court to conclude the interview was “appropriate.” (*Id.* at p. 575.)

The Court of Appeal reversed, finding “the prosecution failed to prove by a preponderance of the evidence that Elias’s inculpatory statements were voluntary.” (*Elias V.*, *supra*, 237 Cal.App.4th at p. 600). The court reached its decision based upon the combination of three factors: “(1) Elias’s youth, which rendered him “most susceptible to influence” [citation] and “outside pressures” [citation].’ [Citation]; (2) the absence of any evidence corroborating Elias’s inculpatory statements; and (3) the likelihood that [the detective’s] use of deception and overbearing tactics would induce involuntary and untrustworthy incriminating admissions.” (*Id.* at pp. 586-587.)

1. *Valenzuela Is Not a Juvenile*

Valenzuela was 47 years old at the time of his arrest. No evidence suggests he was immature or unsophisticated—nothing close to 13-year-old Elias.

2. *Substantial Evidence Corroborated Valenzuela’s Confession*

Because a statement obtained by physical or psychological coercion may lead to a false confession, *Elias V.* examined whether the evidence confirmed the trustworthiness of Elias’s statements. The court pointed out that corroborative evidence

can come from many sources: the officer's investigation, witness statements, and information from the suspect that only the perpetrator would know. (*Elias V.*, *supra*, 237 Cal.App.4th at p. 591 ["The best form of corroboration is the suspect's revelation of information only a guilty suspect would know"].) To avoid "contamination" an interrogator should not volunteer information that a suspect may simply repeat. (*Elias V.*, at p. 592 ["Revelation to a suspect of known details about a crime is discouraged because it creates the possibility a confession may simply reflect suggestions made by the investigator, 'not the product of spontaneous recall on the part of the suspect'"].)

In *Elias V.*, corroborating evidence was lacking. (*Elias V.*, *supra*, 237 Cal.App.4th at p. 591 ["The sole evidence of the manner in which Elias allegedly touched the child came from Elias's interrogation, and no evidence corroborated his incriminating statements"].) The alleged victim's mother did not see Elias touch her daughter. Instead, when she walked in the room and asked what had happened, Elias looked "surprised" and "scared" and said the child asked him to help her take off her pants because she wanted to go to the bathroom. (*Id.*, at p. 571.)

In the present case, 17-year-old R.O. testified in great detail regarding each of the counts. Throughout Valenzuela's interview, he provided facts only the perpetrator would know—facts that were not provided to him by the detective. For example, he specified locations where the sexual conduct occurred, such as the rooms of his sister's house and the backyard at R.O.'s house near the Michelangelo statue. Unlike Elias, whose "admissions did not even amount to an 'I did it'" (*Elias V.*, *supra*, 237 Cal.App.4th at p. 592), Valenzuela not only admitted



his offenses in great detail but also demonstrated physically one of the sexual positions he used.

3. *Detective Smey's Tactics Did Not Render Valenzuela's Statements Involuntary or Unreliable*

Valenzuela argues Detective Smey's use of deception and overbearing tactics rendered his statements involuntary. Valenzuela argues three considerations compel this conclusion: (1) there was no "pre-interrogation interview"; (2) Valenzuela was in a "vulnerable state" during the interview; and (3) Detective Smey used the "maximization/minimization" technique to obtain his confession.

a. *Pre-interrogation Interview*<sup>6</sup>

Valenzuela argues that because Detective Smey did not engage in a pre-interrogation interview, the detective "failed to deploy a critical safeguard to ensure that a false confession was not obtained." (*Elias V.*, *supra*, 237 Cal.App.4th at p. 598 ["virtually all interrogation manuals" counsel that, "[a]bsent a life-saving circumstance the investigator should conduct a non-accusatory interview before engaging in any interrogation"].) "[A]n 'interview' is 'nonaccusatory,' its purpose 'is to gather

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<sup>6</sup> Before the trial court, Valenzuela argued "[h]is statements were coerced as the police 'softened him up' prior to the interview." On appeal Valenzuela argues his confession was involuntary and unreliable because the detective failed to conduct a pre-interrogation interview. This missing pre-interrogation interview, however, is the very same interview Valenzuela argued "soften[ed] him up." Accordingly, Valenzuela's argument that a pre-interrogation interview did not take place lacks merit.

