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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LYLE GILBERT,

Defendant and Appellant.

A137244

(Alameda County
Super. Ct. No. H49894)

Defendant Lyle Gilbert was sentenced to 15 years to life in prison after conviction by a jury of two counts of sexual penetration of a child under age 10 (Pen. Code, § 288.7, subd. (b)). Gilbert argues that the court erred when it denied his motion to suppress his admissions to police on the ground that they were involuntary. Based on our independent review of the record, we conclude that Gilbert’s confession was voluntary and affirm the judgment.

I. BACKGROUND

This appeal arises from Gilbert’s second trial on these charges. The first ended in a mistrial when the jury could not reach a verdict.

Gilbert’s daughter S. testified that he inserted his finger into her vagina on two occasions when she was nine years old. The crimes occurred when S. was visiting Gilbert in his mother’s home, where he lived after he separated from his wife Julie, S.’s mother. S. was molested at night on a bed in Gilbert’s bedroom, where she would sleep with her younger brother during her visits.

S. continued to visit Gilbert for about a year before disclosing the incidents to Julie in February 2010. Julie took S. to the doctor, and was contacted by the police. In March, S. was interviewed at the Child Abuse Listening and Interviewing Center, and Gilbert was interviewed by police detective Huiskens. Huiskens arranged to have Julie make recorded “pretext” phone calls to Gilbert from the police station on April 1, 2, and 6. In those conversations, Gilbert denied S.’s allegations. However, he admitted molesting S. when he was interviewed by police after he was arrested on April 6.

During the interview, Gilbert said he touched S.’s vagina under her underpants, and that his finger might have penetrated her vagina. He eventually acknowledged that there may have been two incidents, and described the second as more “severe” than the first. He said, “I need help. I need to go talk to somebody. . . . [¶] Because I did it and I feel bad.” He said, “[I]t’s one of those things where you wish you could go back in time. I—I don’t know what I was trying to accomplish. I don’t know why it happened. I don’t know what I was trying to do. Like you ask me if I was aroused—no. I’m totally attracted to women. You know? Women my age. It’s just—it’s just—it makes me—like I told (Julie)—I told (Julie)—it makes me ill. It makes me sick. To think about it and you know, you know that I did that to my own daughter is—just makes me sick. It’s going to be—but you were right about what you said. You know? It—it eats you alive. [¶] . . . [¶] It doesn’t go away.” He said, “I just don’t want my daughter to grow up . . . [¶] . . . Knowing that her daddy called her a liar. [¶] . . . [¶] . . . I care more about that than anything.”

The officers offered Gilbert the opportunity to write an apology letter to S., and Gilbert wrote: “To my baby girl, my dearest [S.]: I write this letter to you wanting to let you know I am sorry, so sorry, sweetheart. I have caused you a lot of pain. I want you to know that I love you very much and I don’t want you to grow up feeling bad. I made a huge mistake, and I want you to be happy someday and have a wonderful life. I hope someday we can be close again. You were always a daddy’s girl. I miss you very much. Remember, I love you and [your brother] very much. I never meant to hurt either of you. Love, Daddy.”

Toward the end of the interview, after making his incriminating admissions and writing the letter of apology to S., Gilbert said, “This is crazy – whatever. Fucking absurd. (Julie) tricked me. She tricked me.”

At trial Gilbert testified that he never molested S. He said that he confessed because “I didn’t want [S.] to grow up to be screwed up, and I wanted to save her life, and I just wanted to make sure that she was okay.” When he confessed, he was “very nervous.” He said, “They were asking me things and I just wanted to cooperate. . . . I am not a fighter.”

Social psychologist Richard Ofshe, an expert in “influence during interrogation and the phenomenon of false confession,” testified for the defense that false confessions can result from “psychological coercion, linking a benefit to agreeing to what I want you to say, linking a harm to continuing to deny you did what I’m accusing you of having done.”

II. WHETHER GILBERT’S CONFESSION WAS INVOLUNTARY

A. Record

Gilbert filed a motion in limine to suppress his confession to the police, arguing that “it was involuntary and the product of coercion by both the wife, Julie, as a police agent and/or as a private person, and the product of coercion by the police officers in the final interrogation. Defendant’s will was overborne by the promises and threats made by Julie and the police officers.” In ruling on the motion, the court considered the three pretext calls by Julie, the interview that produced Gilbert’s admissions, and Gilbert’s testimony from the first trial.

