

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO LOPEZ MARTINEZ,

Defendant and Appellant.

A134355

(Solano County  
Super. Ct. No. FCR285401)

A jury convicted appellant of two counts relating to possession of methamphetamine for sale, violations of Health and Safety Code sections 11389 and 11379, subdivision (a). When initially interviewed by the police and during a *Miranda*<sup>1</sup> admonition, appellant claimed that his English was limited and asked for an interpreter, which was promised but not provided. At trial, appellant's incriminating statements to the police officer were admitted into evidence over his *Miranda* objections. The trial court determined that appellant's waiver was voluntary and that his knowledge of English was sufficient for *Miranda* purposes. We conclude that even if admission of the statements was error, it was not harmful. We affirm.

I.

FACTUAL AND PROCEDURAL  
BACKGROUND

Appellant was under surveillance for months at a Dixon address where he was seen visiting many times before his arrest. The homeowner was never identified;

<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

however, a vehicle that appellant drove was “consistently associated” with the residence. Appellant entered and exited the home without knocking on different days that the residence was under surveillance, and he was sometimes seen using a key to open the front door. He also did yard work and was seen mowing the lawn at least once as well as going in and out of the garage. Numerous other people were seen visiting the house for brief periods, and an expert at trial said these visits were consistent with drug sales.

On June 8, 2011, after a police officer noticed two possible drug sales, he saw appellant leaving in his car, and the officer followed appellant. After officers initiated a traffic stop, appellant attempted to flee on foot. During his flight he ran past 1000 Silver Ridge Place but, as the officers’ view of appellant was partially blocked as he ran past this home, he was not seen disposing of a baggie containing methamphetamine that was later found in the backyard there. Appellant was arrested for possessing methamphetamine for sale. At the time of his arrest, he was Tasered.<sup>2</sup>

Also at the time of his arrest, appellant was found with \$120 in cash but no drugs. Officers found \$2,700 in cash and methamphetamine inside the house under surveillance. The methamphetamine was inside a baggie with a red stripe on it, which matched the baggie with a red stripe found along appellant’s escape route. The arresting officer interviewed appellant and administered the *Miranda* warning in English without any interpreter present. The interview was conducted by Officer Dustin Willis and recorded on audiotape.<sup>3</sup> In pertinent part the transcript reads as follows:

“Q I’ve got to tell you your rights real quick, okay? This is the official stuff, all right? You have the right to remain silent and not talk to me;

“A Wow.

“Q You have the right to have a lawyer present while I’m talking to you—

---

<sup>2</sup> No arguments have been made about the effects this may have had, if any, on the statements by the appellant.

<sup>3</sup> The audiotape recording and a transcript thereof were transferred to this court for review after the court granted appellant’s motion to augment the record.

“A *Where is that man that was explaining to me.*<sup>[4]</sup>

“Q I don’t—he’s not here, and you speak English well enough, so I’ve got to talk to you first *and I’ll find a Spanish speaker for you later, okay? We’ll talk again, okay?* [¶] All right, listen to me: [¶] You have the right to remain silent. Okay? [¶] Anything you say can and will be used against you in court; [¶] You have the right to an attorney and to have an attorney present both before and during any questioning; [¶] If you cannot afford to hire an attorney, a lawyer, one will be provided for you free of charge. [¶] Do you understand?

“A *(no audible reply heard)*

“Q What don’t you understand?

“A *Half.*

“Q What part?

“A *I don’t remember.*

“Q Dude, you speak English fine. I’m—

“A *I—talk to me slow.*

“Q If you don’t talk to me right now, that’s—

“A *Talk to me slow, Man.*

“Q Okay, Man. You—you have the right to a lawyer—

“A Because I have—

“Q Listen.

“A Okay. ¶ . . . ¶

“Q Okay: You have the right to a lawyer before I talk to you and while I talk to you. [¶] Do you understand that?

“A I don’t need to tell you, I got a 90—99 percent of—of jail. ¶ . . . ¶

“Q Okay, do you understand everything, then?

