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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE SIMPSON,

Defendant and Appellant.

C067056

(Super. Ct. No.
SF114762A)

As octogenarians Lawrence and Rosina Arebalo were unloading their car and putting away groceries, defendant Willie Simpson entered their garage and then their house, assaulted both of them, and stole Rosina's purse.¹ A jury convicted defendant of first degree robbery (Pen. Code,² § 211) and first degree

¹ Because the Arebalos share the same last name, we shall refer to them by their respective first names.

² Further undesignated statutory references are to the Penal Code.

burglary (§ 459), both with an enhancement for crimes against the elderly (§ 667.9, subd. (a)), and two counts of misdemeanor elder abuse (§ 368, subd. (b)(1)). The trial court found true allegations that defendant had a strike prior (§§ 667, subd. (b)-(i); 1170.12), a prior serious felony conviction (§ 667, subd. (a)), and had served a prior prison term (§ 667.5, subd. (a)) for attempted robbery in case No. SF097665A.

Sentenced to 19 years in prison, defendant appeals. He contends the trial court erred in admitting his confession, which he claims was coerced, and that his counsel was ineffective in litigating the suppression motion.

We find defendant's confession was voluntary and there was no ineffective assistance of counsel. However, because the trial court improperly imposed enhancements under both section 667, subdivision (a) and section 667.5, subdivision (a) for the same offense, we stay execution of sentence on the lesser enhancement. With that modification, we otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Crimes

Rosina lived with her husband Lawrence and her twin sister. On the morning of April 23, 2010, the two women went grocery shopping. First, they stopped at the bank where Rosina withdrew \$600. They returned home with the grocery bags in the trunk of the car. Lawrence came out to the garage to unload the groceries.

As Lawrence was unloading the bags, defendant grabbed him from behind and forced him to turn around, tearing his trousers. Defendant told Lawrence he was going to rob him. Lawrence yelled, "help." Rosina opened the door to the garage and came face to face with defendant, whom she described as a "monster." Defendant punched her and she fell; he hit her again as she tried to get up. Defendant took Rosina's purse and fled through the garage; as he ran past Lawrence, defendant pushed Lawrence against the car.

Heather and Donald Ferido were driving by when they saw defendant running out of the Arebalos' garage with something under his arm. Defendant entered a van through an already open driver's door. The Feridos wrote down the license plate number of the van and went to be with the Arebalos. When the police arrived, Donald Ferido gave an officer the van's license plate number.

II

The Investigation

The police determined the van was registered to Monisha Roots, defendant's wife. A patrol officer, who was on the lookout for the van, saw it leaving a residence. He followed the van a short distance, stopped it, and detained the occupants. Defendant was driving; his wife was a passenger and two children were in the backseat.

Detective Michael Perez prepared a photographic lineup including defendant's picture and showed it to the Feridos. They both identified defendant as the man they saw running from

the garage. Back at the station, Perez first spoke with Roots and then interviewed defendant.

III

Defendant's Statements and Letter of Apology

After advising defendant of his rights per *Miranda*,³ Perez asked him about his wife and told defendant she was upset. Perez explained that law enforcement had obtained the van's license plate at a robbery. The police had asked his wife who drove the van and she had provided a list. The only one on the list who matched the description of the robber was defendant. Defendant denied that he was near the location or committed a robbery.

Perez told defendant police would search his house, the van, and his wife's purse, and asked if they would find stolen property. Defendant said no, but admitted they might find a crystal pipe. Perez said they were looking for cash and noted there was a lot of cash in Roots's purse. Defendant explained his wife had \$900 from cashing her check.

Perez told defendant that he was not being honest and repeatedly questioned him about whether he had a weapon. Defendant admitted that he had handed his wife two pieces of crystal methamphetamine when the police were following them earlier and that he had a drug habit. Perez told defendant,

³ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

"The meth is on her and she's going to get booked for that."

Defendant responded, "Ok, I can respect that."

Defendant asked what his wife's position was. Perez said, "She's out of the vehicle, we got it at the tow yard, she's here and she's got meth on her and then we got two kids." He explained that children can be released only to a biological parent,⁴ not a grandmother. Then Perez said, "But, see, what we're not going to do is hang the kids over your head. . . ." Defendant again asserted that the methamphetamine in his wife's purse was his, but Perez asked, "How can we believe you on that if you won't tell the truth about the robbery?" Defendant responded he was going to tell the truth about everything, but he needed an "understanding" about his wife because she was pregnant and he did not want her "going through."