information,’ it ‘may be conducted early during an investigation,’ it ‘may be conducted in a variety of environments,’ the conversation should be ‘free flowing and relatively unstructured,’ and ‘[t]he investigator should take written notes . . . .’ [Citation.]”<sup>7</sup> (*Ibid.*)

Contrary to Valenzuela’s assertion, the record establishes that Detective Smey conducted what was, in substance, a “non-accusatory” pre-interrogation interview before advising Valenzuela of his *Miranda* rights and commencing the interrogation. At the start of their exchange, the detective took notes as he asked Valenzuela for his address, date of birth and other background information and they discussed Valenzuela’s work at some length. The tone was conversational, and the detective listened to Valenzuela as he spoke freely without cutting him off or behaving aggressively in any way. Detective Smey told Valenzuela he liked his Bob Marley T-shirt, which prompted Valenzuela to volunteer information about his fiancé and their wedding plans and his son’s upcoming birthday. (*Elias V.*, *supra*, 237 Cal.App.4th at pp. 598-599 [“During the interview the investigator can establish rapport with the suspect, assess their credibility, develop investigative information and establish a behavioral baseline”].)

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<sup>7</sup> “On the other hand, an ‘interrogation’ is ‘accusatory’ and ‘involves active persuasion,’ it ‘is conducted in a controlled environment’ and ‘*only when the investigator is reasonably certain of the suspect’s guilt*,’ and the investigator ‘should not take any notes until after the suspect has told the truth and is fully committed to that position.’ [Citation.]” (*Elias V.*, *supra*, 237 Cal.App.4th at p. 598.)

b. *Valenzuela's "Vulnerable State"*

Next, Valenzuela argues that because he was already “in a vulnerable state” before his interrogation, his confession was not voluntary. Valenzuela argues he was vulnerable because he had been in custody for two days without being informed of the reason for his arrest.<sup>8</sup> Valenzuela does not cite any authority for the proposition that two days in custody without being told the reason for his arrest constitutes coercive prolonged detention nor does the videotape of the interrogation demonstrate Valenzuela was in a vulnerable state. There is no indication Valenzuela was injured, hungry, sleep-deprived, confused, or disoriented. No evidence suggests or supports the conclusion Valenzuela was in a vulnerable state.

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<sup>8</sup> Relying on his trial testimony, Valenzuela suggests the following factors added to his vulnerability: lack of food, and lack of access to a shower or a phone. Valenzuela did not raise these factors as part of his motion to exclude, and consequently, these factors are forfeited. (*Williams, supra*, 49 Cal.4th at p. 435 [“A defendant ordinarily forfeits elements of a voluntariness claim that were not raised below”]; *People v. Rundle, supra*, 43 Cal.4th at p. 121 [the defendant forfeited the claim that the length of the interrogation and of an interview with a state-appointed psychiatrist rendered statements involuntary because he failed to raise these claims in the trial court], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Ray* (1996) 13 Cal.4th 313, 339 [because defendant did not mention the asserted ground in his motion or at the hearing, “the parties had no incentive to fully litigate this theory below, and the trial court had no opportunity to resolve material factual disputes and make necessary factual findings. Under such circumstances, a claim of involuntariness generally will not be addressed for the first time on appeal”].)

Moreover, there is no evidence these factors (being held in custody for two days without knowing the basis for his arrest) motivated Valenzuela's confession. Absent a connection between the alleged coercive police conduct and Valenzuela's incriminatory statements exclusion is not warranted. In *Williams*, the California Supreme Court addressed a similar issue where the defendant referred "to the coercive effect of prolonged custody, pointing to the period between his arrest" and his interrogation three days later. (*Williams, supra*, 49 Cal.4th at p. 446.) The court found the defendant failed to "demonstrate an "essential connection between the illegal detention and the confession . . . . There is no evidence indicating that his eventual willingness to make admissions was caused by prolonged custody." (*Ibid.*; see also *People v. Turner* (1994) 8 Cal.4th 137, 176 ["[t]o justify exclusion of a statement, [a] defendant must show that the delay produced his admissions or that there was an essential connection between the illegal detention and admissions of guilt"].) The same is true here. Nothing in the videotape suggests his detention or lack of knowledge concerning the basis for his arrest played any part in his decision to admit his involvement in the crimes.

