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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL RENATO CASTRO,

Defendant and Appellant.

F062797

(Super. Ct. No. F09906233)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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Following a court trial, 15-year-old Raul Renato Castro, who was tried as an adult, was convicted of first degree murder (Pen. Code, § 187)¹ (count 1), sodomy (§ 286, subd.

¹ Undesignated statutory references are to the Penal Code.

(c)(2)) (count 4), and forcible lewd acts upon a child (§ 288, subd. (b)(1)) (count 5). The court found true allegations that (1) Castro was a person 14 years of age or older during the commission of the offenses set forth in Welfare and Institutions Code section 707, subdivision (b) (Welf. & Inst. Code, § 707, subd. (b)(1)), and (2) he committed the murder during the crime of lewd or lascivious conduct upon a child under the age of 14 and during the commission of sodomy (§ 190.2, subd. (a)(17)(E) & (D)). The court found Castro not guilty of kidnapping (count 2) and kidnapping to commit sodomy (count 3), and that Castro did not commit the murder during the commission of the crime of kidnapping. It also found untrue special circumstance allegations attached to counts 4 and 5.

The court sentenced Castro to a determinate upper term of eight years for sodomy (count 4) and an indeterminate term of 25 years to life for first degree murder (count 1). The court imposed an eight-year upper term for forcible lewd acts upon a child under 14 (count 5), which was stayed pursuant to section 654.

On appeal, Castro asserts the trial court (1) erred when it denied his pretrial motion to exclude his statements to the police, and (2) abused its discretion when it imposed the upper term for sodomy and forcible lewd acts upon a child under 14. As we shall explain, while we disagree with Castro's first contention, we conclude that the appropriate disposition in this case is to stay the sentence on the sodomy count, count 4, pursuant to section 654.

STATEMENT OF FACTS

Since sufficiency of the evidence is not at issue, a summary of the facts will suffice. On October 30, 2009, four-year-old Alex Mercado went missing from his home. A massive search ensued, which continued into the following day when the searchers undertook to contact each resident of the neighborhood and obtain consent to search their homes. During a search of Elsa Castro's apartment, to which she consented, Alex's body was found in the dryer.

Elsa and her son, Castro, were interviewed at the Mendota Police Department that day. Fresno County Deputy Sheriffs Sergio Toscano and Hector Palma twice interviewed Castro, who was 14 years, three months old. The first interview was audio recorded while the second was both audio and video recorded. The recordings were played in court.

In the first interview, Castro initially denied having anything to do with Alex's death. Eventually he admitted sodomizing and drowning Alex, and placing him in the dryer. Castro said he always had an "urge to kill," which scared him, and it got out of hand that day. In the second interview, Castro said he saw Alex through the screen door; he was walking around in the area between Castro's and Alex's apartments, which faced each other and were about 10 yards apart. Castro got Alex to enter Castro's apartment by saying he wanted to show Alex something. Once inside, Castro told Alex he thought it was in the restroom; Alex followed him into the restroom and closed the door. Castro was feeling the urge to kill. Alex pulled his pants down and tried to use the toilet, but then said he did not need to. Castro approached Alex from behind, tried to penetrate him, and ejaculated "[a] little bit." After he stopped, Alex tried to pull his pants up but tripped on the carpet and fell, hitting his head. Alex started to cry and said he was going to tell his mother. Castro panicked and decided to drown Alex to stop him from telling anyone. He put Alex in the bathtub, turned on the water, got into the tub on top of Alex, and held him down in the water until he stopped struggling. He decided to put Alex in the dryer since they rarely used it. Castro's mother returned home about an hour later. Castro did not tell his mother what had happened.

An autopsy revealed the cause of death as drowning. There were injuries to the anal area consistent with penetration. Six bruises on the forehead, temple and scalp occurred at the time of death and were caused by blunt trauma, caused by the head being struck or falling against something. The bruises could have been produced by falling and

hitting the head in a bathtub, but could not have been produced by a single fall. A rectal swab taken from Alex revealed sperm cells the DNA of which matched Castro's DNA.

DISCUSSION

I. The Suppression Motion

Castro contends the trial court erred in denying his motion to suppress evidence of his confession because he was in custody throughout the police interviews and his implied *Miranda* waiver was not voluntary, knowing and intelligent. He asserts that under the recent United States Supreme Court case of *J.D.B. v. North Carolina* (2011) 564 U.S. ___, 131 S.Ct. 2394, 2406, his age must be taken into consideration when determining this issue, and when it is, we would be compelled to conclude he was in custody. He also asserts that because an expert psychologist testified that it would be difficult for him to comprehend an oral presentation of the *Miranda* warnings, the only conclusion to be reached under the circumstances is that the prosecution did not satisfy its burden of demonstrating that he knowingly and intelligently waived his privilege against self-incrimination.