---

<sup>4</sup> The parties agree, and our independent review of the audiotape confirms, that appellant can be heard requesting the man “*who speaks Spanish,*” supporting an inference that someone previously had been “explaining,” i.e., translating, words from English to Spanish for him. (Italics added.)

“A I think.

“Q Yes, or no?

“A I think.

“Q You said ‘yes’ to everything, so *I am trying to figure out if you understand everything.*

“A You say I need—you got a lawyer all to free—

“Q Yes, you get a lawyer. ¶ . . . ¶

“Q Okay. *I will get a Spanish speaker later and we’ll talk again* but just in case I can’t find one real soon, that’s why I’m talking to you right now, okay? [¶] Do you understand why you’re going to jail?

“A Why?” (Italics added.)

The incriminating statements tying appellant to the two baggies were then made. At trial appellant sought to suppress the incriminating statements with a motion in limine. The trial court reviewed the audiotape transcript and listened to the tape. The trial court allowed the incriminating statements in through the testimony of the police officer who questioned appellant, determining that there was no right to an interpreter because appellant understood what had been said, and that there was no *Miranda* violation.

## II. DISCUSSION

Appellant contends that because an interpreter was not present and because he did not understand the questions, he did not give a knowing, intelligent, or voluntary waiver of his *Miranda* rights during his post-arrest interview. Appellant argues that his incriminating statements should have been suppressed. The trial court determined that under the totality of the circumstances the waiver was voluntary even though “it would have been better to have an interpreter.”

A. *Miranda rights must be knowingly and intelligently waived.*

Pursuant to *Miranda*, “a custodial suspect must be warned prior to interrogation ‘that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.’ ” (*People v. Hill* (1992) 3 Cal.4th 959, 982, quoting *Miranda, supra*, 384 U.S. at p. 444; *Hill* overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) The *Miranda* procedures assure that the accused is accorded his privilege against self-incrimination under the Fifth Amendment to the federal constitution. (*People v. Whitson* (1998) 17 Cal.4th 229, 244.) “After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.” (*Miranda* at p. 479.)

The determination of whether a defendant’s waiver of his *Miranda* rights was knowing, intelligent, and voluntary involves two components. (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *People v. Whitson, supra*, 17 Cal.4th at p. 247.) “ ‘First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]’ ” (*Whitson* at p. 247., quoting *Moran*, at p. 421.) What is required is that the defendant comprehend all of the information that the police are required to convey by *Miranda*. (*People v. Clark* (1993) 5 Cal.4th 950, 987, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

No particular manner or form is required to signify an acceptable waiver. (*Miranda, supra*, 384 U.S. at pp. 444-445; *In re Paul A.* (1980) 111 Cal.App.3d 928, 934-

935.) A valid waiver may be express or implied. (*People v. Whitson, supra*, 17 Cal.4th at p. 246.) If the suspect was advised of his rights, said he understood them, did not request an attorney, and chose to speak to police, an implied waiver may be found. (*Moran v. Burbine, supra*, 475 U.S. at pp. 422-423; *People v. Sully* 53 Cal.3d 1195, 1233; *People v. Johnson* (1969) 70 Cal.2d 541, 558, disapproved on another ground in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8.) The question of waiver must be determined on the totality of the circumstances surrounding the case. (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375; *People v. Bradford* (1997) 14 Cal.4th 1005, 1034.) The prosecution must establish the validity of the defendant's waiver by a preponderance of the evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 383.)