c. *The Maximization/Minimization Technique*

Finally, Valenzuela argues Detective Smey employed the "maximization/minimization technique" criticized in *Elias V.* and contends use of this technique was coercive. However, Valenzuela does not cite any authority for the proposition that *Elias V.*'s criticisms apply in the same way with respect to

adults.<sup>9</sup> To be sure, courts must consider the effect of such techniques when evaluating the voluntariness of a confession, but the ultimate inquiry turns on “*all* the surrounding circumstances both the characteristics of the accused and the details of the interrogation.” (*Schneckloth v. Bustamonte, supra*, 412 U.S. at p. 226.) Simply because Detective Smey either intentionally or in effect used the maximization/minimization technique does not necessarily render Valenzuela’s confession involuntary.<sup>10</sup>

In response to a similar argument challenging the use of maximization/minimization techniques as being coercive, the California Supreme Court in *Williams* wrote: “Defendant insists, however, that [the officers] coerced his statements during the first interview by engaging in practices assertedly disapproved by the United States Supreme Court in [*Miranda*]. He refers to the

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<sup>9</sup> In *Elias V.* the court noted its concern about the use of the “Reid Technique” in cases involving juveniles, not adults. (*Elias V., supra*, 237 Cal.App.4th at pp. 579, 587, 593 [the detective in *Elias V.* used the Reid Technique, the “classic work . . . quoted extensively . . . in *Miranda*” and “commonly employed in the custodial interrogation of *adults*”—despite the “growing consensus . . . about the need for extreme caution in applying [the same methods] to juveniles”].)

<sup>10</sup> Maximization tactics include: “making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspect’s mental state from confident to hopeless” and communicating “the interrogator’s rock-solid belief that the suspect is guilty and that all denials will fail.” (*Elias V., supra*, 237 Cal.App.4th at p. 583.) By contrast, “minimization” techniques “are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question.” (*Ibid.*)

high court's discussion of potentially coercive conduct such as threatening a defendant, using deception, displaying confidence in the suspect's guilt and directing questions solely at 'confirming . . . details' [citation] minimizing the accused's responsibility for the crime, and employing a 'good cop, bad cop' interrogation tactic. [Citation.] The *Miranda* decision, however, suggested that the advisements required by the opinion in that case would serve as a counterweight to the coercive pressure that may be exerted by the noted interrogation tactics. [Citations.] As we have explained, [the] defendant was advised of and waived the rights set out in *Miranda*." (*Williams, supra*, 49 Cal.4th at p. 442.) The same *Miranda* warnings given in this case supply the same counterweight to the coercive pressure of the maximization/minimization techniques.

Nor does the fact Detective Smey used deceptive tactics as part of the maximization technique render Valenzuela's confession involuntary and unreliable. Detective Smey certainly lied to Valenzuela when he claimed the police had matching DNA evidence and inculpatory audio recordings. Such deceptions, however, do not undermine the voluntariness of a defendant's statements unless the deception is ""of a type reasonably likely to procure an untrue statement."" [Citations.]" (*Williams, supra*, 49 Cal.4th at p. 443; *People v. Jones, supra*, 17 Cal.4th at p. 299 ["The detective implied at various times that he knew more than he did or could prove more than he could"; "[s]uch deception regarding the evidence was permissible, for it was not ""of a type reasonably likely to procure an untrue statement"""].) "Police officers are thus at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion. [Citations.]"

(*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280; see also *People v. Richardson* (2008) 43 Cal.4th 959, 993 [telling the defendant witnesses identified him when that was not true did not render his statements involuntary]; *People v. Smith, supra*, 40 Cal.4th at pp. 500, 506 [subjecting the defendant to a fake test described as a “Neutron Proton Negligence Intelligence Test” and informing the defendant the test proved he recently fired a gun did not render his statement involuntary]; *People v. Farnam* (2002) 28 Cal.4th 107, 182 [telling the defendant his fingerprints were found on the victim’s wallet when that was not true did not render his confession involuntary]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1241 [telling the defendant his fingerprints had been lifted from the victim’s skin when that was not true did not render his statements involuntary]; *People v. Mays* (2009) 174 Cal.App.4th 156, 166 [fake polygraph exam conducted at the defendant’s request was unlikely to produce a false confession].) In the present case, Detective Smey’s tactics, while deceptive, did not render Valenzuela’s statement involuntary and unreliable.