A. Trial Proceedings

Before trial, Castro filed a motion to suppress statements he made during police interviews, arguing that under the totality of the circumstances he was in custody when he was questioned and he did not knowingly and intelligently waive his right to remain silent, as required by *Miranda v. Arizona* (1966) 384 U.S. 436. The prosecutor filed written opposition to the motion.

An evidentiary hearing was held on the motion. Before the hearing, the trial court reviewed the transcript of the two interviews at issue, and a video recording of the second interview. Fresno County Deputy Sheriff Sergio Toscano, a member of the homicide unit, testified that on Saturday, October 31, 2009, at about 2:30 p.m., he was advised that a missing child had been located deceased in a residence and was asked to assist the

primary detectives on the case. He arrived at the Mendota police station around 5:15 or 5:30 p.m., where he was briefed on the investigation until 6:20 p.m.

During the briefing, he was advised that: Castro and his mother lived at the residence where the deceased was located; they were taken to Castro's grandmother's house so they could leave their dogs there; and they then were transported to the Mendota Police Department. Castro's mother had asked that Castro "be brought with her" to the police station.² Toscano also was advised that Castro and his mother had been waiting for his arrival and that of other law enforcement officers, Castro had been there a few hours, and he was waiting in a briefing/conference room.

Toscano, who was assigned to interview Castro to get a statement, and his partner, Deputy Hector Palma, joined Castro in the conference room at about 6:20 p.m. Toscano estimated the size of the conference room as either "15 by 15" or "20 by 20," and described the room as a "brand-new facility" with a few chairs and a desk where the officers sit; the room was "very nice" and a "pleasant environment." The deputies were dressed in civilian clothes and each carried a gun on his waist. Toscano sat a "couple of feet or so" in front of Castro, while Palma sat to Toscano's right. There was no table between the deputies and Castro. Toscano estimated his height and weight as "almost six feet tall, and 250, 255 pounds," and Palma's height as around six feet tall and his weight as 205 or 210 pounds. Castro was five feet tall and 170 pounds.

Castro was not handcuffed and, according to Toscano, was not in custody and had not been arrested. Toscano explained that Castro did not become a suspect until about 50

² According to FBI reports, at about 1:50 p.m., investigating agents asked Castro's mother to voluntarily accompany them to the police station for questioning. She agreed to go, but asked that Castro be allowed to go with her.

minutes into the first interview, which was 72 minutes long and was audio recorded.³ After a 15 minute break, Toscano and Palma continued to interview Castro in the video audio interview room, which lasted about 43 minutes and was both video and audio recorded. A written transcript of both interviews was entered into evidence, as was a DVD that contained audio of both interviews and a video of the second interview. Toscano could not recall the size of the video audio interview room, but he knew it was smaller than the conference room and estimated it to be “eight by eight” or “ten by ten.” There were chairs for each person and, he believed, a table between the deputies and Castro. The deputies and Castro, who was not handcuffed, were sitting, not standing.

Toscano began the first interview by stating Castro’s birth date and address. Castro was 14 years, three months old. Toscano asked Castro about basic contact information and Castro confirmed the names of various family members. Toscano told Castro he was brought to the station so police could talk to him about the on-going investigation of the missing boy. When asked if he knew the boy’s name, Castro responded he only knew his first name, Alex. Castro confirmed he had not been handcuffed or put under arrest, and that he had been offered something to drink and took a soda. Castro was not hungry and agreed he would let the deputies know if he needed something. Toscano said “You know you’re not, you’re not in custody, right?” Castro responded, “Yeah.”

After this, the following exchange occurred between Toscano and Castro:

“Q. Alright. But I’m, I’m gonna advise you, because you’ve been here for so long only, I’m gonna - I don’t know if you’ve ever heard Rights . . . before?

“A. Um, you know sometime on TV though, but . . .

³ The first interview was not video recorded because the primary case detectives were using the “audio visual” room to interview Castro’s mother. The conference room did not have video recording equipment.

“Q. I’m just gonna advise you of this just so that we can get that cleared up.

“A. Alright.

“Q. So that we have an understanding on this; You have the right to remain silent. Anything you say may be used against you in court. You have the right to an attorney prior to and during any questioning and if you cannot afford an attorney, one will be appointed for you before questioning. You understand that, right?