Defendant asked if his wife would be able to go home with the children. Perez responded they "haven't gotten to that point." He explained that if they found stolen property during the searches and defendant claimed he knew nothing, they would have to talk to his wife again and consequently she was "not going to be released." He reminded defendant that his wife also possessed methamphetamine. When defendant again claimed the methamphetamine was his, Perez pointed out, "You also said that this is not you," meaning the robber.

⁴ Defendant was not the children's biological father.

Defendant then admitted he was the robber, but claimed he did not use a weapon or go in the house. Defendant said he went into the garage and did not hurt anyone; he just grabbed the purse. Defendant gave other details of the robbery, describing Heather Ferido and her vehicle, Rosina Arebalo and her car, and the denominations of the stolen cash--these details were fairly accurate, although he minimized his assaultive conduct. Defendant explained he was desperate to smoke crystal methamphetamine and was not trying to hurt anyone.

Perez asked defendant if he would like to write an apology letter and defendant said yes. Perez told him he would be left alone to write the letter. At the end of the interview defendant said to a different detective, "I'm confessing to a charge to get my wife out of this situation. They ain't gonna find shit."

Defendant's letter of apology read: "To the lady I took the purse from: I'm so sincerely sorry for doing that to you. I promise on my life, I will give you everything I took from you. I didn't have any weapons on me when I took your purse. I humbly apologize to you and your family. Sincerely, please give me a chance. I have kids, a wife I need to be with. I'm not a bad person. Really, I was desperate for some money, and I can do whatever you want me to to repay you back for my mistake. Can you please forgive me, but not forget what I've done? I deeply am sorry for all the pain I caused you. Can you please?"

IV

Motion to Exclude Defendant's Statements and Letter

One of defendant's motions in limine sought to exclude defendant's statements and letter from the People's case in chief. The trial court asked the grounds for exclusion and counsel responded, "Miranda issue." When asked if that was the sole basis, counsel added, "And a possible pressure--misleading and pressuring by the interrogating officer." The defense did not file a separate motion or a memorandum of points and authorities.

The court held a hearing pursuant to Evidence Code section 402. At the hearing, defendant testified the detective told him that methamphetamine was found on his wife and the police were going to book her for possession. When defendant asked about his children, he was told they would go to "the hall" (Mary Graham Hall); only a biological parent could pick them up, not a grandmother. The detective told defendant that if he had nothing to say, they would book his wife for possession of methamphetamine.

The trial court denied the motion to exclude, reasoning that a defendant's mere *belief* that his cooperation will aid a relative does not invalidate his statement. The court found no threats or promises by law enforcement, express or implied, and that defendant's desire to aid his wife by confessing was self-motivated. The court further found that defendant's version of

the facts at the hearing, which differed from his recorded statement, called into question his credibility.

At trial, the video of defendant's statements was played and the video and transcript were admitted into evidence; and his letter of apology was read and admitted into evidence.

DISCUSSION

I

The Law

"Any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion is inadmissible pursuant to the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution.

[Citations.] To determine the voluntariness of a confession, courts examine "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession.'

[Citation.] In making this determination, courts apply a 'totality of the circumstances' test, looking at the nature of the interrogation and the circumstances relating to the particular defendant. [Citations.] With respect to the interrogation, among the factors to be considered are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity'. . . ." [Citation.] With respect to the defendant, the relevant factors are "'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.'" [Citation.] 'A statement is involuntary [citation] when, among other circumstances, it "was "extracted

by any sort of threats . . . , [or] obtained by any direct or implied promises” [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 752.)

“A threat by police to arrest or punish a close relative, or a promise to free the relative in exchange for a confession, may render an admission invalid.” (*People v. Steger* (1976) 16 Cal.3d 539, 550 (*Steger*).) In *People v. Trout* (1960) 54 Cal.2d 576 (*Trout*), overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 509, footnote 17, the police held defendant’s wife, without grounds for arrest, and sent her to talk with defendant several times. She was released as soon as defendant confessed. (*Trout, supra*, 54 Cal.2d at p. 584.) The Supreme Court found the confession was the result of improper pressure, the implied threat or promise that the wife’s release was dependent on defendant’s confession. (*Trout, supra*, at p. 585.) An implied promise to a defendant, a minor, that he would get to see his pregnant girlfriend and the baby was one of several promises of leniency in exchange for a confession that made the confession involuntary in *In re Shawn D.* (1993) 20 Cal.App.4th 200, 214-216.

