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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

HUMBERTO TAPIA LINO,

Defendant and Appellant.

2d Crim. No. B229163
(Super. Ct. No. 2009035782)
(Ventura County)

Humberto Tapia Lino appeals a judgment following conviction of two counts of aggravated sexual assault of a child, and two counts of continuous sexual abuse of a child, with a finding that he committed the sexual offenses against more than one victim. (Pen. Code, §§ 269, subd. (a)(1), 288.5, subd. (a), 667.61.)¹ We affirm.

FACTS AND PROCEDURAL HISTORY

Lino lived with his wife and two minor daughters, M. and S., in Simi Valley. For many years Lino committed sexual acts, including sexual intercourse and oral copulation, on his daughters.

At trial, M. testified that her father first committed sexual acts on her when she was three years old. The acts continued until she was 11 years old. (Count 3.) M. stated that her father would have intercourse with her "whenever he felt like it," and

¹ All further statutory references are to the Penal Code.

threatened to "belt" her if she informed anyone. M. informed her mother, but her mother did not believe her.

M. testified that Lino raped her on September 5, 2009, and again on September 7, 2009. (Counts 1 & 2.) On each occasion, Lino pulled her into his bedroom despite her protests and resistance. Following the latter incident, M.'s mother entered the bedroom, argued with Lino, and instructed M. to shower.

On another occasion, M. saw her father and her sister in bed together without their clothing. Lino was on top of S., who was trying to slip away. Lino ordered M. to leave the room.

M. realized that her father's sexual acts were wrong when she saw a television program concerning the apprehension and arrest of a man who had molested a relative.

S. testified that her father first had sexual intercourse with her when she was eight years old. For the next four years, he engaged in sexual intercourse and oral copulation with her. S. would struggle and resist, but her father was stronger and heavier. (Count 4.) On one occasion, S. saw her father engaging in sexual activity with M.

In September and October 2009, Simi Valley police officers interviewed M. and S. M. described two recent acts of sexual intercourse with her father, as well as other sexual acts that began when she was three years old. S. stated that her father had sexual intercourse with her "[t]wo or three" times in 2007, and warned her not to tell anyone.

Nurses examined M. and S. as part of a forensic medical examination following the girls' complaints of sexual assault. The nurses found that each girl suffered a complete tear to the hymen, consistent with multiple acts of sexual penetration.

Lino's Police Interview

On September 29, 2009, Simi Valley Detective David Del Marto interviewed Lino. In English, Del Marto informed Lino of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, 479, and inquired if he would consent to an interview. Lino replied, "Yeah, why not." The interview proceeded in the English language.

Lino stated that his daughters attempted "to play" with him, but that he resisted and warned M. that he could "get in jail" and she could "get in trouble too." As the interview proceeded, however, Lino admitted that he had engaged in sexual activities with his daughters for about six months, including oral copulation and rubbing his penis on their genitals. Lino stated that he would ejaculate into his hand. He added that he engaged in the sexual activities "to try to instruct [them] to don't do things like this without protection or . . . get pregnant." During the interview, Lino also stated: "I've destroyed . . . my life. . . . I feel really, really miserable." At trial, the prosecutor played a recording of the police interview.

M. and S. also testified at trial that the family spoke English at home and that their father spoke "[m]ainly" English.

Sentencing

The jury convicted Lino of two counts of aggravated sexual assault of a child, and two counts of continuous sexual abuse of a child. (§§ 269, subd. (a)(1), 288.5, subd. (a).) It also found that he committed the sexual offenses against more than one victim. (§ 667.61.) The trial court sentenced Lino to a prison term of 60 years to life, consisting of four consecutive 15-years-to-life terms. The court ordered victim restitution, imposed fines and fees, including a \$1,000 restitution fine and a \$1,000 parole revocation restitution fine, and awarded Lino 357 days of actual presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

Lino appeals and contends that the trial court erred by admitting evidence of his inculpatory statements made during the interview with Detective Del Marto.

DISCUSSION

Prior to trial, Lino sought to exclude evidence of statements made during the police interview, asserting that his limited understanding of the English language precluded a valid waiver of his rights pursuant to *Miranda v. Arizona*, *supra*, 384 U.S. 436. At a subsequent evidentiary hearing, Lino testified that he did not understand his *Miranda* rights, particularly that he could request a lawyer to represent him. Lino stated that he did not request the assistance of an interpreter during the interview due to his

pride. He also testified that he has a sixth grade education but conceded that he has lived in the United States since 1987 and speaks the English language with his family.