“A. Yeah.

“Q. It’s pretty simple, right?

“A. Yes sir.

“Q. You know that the only reason why we’re here, we’ve introduced ourselves. We’re investigators with the Fresno Sheriff’s Office. We wanna just get a statement from you regarding this on-going investigation regarding the, the missing boy, uh, Alex, correct? . . . Okay? . . . Um, so if you need anything just let us know, alright?”

Toscano testified he decided to give Castro a *Miranda* admonition even though Castro was not in custody or a suspect because he wanted to “cover [his] bases” since Castro had been at the police station for at least four hours and Toscano did not know the details or particulars of what had occurred during that time period. Toscano read the *Miranda* rights from a card and testified the way he read the rights “was slower” and “it was clear.”

According to Toscano, during the interview Castro responded appropriately to the questions and his answers showed that he understood them. Castro’s responses during the first part of the interview were at a medium volume and clear for the deputies to hear. After he began making inculpatory statements, however, his voice became softer. It gradually became stronger as the interview progressed, eventually becoming “more medium.”

Psychologist Laura Geiger, Ph.D., testified on Castro’s behalf. She met with Castro five times beginning in November 2010 and ending on February 11, 2011. She

tested Castro's cognitive abilities by administering the Wechsler Intelligence Scale for Children, Fourth Edition. Compared to the standard score of 100, Castro scored as follows: (1) verbal comprehension - 99, which placed him in the 47th percentile; (2) perceptual reasoning (the ability to think holistically or use visual and non-visual information) - 112, which was above average and placed him in the 79th percentile; (3) working memory (how much information one can hold in one's mind and perform actions on) - the low average range at the 21st percentile; and (4) processing speed (how quickly the subject can use his mental reasoning) - 80, placing him in the ninth percentile and at the cutoff for borderline impaired. While Castro's full scale IQ score was 95, the range of his domain scores (between 80 and 112) suggested the full scale score was not an "accurate representation" of how Castro was able to use his full mind. In such a situation, one must "really look carefully at the four different indexes and notice where their strengths and relative weaknesses might be lying."

Castro was not in special education while in the care of the juvenile authority. He was not taking psychotropic medication and Geiger did not testify to any mental disorders. Geiger was concerned about Castro's processing speed, as she found Castro had difficulty apprehending information presented in an auditory fashion and needed instructions broken down into single sentences. She opined Castro struggled with trying to take in information and processing it. She explained: "Once he gets it in, he can think about it, and he has pretty good thinking skills, but he really has a deficit in [the processing speed] area." Geiger wrote in her report that Castro's "thought content was in normal limits, and his thought processes were goal-directed and logical."

On February 11, 2011, Geiger administered a *Miranda* comprehension test consisting of four sub-tests. The tests involved: (1) restating the *Miranda* rights in the subject's own words; (2) selecting sentences paraphrasing *Miranda* rights; (3) defining six vocabulary words that, according to the test, are used in *Miranda* advisements; and (4) indicating the subject's understanding of "three specific domains as far as function of

their rights.” Geiger admitted the test could not evaluate Castro’s comprehension at the time of the crimes, only his knowledge base on the day of the test, and it could not be used as an empirical definition of understanding at the time of interrogation.

Geiger had not read the transcript of Castro’s actual *Miranda* waiver or the interviews, although she read about five pages of the transcript on the morning of her testimony, and had not listened to the audio, or watched the video, recordings of the interviews. Geiger also did not interview Castro’s family members or the police officers who had interviewed Castro. Geiger’s testing compared Castro’s responses with the average of 15 year olds, which she recognized was a weakness, since Castro was 14 when he was questioned.

On the comprehension of *Miranda* rights/recognition portion of the test, Castro was in the 45th percentile, which was slightly lower than the average range for juveniles. On the vocabulary section, Castro received a standard score of 85, which put him in the low average range. His main areas of difficulty were (1) not understanding the idea of consulting with an attorney, (2) believing an “interrogation” meant being interviewed and talking with someone, not being questioned, (3) weakness in his understanding of being appointed an attorney or his entitlement to consult with one, and (4) failing to understand the legal meaning of a right and instead believing the word “right” meant “choice.” Castro had a limited vocabulary and had difficulty with “10-dollar words,” which are long words with many syllables. His language and speech were lower than average for a 15-year-old.