d. *Additional Considerations Demonstrate  
Valenzuela’s Confession Was Voluntary*

In addition to the examination of ““the crucial element of police coercion”” (*Williams, supra*, 49 Cal.4th at p. 436), courts must also consider the length, location and continuity of the interrogation as well as the maturity, education, physical condition and mental health of the defendant. (*Cunningham, supra*, 61 Cal.4th at pp. 642-643). Here, the length of the interview was relatively short—roughly one hour from the start of the interview until Valenzuela wrote his apology to R.O. (See *Cunningham*, at p. 644 [four-hour interview not coercive]; *People*

*v. Hill* (1992) 3 Cal.4th 959, 981 [eight hours of questioning over a 12-hour period not coercive], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) While the interview and interrogation took place in a small room, there was nothing particularly coercive about the environment. Valenzuela was not handcuffed and moved about freely. Given the short duration of the questioning, breaks were not necessary. Contrary to Valenzuela's contention, Detective Smey did not attack him, talk non-stop, or bombard him with questions. The video demonstrates quite the opposite. The officers were polite and empathetic. They never raised their voices or badgered Valenzuela. They were neither aggressive nor threatening.

Turning to Valenzuela's maturity, education, physical condition and mental health, none of these factors suggests Valenzuela was impaired or immature. Valenzuela was a man of mature years—47. He graduated from high school in El Salvador and had lived in the United States for over a decade. He worked construction and did not demonstrate any physical ailments.<sup>11</sup> A Spanish interpreter translated the conversation. Valenzuela did not have any trouble following and participating in the conversation, and nothing suggests Valenzuela suffered from any mental health issues or that the detective exploited any psychiatric problems in order to produce the incriminating statement. There is no evidence Valenzuela's abilities to reason or comprehend or resist were in fact so disabled that he was incapable of free or rational choice. (See *Cunningham, supra*, 61

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<sup>11</sup> At trial, Valenzuela testified he was trained as an electrician and plumber in El Salvador. He continued his trade in the United States and was familiar with building codes and the technical requirements needed to perform his jobs.



Cal.4th at p. 645.) While Valenzuela cried and was emotional at several points, his emotional responses were appropriate given the revelations about his sexual crimes. His distress was clearly attributable to his own actions, in recognition of the gravity of the harm he had caused, rather than any police conduct.

During the interview, Valenzuela did not complain about his well-being or treatment. He never asked to stop the interview. He never asked for a break. He volunteered information. No threats or promises were made by the officers. No physical force was used. He wrote out his own statement, in his own words, which he read out loud for the officers. Valenzuela referred to his own conduct as “ugly” no fewer than six times. He described his behavior as a compulsion similar to that of R.O.’s father’s drug problem.

Ultimately, the question is not whether Detective Smey used a maximization/minimization technique or employed deceptive tactics; he did. The question is whether under the totality of circumstances, Valenzuela’s confession was voluntary; it was. The psychological ploys utilized by Detective Smey were not so coercive to produce an involuntary and unreliable statement. As we have previously discussed, Valenzuela’s statements were corroborated by R.O.’s testimony and contained information only the perpetrator would know. As such, his statement was both externally and internally reliable. While Valenzuela confessed, in every sense of the word, he did not do so because his will was so “““overborne and his capacity for self-determination critically impaired”” by coercion.” (*Williams, supra*, 49 Cal.4th at p. 436.) The People established by a preponderance of the evidence that Valenzuela’s confession was

made voluntarily. The trial court did not err by admitting his statements at trial.<sup>12</sup>

E. *Valenzuela's Ineffective Assistance of Counsel Claim Lacks Merit*

Valenzuela argues his counsel failed to present evidence in support of his motion to exclude that, prior to his interrogation, he had been deprived of food, denied access to a shower, and denied use of a phone.<sup>13</sup> He argues these additional factors rendered him particularly vulnerable to Detective Smey's coercive tactics, and had the trial court known of these facts, the court would have granted his motion. Anticipating correctly these arguments would be forfeited on appeal because they were not raised below, Valenzuela posits the failure to present these arguments constitutes ineffective assistance of counsel.