*B. The absence of a requested interpreter is not independently significant.*

“Included in the totality of circumstances standard are such factors as age, intelligence, education and ability to comprehend the meaning and effect of a confession.” (*In re John S.* (1988) 199 Cal.App.3d 441, 445.) We are also guided in our inquiry by: “(1) whether the defendant signed a written waiver, *See* [*United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749,] 752-753; *United States v. Bautista-Avila*, 6 F.3d 1360, 1365 (9th Cir.1993); (2) whether the defendant was advised of his rights in his native tongue, *see id.*; *United States v. Gonzales*, 749 F.2d 1329, 1336 (9th Cir.1984); (3) whether the defendant appeared to understand his rights, *see id.*; (4) whether a defendant had the assistance of a translator, *see Bernard S.*, 795 F.2d at 752-753; (5) whether the defendant's rights were individually and repeatedly explained to him, *see Derrick [v. Peterson* (9th Cir. 1990)] 924 F.2d [813,] 824; and (6) whether the defendant had prior experience with the criminal justice system, *see* [*United States v.*] *Glover* [(9th Cir. 1979)] 596 F.2d [857,] 865.” (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 538.) To decide the issue of voluntariness, we examine the entire record of the facts surrounding the statements, not only the characteristics of the accused, but also the nature of the interrogation. (*People v. Hall* (2000) 78 Cal.App.4th 232, 239; *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)

C. *The waiver was not knowing and voluntary.*

The trial court relied on the audiotapes, which this court has independently reviewed. “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.” (*People v. Vasila, supra*, 38 Cal.App.4th at p. 873.)

Appellant’s claim of involuntariness is based upon lack of comprehension of his rights due to his inability to fully understand English. We agree with appellant that any language impediments to his understanding of the *Miranda* warnings must be considered to determine if there has been a valid waiver. (*United States v. Bernard S., supra*, 795 F.2d at pp. 751-752.) “In determining whether a defendant knowingly and intelligently waived his *Miranda* rights, we consider, as one factor, any language difficulties encountered by the defendant during custodial interrogation.” (*United States v. Garibay, supra*, 143 F.3d at p. 537.) We look to the entire record, however, and particularly the transcripts and tape recordings of his statements as the best sources of proof of his inability to comprehend and voluntarily waive his rights. (*United States v. Bautista-Avila, supra*, 6 F.3d at p. 1366; *Bernard S., supra*, at p. 752.)

The test for voluntariness “ ‘examines “whether a defendant’s will was overborne” by the circumstances surrounding the giving of a confession.’ ” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.) Aspects of the conduct of the interrogation to be considered include whether promises, threats, or intimidation were used to induce the statement, whether the defendant was deceived by police (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209-210), whether the defendant’s will was broken through a denial of “creature comforts,” or through trickery. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1484-1486.)

Upon review of the transcript of the interview and after listening to the audiotape recording, we conclude that appellant may not have adequately understood the nature of the proceedings and the rights he relinquished. Appellant was not provided with a Spanish interpreter, and the admonition was not provided in Spanish. (Cf., *United*

*States v. Garibay, supra*, 143 F.3d at p. 539.) In fact, appellant was twice promised that an interpreter would be provided, and the failure to promptly provide one when requested may violate fundamental fairness during custodial questioning. (*People v. Carreon* (1984) 151 Cal.App.3d 559, 567.) Such tactics may even amount to trickery. (*People v. Cruz* (2008) 44 Cal.4th 636, 668-669.)

*D. The admission of the statements was harmless error.*

We nonetheless conclude that any error in admitting appellant's statements was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-310; *Chapman v. California* (1966) 386 U.S. 18; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) There was more than enough evidence, without appellant's statements, to support his conviction: appellant's activity at the home under surveillance for months before his arrest, his attempted escape when stopped, the baggie located exactly along the escape route that matched the baggie in the home connected to him, and the large amount of cash found in the home, collectively show that the error in admitting the incriminating statements meets the harmless error standard. Moreover, although the prosecutor mentioned appellant's incriminating statements during closing argument, she argued that even without appellant's statement, there was strong circumstantial evidence to convict him. The prosecutor placed great emphasis on appellant's flight after police tried to stop his vehicle. On the record before us, we conclude that any error in admitting the evidence was harmless beyond a reasonable doubt.

### III. DISPOSITION

The judgment is affirmed.

---

Baskin, J.\*

We concur:

---

Reardon, Acting P.J.

---

Rivera, J.

\* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.