Prior to ruling, the trial court listened to the recording of the custodial police interview. The trial judge noted that Detective Del Marto spoke "very clearly and very slowly" and that Lino engaged in conversation and responded appropriately to questioning. The judge also remarked that Lino used the word "hallucinate" during the interview and at no point did he state that he did not understand a particular question. The court then denied the suppression motion, stating that Lino's contention that he did not understand the word "attorney" (as opposed to "lawyer") was not credible. The court also relied on Lino's express waiver of an interpreter at the preliminary examination.

Lino now argues that the trial court erred by admitting evidence of his inculpatory custodial statements in violation of his Fifth Amendment rights. He contends that he did not knowingly waive his right to remain silent due to his limited command of the English language, minimal education, and lack of experience with the criminal justice system. (*U.S. v. Garibay* (9th Cir. 1998) 143 F.3d 534, 537-539 [defendant with mental deficits and limited English language skills did not voluntarily and intelligently waive *Miranda* rights].) Lino points out that Del Marto did not read the *Miranda* warnings in the Spanish language, provide a written explanation of the *Miranda* rights, nor ask if he required an interpreter. (*Id.* at pp. 538-539.) He asserts that the error is not harmless beyond a reasonable doubt because his daughters' testimony was not credible.

A defendant may waive the rights conveyed by the *Miranda* warnings provided the waiver is made voluntarily, knowingly, and intelligently. (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *People v. Combs* (2004) 34 Cal.4th 821, 845.) There are two parts to this inquiry: First, the relinquishment of rights must be voluntary in the sense of a free and deliberate choice, rather than intimidation, coercion, or deception. (*Ibid.*) Second, the waiver must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. (*Ibid.*)

At trial, the prosecution bears the burden of establishing the voluntariness of a defendant's waiver and confession by a preponderance of the evidence. (*People v.*

Guerra (2006) 37 Cal.4th 1067, 1093, overruled on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Whitson* (1998) 17 Cal.4th 229, 248.) The voluntariness inquiry considers the totality of the surrounding circumstances--the characteristics of the accused and the details of the interrogation. (*U.S. v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 751, disapproved on other grounds by *U.S. v. Dozier* (9th Cir. 1987) 826 F.2d 866, 871 [validity of waiver depends on totality of the circumstances, including background, experience, and any language difficulties of defendant]; *People v. Cruz* (2008) 44 Cal.4th 636, 668; *Guerra*, at p. 1093.)

In reviewing a defendant's claim that his *Miranda* rights were violated, we accept the trial court's resolution of disputed facts and inferences that are supported by substantial evidence. (*People v. Cruz, supra*, 44 Cal.4th 636, 667.) We also accept the trial court's determinations of witness credibility. (*Ibid.*) We independently assess, however, whether defendant's waiver and statements were voluntary, knowing, and intelligent. (*People v. Guerra, supra*, 37 Cal.4th 1067, 1092.)

Considering the totality of the circumstances, the trial court did not err by deciding that Lino voluntarily waived his *Miranda* rights. (*U.S. v. Bernard S., supra*, 795 F.2d 749, 753 [defendant stated that he understood each right as explained, answered the interrogation in the English language, and did not indicate that he did not understand the questioning]; *People v. Combs, supra*, 34 Cal.4th 821, 847 ["Defendant was told in no uncertain terms that he had the right to consult with, to be represented by, and to have an attorney present before and during questioning, and the further right to have counsel appointed if he was indigent. He never requested an attorney or indicated that he wished to end the interview".]) Del Marto properly stated the *Miranda* warnings to Lino, who replied that he understood and agreed to be interviewed. Lino's responses to questioning were appropriate and he did not state any lack of understanding. (During questioning, for example, Lino stated that his wife did not "hallucinate" events, but that she "overreacts.") Del Marto also informed Lino that it was "up to [him]" whether to agree to be interviewed and that he could "choose to talk." Moreover, at the later preliminary

examination, Lino refused to use an interpreter and also attempted to speak to the court directly in the English language.

Lino had resided in the United States for 22 years prior to his arrest and interrogation. He was employed as an air conditioning installer at the time of his arrest. Family members spoke the English language at home. Although Lino may have minimal education, there was no evidence that he had mental deficits. (*U.S. v. Garibay, supra*, 143 F.3d 534, 538 [Spanish-speaking defendant was "borderline retarded"].) Moreover, Lino has a prior conviction for driving under the influence of alcohol and presumably knows the meaning of "attorney."

In sum, the trial court did not err by finding under a totality of the circumstances that Lino's waiver of his *Miranda* rights was voluntary, knowing, and intelligent.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Rebecca S. Riley, Judge
Superior Court County of Ventura

Jennifer A. Mannix, under appointment by the Court of Appeal, for
Defendant and Appellant.

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