“However, where no express or implied promise or threat is made by the police, a suspect’s belief that his cooperation will benefit a relative will not invalidate an admission.” (*Steger, supra*, 16 Cal.3d at p. 550.) Where defendant’s desire to aid a family member by confessing is entirely self-motivated, without an express or implied promise of threat by the police, his statements are voluntary. (*Steger, supra*, at p. 550.)

We independently review the ultimate question of whether defendant's confession was voluntary. (*People v. Holloway* (2004) 33 Cal.4th 96, 114.)

II

Analysis

Defendant contends "Perez conducted a very sophisticated interrogation of [defendant] by utilizing threats regarding his wife and children to overcome [defendant's] free will." He adds Perez was aware of defendant's anxiety about his wife and children and used it to obtain his confession. He argues Perez impliedly threatened to arrest defendant's wife if stolen property were found in her purse, and also threatened to arrest her for drug possession. According to defendant, Perez also played on defendant's anxiety about the children, telling defendant they could be released only to a biological parent. He argues that only after the implied threats about his wife and children were made did he confess, and then only "to get my wife out of this situation."

We have reviewed the transcript of the interview.⁵ As we explain, we find defendant's statements were voluntary and not the product of coercion. While Detective Perez initially brought up the topic of defendant's wife and how upset she was, it was defendant who raised the issue of her custody status and

⁵ We were not provided with the DVD recording of the interview, seen by the judge and jury, but only with the transcript, which was also introduced into evidence at trial. The parties rely on the transcript alone; we do the same.

any potential charging decisions by asking about her "position right now." Unlike the wife in *Trout*, defendant's wife was properly detained because there was methamphetamine in her purse, as well as a large amount of money after a robbery in which over \$600 was stolen. Defendant acknowledged it was proper to hold his wife because of the drugs, telling Perez, "Ok, I can respect that."

Although Perez refused to accept defendant's claim that the drugs were his and not his wife's, citing defendant's lack of credibility due to his continued refusal to admit he was involved in the robbery, this appears to us to be a valid observation. Defendant's denial of involvement in the robbery was certainly suspect. Of the persons his wife admitted drove the van, only defendant matched the description of the robber. Witnesses had already identified defendant as the robber. Moreover, the record does not reveal the disposition of the possible drug charges.

At no time did Perez condition the release of defendant's wife and her children on his confession to the robbery. Rather, Perez made clear he was *not* going to "hang the kids over [defendant's] head." Defendant discounts this statement as purely self-serving; however, it was defendant, not the police, who raised the need for an "understanding" about his wife before he would tell the truth. When the issue was discussed, he was informed that she was "not going to be released," and nowhere in the record is that statement conditioned on defendant's confession or even cooperation. Even if defendant thought the

confession would better his wife's situation, he was not *told* that, nor was it even suggested to him, just *by* him. The fact that his principal motive for confession may have been improvement of his wife's situation does not make the confession involuntary. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 355-356.)

III

Sentencing Error

Our review of the record has revealed a sentencing error which is subject to correction on review. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1295.) The amended information alleged defendant had been sentenced to a prior prison term for his 2006 conviction for attempted robbery. It also alleged he had suffered convictions for the prior serious felonies of grand theft person and attempted robbery in 2006. Of these two crimes, only attempted robbery is properly classified as a serious felony. (§ 1192.7, subd. (c)(19) & (39).) The trial court found defendant had a prior conviction and had served a prison term for attempted robbery. The court imposed both the one-year and five-year enhancements of sections 667.5, subdivision (b) and 667, subdivision (a) for this one crime.

"[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.) Accordingly, we must stay execution of sentence on the lesser enhancement. (*People v. Lopez* (2004) 119 Cal.App.4th 355, 364;

cf. *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1123 [staying lesser firearm enhancements].)

DISPOSITION

The judgment is modified to stay the one-year enhancement imposed under section 667.5, subdivision (b) for the 2006 prison term for attempted robbery. The clerk of the superior court is ordered to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

DUARTE, J.

We concur:

BUTZ, Acting P. J.

HOCH, J.