Detective Huiskens testified at the hearing on the motion that she may have written notes to Julie during the pretext calls, but she did not give Julie a script to follow, or say anything to her about making promises or threats. She simply told her “to call Lyle on the phone and just initiate a conversation with him and talk with him like she would normally talk to him . . . on any day, and to just see if he would talk about the allegations that [S.] made”

In the first call, when Julie said that S. “has to know that you validated what happened so that she can get through this,” Gilbert responded, “I’m not gonna sit there and say that I did it when I didn’t do it.” When Julie told Gilbert that she could ensure that his mother and grandmother could see S. and her brother if he could “come clean about this,” Gilbert said, “You feel that I’m lying. You feel that something happened, and I didn’t do that.” Julie said, “They’re gonna drop the case if I don’t press it any further. I’ll do that for you and for [S.], if you tell me the truth, Lyle, if it’s between me and you.” Gilbert replied, “Oh my god. Julie, I have never, ever touched [S.] in those areas ever. Okay? I used to change her damn diaper.”

In the second call, Julie said, “I want you to be able to parent your children and if you got help, Lyle, I have a feeling that this could all be healed.” Gilbert said, “I’m not a child molester.” Julie said, “If you were willing to admit that you did something, this would help me to help you. . . . [¶] [¶] . . . I wanna help you. [S.] wants to help you. She doesn’t want you to go to jail. But she is adamant that if you call her a liar and say that she is not telling the truth that she is never going to forgive you, Lyle. You will never have a relationship with her unless you can give her something to go off of here. She needs you to try to remember, to try to be honest. Try to remember, Lyle. Try to remember.” Gilbert answered, “I’m trying to remember, but I don’t remember doing anything.”

In the third call, when Julie said, “Lyle, she told me that you put your fingers in her vagina, and you touched her,” Gilbert said, “No. No, there’s no way possible. I—I—there’s no way I could do that, Julie. Come on.” As the conversation was winding down, Julie said, “You’re not admitting anything. You’re not admitting that you did anything.”

During his police interview with Detective Huiskens and another officer, Gilbert was advised of his *Miranda* rights before he was questioned about S. He was asked, “[H]aving these rights in mind, do you wish to talk to us now?” He answered, “I don’t have a problem just talking with you. I do have a lawyer, though.” When he was asked again whether he had a “problem talking to us right now?” he said, “[N]o, I don’t but . . . I think that [the lawyer] needs to be notified that I’m here.”

Gilbert said that Julie had been calling, “trying to get the truth out of me,” and that “she didn’t want to involve the police. She wanted me to work this out with her.” The officers told Gilbert that S.’s allegations were “the kind of thing that can derail a life,” and “can really fuck up a little girl. So what were looking for from you . . . is . . . a little bit more honesty for [S.]” Gilbert asked, “Say I go to jail—how is that helping [S.]?” and added, “ ’Cause that’s something that me and (Julie) discussed about. And (Julie) told me that she didn’t want the police involved. But here I am sitting here. [¶] . . . [¶] So, I’m confused.” Gilbert was advised: “Well, some things are out of her hands (Lyle). [¶] A lot of things now. [¶] Even if (Julie) called me today and said, Heather — you know, if I called her and said, hey (Julie), (Lyle)’s in jail right now and she says, well let him go—I don’t want it—I don’t want to do anything . . . [¶] . . . [¶] She couldn’t.”

The police then returned to the harm S. would suffer if her allegations were falsely denied, saying, “she could become a prostitute. She could drop out of school. [¶] . . . We want this girl to—to go on and marry and have children. Get a college degree. We want her to be successful. And . . . this is huge. What’s happening to her right now. [¶] . . . [¶] And it’s huge for you in that you have the ability as the adult to set her on the right course. [¶] She needs to have faith in you and in (Julie). And she needs to believe that if I come forward and talk about these things, that you’re going to be there to support her” The officers asked Gilbert to “save [S.’s] life from being derailed.” They were “kind of pleading with [him] at this point.” Gilbert told them, “Well, I’m being honest.”

The officers said, “[T]his has been nagging you since it happened. [¶] You haven’t been feeling good.” Gilbert acknowledged “having a hard time . . . [¶] . . . [¶] living with myself.” The officers said, “Well, what happened? ’Cause then we can help . . . [¶] Yeah. Tell us—tell us your story so we—can try to understand. . . . [¶] . . . [¶] I want to be able to help you find some clarity in this . . . [¶] . . . You have all the body language—this is wearing the crap out of you and you don’t feel good . . . [¶] . . . [A]s horrible as you feel, the minute you’re able to get it out, you—a huge weight is going to come off you because now you start moving forward. You start healing. You start rebuilding.” Gilbert responded, “I don’t even know what I was looking for. I don’t.” He

said, “I don’t understand why it even happened,” and the officers said, “Well tell us what happened and then we can talk more about that. . . . You’re this close—come on. [¶] . . . [¶] Take that . . . step with us. We’re here to listen. We’re not sitting in judgment. . . . We’ve all made mistakes” At that point, Gilbert began describing an incident when S. was sleeping in her underwear and pajamas. He hesitated, saying, “There’s just so many things going through my mind right now. Q1: What’s going through your mind? A: I made a big mistake. And my life to come to an end.”