Pursuant to the test protocol, Castro was tested on the words “consult,” “attorney,” “interrogation,” “appoint,” “entitled,” and “right.” Geiger explained that Castro’s use of the word “interview” when defining the word “interrogation” gave him a lower score because, while an interview involves questions being asked and answered, “interrogation has a much stronger connotation than interviewing.” Geiger also opined Castro did not

comprehend the meaning of the word “entitled” in the “entitled to consult with an attorney” portion of the advisement.

In the function of rights section, Geiger gave Castro a standard score of 50, which is in the impaired range, for his understanding of the nature of an interrogation. She opined that Castro did not understand that “the police have intentions to deal with the suspect, and that it is an adversarial situation.” Regarding the right to silence, Geiger noted that Castro “didn’t understand the legal meaning of a right, that a person had power of privilege [which] belonged to the person by law, nature, or tradition.” Geiger opined Castro’s statement that the word “right” meant having a choice did not show a full comprehension of the term, as “choice” is a neutral term while a “right” is “a privilege, or something that needs to be protected.” Castro was given a scenario where a subject decided not to talk to police and asked what the police were supposed to do in response. He answered that the police would get the subject to talk. Geiger, however, testified the appropriate answers were that the subject had a right not to be questioned further, to be left alone, or that the police should get him an attorney, telephone his mother, or let him go. Geiger thought Castro’s answer showed he was expecting to be questioned further. However, in another scenario in which police continued to pressure the subject or tell him he had to talk, Castro understood he did not have to talk if he did not want to.

Geiger testified Castro obtained a borderline impaired score of 77 with regard to his knowing what his right to counsel was, as he did not give any fully competent answers in that area. Although Castro understood an attorney did some sort of work for the client, he could not describe that an attorney would be there to assist him. Geiger thought this was significant, as Castro had been in custody for more than a year and three months, yet “even at this late juncture with all the motions and hearings [and] legal activities” he still did not really perceive that an attorney was there to assist him. She would have expected him not to understand this at the time he was questioned, as at age 14 he had minimal exposure to an attorney, but she hoped he would have had a better

understanding after working with an attorney for over a year. Geiger conceded that she was not aware of how much time Castro had spent in court during the case.

With respect to whether Castro comprehended the *Miranda* advisement, Geiger opined that he has some problems regarding both his knowledge base and the way he functions with regard to his processing speed and cognitive deficits, which have “some bearing on how valid his understanding of his *Miranda* rights were.” Geiger recognized it was not up to her to decide if Castro did not comprehend the advisement a year and three months ago; her opinion was based on his present level of functioning, taking into account a number of factors of how Castro thinks. Geiger believed it would be very difficult for Castro to understand an auditory reading of a paragraph that is three sentences long and contains a number of different concepts without any visual to look at.

After hearing oral argument, the trial court issued its ruling. The court ruled that Castro was not in custody when the initial interview began, but by the conclusion of that interview he had reverted to custody as he had made admissions and statements that showed he had a clear and reasonable belief he was in custody. The court, however, noted that even if Castro were in custody the entire time, he had been advised of his *Miranda* rights. The court found the content of the advisement was appropriate and, after being advised, Castro indicated he understood and he impliedly waived those rights by continuing with the interview.

The court found the waiver to be knowing, intelligent and voluntary. As to voluntariness, the court noted that the video and audio recordings showed that the officers never raised their voices, never criticized Castro, and did not engage in any apparent conduct that would overcome Castro’s free will. The court noted Dr. Geiger’s testimony approached the issue from a slightly different perspective, i.e. that the *Miranda* advisement is so complicated Castro could not process it. The court noted the officers never used three of the six key words Geiger referred to, namely “consult,” “interrogation,” and “entitled,” and while they used the words “attorney” and “appoint,”

those are words of common understanding. The court explained Geiger's testimony was based on the word "right," which involved the application of a highly technical definition of *Miranda* that went beyond the case law.

The court found the advisement appropriate and that Castro had the capacity to, and did, understand it. The court's finding was based on the interviews, during which Castro spoke clearly, gave appropriate responses, indicated a "remarkable memory" of recent events, and admitted sophisticated thought processes in his conduct, initial denials and his later admissions. The court believed he showed a maturity beyond his age and came to his own conclusions about the impact of his conduct, what it meant to him, and the consequences. The court's opinion, after listening to the recordings, was that Castro exhibited enough processing ability, intelligence, maturity and capacity to understand each every one of those rights, and that his waiver of rights was in fact knowing, intelligent and voluntary, and he fully understood the rights of which he was advised and the impact of the waiver, as exhibited later on in the interview when he admits what is going to happen as a result of his conduct. Accordingly, the court denied the motion.