1. *General Principles and Standard of Review*

“To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.’ [Citation.]” (*People v. Johnson* (2015) 60 Cal.4th

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<sup>12</sup> Valenzuela argues reversal is required because the erroneous admission of his confession was prejudicial. Because Valenzuela has failed to demonstrate error, we need not address this argument.

<sup>13</sup> Although Valenzuela testified to these matters at trial, defense counsel did not renew the motion to exclude.

966, 979-980; accord, *In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

“The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.’ [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 656; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875.) There is a presumption the challenged action or inaction “might be considered sound trial strategy” under the circumstances. (*Strickland v. Washington, supra*, 466 U.S. at p. 689; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Moreover, “[i]n reviewing a claim of ineffective assistance of counsel, we give great deference to counsel’s tactical decisions.” (*People v. Johnson, supra*, 60 Cal.4th at p. 980.) In addition, on a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel’s challenged act or omission. (*Gamache*, at p. 391; *People v. Centeno* (2014) 60 Cal.4th 659, 674-675 [“Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy””; “[w]hen the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, [the] defendant must show that there was ““no conceivable tactical purpose” for counsel’s act or omission”]; *People v. Anderson* (2001) 25 Cal.4th 543, 569.)

## 2. *Counsel's Performance Was Not Deficient*

Because there was a conceivable tactical purpose for not calling Valenzuela as a witness, Valenzuela's argument of deficient performance fails. The evidence Valenzuela was not provided with food, access to a shower or a phone was equivocal, at best. During the trial, Valenzuela initially testified he did not remember what he had eaten after his arrest. Later, he testified he was "[n]ever" offered food although he had been in custody for more than two days. Valenzuela testified he was never offered a shower and that he "was not provided with a phone in his cell that he could use." He testified he wanted to speak with his fiancé but was never able to do so.

The People called Officer Castillo to impeach Valenzuela on these very points. She testified the jails were required to provide food to inmates, indeed it was "mandatory." She testified arrestees were provided with the opportunity to shower and to use the telephone, and the holding tank where arrestees were placed after booking had a phone with instructions explaining how to make three free local calls. In his closing argument defense counsel tried to regain some of his client's credibility by telling the jury (twice) he was "certain" Valenzuela *had* been provided with food, even if he did not consider it "good food."

Given Officer Castillo's impeachment on these points, there is a rational tactical purpose for counsel's decision not to call Valenzuela as a witness at the hearing on the motion to exclude. Defense counsel may well have decided the videotaped interview presented the strongest case for exclusion. By calling Valenzuela as a witness, defense counsel risked exposing Valenzuela to cross-examination and to Officer Castillo's impeachment. Had defense counsel called Valenzuela at the hearing, he may well have found

himself in the position of explaining to the court, instead of the jury, that he was sure Valenzuela had been provided food.

3. *Valenzuela Has Not Shown Prejudice*

Valenzuela bears the burden of showing a reasonable probability that but for the asserted errors of counsel, the result would have been different—meaning a reasonable probability the trial court would have granted his motion to exclude. (*People v. Mayfield* (1993) 5 Cal.4th 142, 175-176 [“We conclude that there is no reasonable probability that the court would have granted a motion to [exclude] the taped evidence on grounds of involuntariness had counsel made such a motion”].) Valenzuela fails to make such a showing.

Even if Valenzuela’s belated concerns are added to the mix of available factors for the court’s consideration, there is no reasonable probability the trial court’s ruling would be any different. This is so because there is no indication any of these factors motivated Valenzuela to confess; the causal connection is therefore lacking. (*People v. Cunningham* (2015) 61 Cal.4th 609, 643 [“[a] confession is involuntary only if the coercive police conduct at issue and the defendant’s statement are causally related”].) As captured on the videotape, Valenzuela never mentioned he was hungry and never stated he had been deprived of food or a shower or access to a phone. He did mention he wanted to speak with his fiancé, but, nonetheless, continued talking with Detective Smey. There is no indication these factors had any impact upon Valenzuela’s decision to speak with the officers. Without this causal connection, Valenzuela fails to establish prejudice.

Valenzuela has not demonstrated deficient performance or prejudice. As a result, his claim of ineffective assistance of counsel fails.

### **DISPOSITION**

The judgment is affirmed.

BENSINGER, J.\*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.