The officers reiterated that S. “needs to grow up and have a family . . . and be successful. [¶] . . . [¶] We need to put her on that right track and unfortunately, you are the only guy that can do that.” Gilbert said, “I don’t know what I want—what I wanted to accomplish by doing that. I don’t. I mean, I—it wasn’t a sexual thing. I—I could—I—I don’t understand. I mean, I’m attracted to – to grown women.” He then continued confessing, and said specifically what he had done to S.

Gilbert testified at his first trial that he believed Julie when she told him in the first pretext call that he would not be prosecuted if she did not press charges.

The court denied Gilbert’s motion in limine to exclude his admissions, finding no “sufficient basis” to conclude that the statements were involuntary. The court stated: “When I consider all the things that were proffered by the Defense with regard to voluntariness, it seems to me that there are no what I would consider threats from the police, there are no promises of leniency from the police. Julie Gilbert may have said certain things, but I don’t know that it’s established that Julie Gilbert is an agent of the police.”

Gilbert renewed his motion to suppress after Huiskens and Julie testified at trial, arguing that Julie “made promises to [him] that caused the confession to the police.” The court again denied the motion, noting that Gilbert “did not make any admissions” to Julie and thus “there was not coerciveness where his will was overborne in any of the pretext phone calls.”

B. Analysis

Admission of an involuntary confession into evidence violates a defendant's state and federal rights to due process. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208.) A confession is involuntary when, in light of the totality of the circumstances, the defendant's choice to confess "was not 'essentially free' because his will was overborne." (*People v. Memro* (1995) 11 Cal.4th 786, 827.) The confession or admission must be shown to be voluntary by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63, 71.) The issue is determined on the record as a whole, taking into account the character of the accused and the details of the interrogation. (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) Whether a confession was voluntary is subject to our independent review, but we must accept the trial court's factual findings if they are supported by substantial evidence. (*People v. Richardson* (2008) 43 Cal.4th 959, 992–993.)

Promises of benefit or leniency can render a confession involuntary if they are a " 'motivating cause' " of the defendant's admissions. (*People v. Williams* (1997) 16 Cal.4th 635, 660; see also *People v. Cahill* (1994) 22 Cal.App.4th 296, 316 [promises were "dominant focus" of the interrogation].) " 'A confession may be found involuntary if extracted by threats or violence' " (*People v. McWhorter* (2009) 47 Cal.4th 318, 347.) Gilbert argues that his admissions were involuntary because they were the product of improper promises and threats.

Gilbert cites Julie's false representation during the first pretext call that she could ensure that he would not be prosecuted. However, this promised leniency could not have been the motivating cause of Gilbert's admissions because the police advised him before he admitted his crimes that Julie could not secure his release from custody. Moreover, Gilbert was not coerced by anything Julie said during the calls because, as the trial court observed, he admitted nothing in the phone calls.

Gilbert contends that the police improperly threatened him during the interview when they told him that S.'s life would be ruined unless he corroborated her allegations. He argues that "[t]his emotional blackmail . . . was so powerful as to overwhelm his

will.” However, the officers were not threatening any action by law enforcement, they were merely predicting the psychological damage S. would suffer if Gilbert did not confess. The police employed what Gilbert’s expert called “psychological coercion” during the interview, pointing out the benefits of a confession (S.’s life would be saved, he would feel better if he came clean, he could begin healing), and the harm that would result from continued denials (S. would become a prostitute, he would be crippled with guilt). But such “psychological coercion” is not unlawful. The police did not threaten Gilbert or S. with any harm from the state, or promise Gilbert any benefit in connection with his case. “[When] the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct, the subsequent statement will not be considered involuntarily made.” (*People v. McWhorter, supra*, 47 Cal.4th at p. 358; internal quotation marks omitted.)

Gilbert also argues his confession was involuntary because “the police intentionally kept him from contacting his retained counsel.” But he never asked to speak to counsel, he just requested that his counsel be notified of his arrest.

Gilbert argues that he was especially vulnerable to manipulation, noting that he had only a high school education and never before been arrested. But nothing in the record suggests any particular vulnerability. Gilbert was an articulate, 39-year old Gulf War veteran, former semi-pro football player, and long haul truck driver. We fail to see his vulnerability. In any event, no improper manipulation occurred.

The motions to suppress were correctly denied.

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.