B. Analysis

Miranda created a set of procedural safeguards intended to protect a criminal suspect's Fifth Amendment right against self-incrimination from the coercive nature of custodial interrogation. (*Miranda, supra*, 384 U.S. at p. 444; *People v. Williams* (2010) 49 Cal.4th 405, 425.) To protect a suspect's privilege against self-incrimination, when the suspect is taken into custody, "[h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda, supra*, at p. 479.) Once a suspect has been given *Miranda* warnings, he or she may knowingly and intelligently waive them and agree to answer questions or give a statement. (*Ibid.*) Statements obtained in violation of these procedural safeguards are

inadmissible to prove the suspect's guilt in a criminal case. (*Ibid.*; *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

Here, Castro challenges the trial court's findings that he was not in custody at the outset of his first interview and that his waiver of *Miranda* rights was voluntary, knowing and intelligent. A custodial interrogation is one in which there is a formal arrest or a restraint on the defendant's freedom of movement to a degree associated with formal arrest. (*California v. Beheler* (1983) 463 U.S. 1121, 1125.) "In determining whether an individual [is] in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" (*Stansbury v. California* (1994) 511 U.S. 318, 322.) "When there has been no formal arrest, the question is how a reasonable person in the defendant's position would have understood his situation. [Citation.] All the circumstances of the interrogation are relevant to this inquiry, including the location, length and form of the interrogation, the degree to which the investigation focused on the defendant, and whether any indicia of arrest were present." (*People v. Moore* (2011) 51 Cal.4th 386, 394-395; see also *Howes v. Fields* (2012) ___ U.S. ___ [132 S.Ct. 1181, 1189].) The United States Supreme Court has held, in a decision issued after the trial court's ruling on Castro's suppression motion, that when the individual being interviewed is a child whose age is known to the officer at the time of questioning, the child's age is a circumstance that should be included in the custody analysis. (*J.D.B. v. North Carolina, supra*, 564 U.S. at p. ___, [131 S.Ct. at p. 2406].)

Since Castro was given a *Miranda* advisement at the beginning of his first interview, we need not decide whether the trial court was correct when it found that Castro was not then in custody; instead, we will assume Castro was in custody throughout his interview. Accordingly, we turn to the issue of whether Castro's implied waiver of his rights was knowing, intelligent and voluntary.

Determining whether a *Miranda* waiver was knowing, intelligent, and voluntary has “two distinct dimensions.” (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) “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.” (*Ibid.*) The prosecution must prove a knowing and voluntary waiver by a preponderance of evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248 (*Whitson*); see *Colorado v. Connelly* (1986) 479 U.S. 157, 168.)

The validity of a *Miranda* waiver is a factual matter to be decided by the trial judge based on the totality of the circumstances, including both the characteristics of the accused and the details of the interrogation. (*Whitson, supra*, 17 Cal.4th 229 at pp. 246-247.) Relevant factors include the minor’s age, mental and physical condition at the time of the questioning, education, intelligence, experience and familiarity with the police. (*In re Anthony J.* (1980) 107 Cal.App.3d 962, 971-972 (*Anthony J.*); *People v. Lara* (1967) 67 Cal.2d 365, 376.) On appeal, the reviewing court accepts the lower court’s resolution of disputed facts and its credibility evaluations if they are supported by substantial evidence. (*People v. Cortes* (1999) 71 Cal.App.4th 62, 70.) However, it independently determines whether, from the undisputed facts and those facts properly found by the trial court, the challenged statements were illegally obtained. (*Whitson, supra*, 17 Cal.4th at p. 248.)

Our first task is to determine whether the statement was voluntary, based on the totality of the circumstances, not on any one particular fact. (See *People v. Williams* (1997) 16 Cal.4th 635, 660-661; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-286.) We must analyze whether the influences brought to bear on Castro were such

as to overbear his will to resist, thus bringing about a statement that he did not freely determine. (See *People v. Hogan* (1982) 31 Cal.3d 815, 841, disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) We evaluate whether the police conducting the interview acted in an oppressive or coercive manner. (See *Colorado v. Connelly, supra*, 479 U.S. at pp. 163-164.)

We have listened to the audio recordings of both interviews and watched the video recording of the second interview, and conclude that no coercion occurred. The deputies made every effort to make Castro comfortable and at ease. They confirmed he had been offered something to drink and he had taken a soda, asked if he was hungry, and told him to let them know when he needed something. They conversed with him in a friendly and matter-of-fact manner. The general mood of the entire interview was low-key, calm, and devoid of a coercive atmosphere. We conclude that under the totality of the circumstances, Castro's will was not overborne and his capacity for self-determination was not critically impaired by coercion. His *Miranda* waiver was voluntary.

An examination of the totality of the circumstances also convinces us that Castro's *Miranda* waiver was knowing and intelligent. Our review of the audio confirms, as Toscano testified, that he read Castro his rights slower than if he had been speaking in simple, everyday language. (See *Florida v. Powell* (2010) ___ U.S. ___, ___ [130 S.Ct. 1195, 1204] [warnings must reasonably convey to suspect his or her rights as required by *Miranda*]; *People v. Samayoa* (1997) 15 Cal.4th 795, 830 [same].) Castro responded in the affirmative when asked if he understood those rights. After this, he immediately proceeded to answer the deputies' questions, thereby impliedly waiving his right to remain silent. (*Berghuis v. Thompkins* (2010) ___ U.S. ___, ___ [130 S.Ct. 2250, 2264] ["a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police"].) This was sufficient to establish a knowing and intelligent waiver.

Castro contends Geiger's "uncontradicted testimony" that it would have been very difficult for him to understand the warnings because they were presented orally without any visual aids compels a conclusion that he did not knowingly and intelligently waive his rights. The trial court, however, rejected Geiger's testimony based on the audio recordings of the interviews, which showed, as the trial court found, that Castro gave appropriate responses, indicated a "remarkable memory of recent events," gave answers and explanations that revealed sophisticated thought processes, and he knew the consequences of his actions, as shown by his statements that he knew he would be going to jail for his actions, and that he felt "bad" and regretted his actions, knowing he "should accept the charges" that would be brought against him. The trial court's findings were a credibility determination, which we find to be reasonable and in which we discern no abuse of discretion or legal error.

Essentially, Castro is urging us to rely on his slow processing capability, his poor working memory and low-average comprehension of the *Miranda* vocabulary as conclusive proof that he was incapable of intelligently waiving his *Miranda* rights. We are not convinced. It is well-established that a confession is not inadmissible as a matter of law merely because the accused was of subnormal intelligence. Intelligence is only one of many factors to be considered in assessing the validity of the *Miranda* waiver. (*In re Norman H.* (1976) 64 Cal.App.3d 997, 1001 (*Norman H.*)) *Norman H.* upheld a *Miranda* waiver made by a 15-year-old boy with an I.Q. of 47. The court concluded the minor had the capacity to understand the waiver, writing: "A confession of a crime is not inadmissible merely because the accused was of subnormal intelligence, although subnormal intelligence is a factor that may be considered with others in determining voluntariness." (*Id.* at p. 1001.) It continued, "Neither a low I.Q. nor any particular age of minority is a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood." (*Id.* at p. 1003.) To conclude otherwise

would misconstrue and improperly extend the knowing element of the *Miranda* waiver. (*Ibid.*) The court in *In re Brian W.* (1981) 125 Cal.App.3d 590 (*Brian W.*) relied on *Norman H.* to conclude that a 15-year-old boy with an I.Q. of 81 validly waived his *Miranda* rights. (*Brian W.*, *supra*, 125 Cal.App.3d at pp. 602-604; see also *Anthony J.*, *supra*, 107 Cal.App.3d 962, 907 [upholding *Miranda* waiver by a 15-year-old boy who functioned at the mental age of an 11 or 12 year old.]; *People v. Watson* (1977) 75 Cal.App.3d 384, 396-397 [upholding *Miranda* waiver even though the adult defendant had organic brain damage, schizophrenia and an I.Q. of 65.]

Having evaluated the entirety of the evidence presented at the suppression hearing, we uphold the trial court's determination that the prosecution proved by the preponderance of the evidence that Castro's *Miranda* waiver was knowing and voluntary. Although he had not been given his *Miranda* rights before, Castro had heard the admonition on television. Toscano read the *Miranda* rights slowly and clearly. Castro confirmed he understood the rights and that they were "pretty simple." He did not indicate any confusion or lack of comprehension about his rights. Castro responded appropriately to all of the questions during the interview. At no time did he ask to end the interview or request an attorney. The interviews were not lengthy – the first lasted 72 minutes and the second 43 minutes, with a 15 minute break in between the two. The deputies did not behave in a coercive or threatening manner. There is no evidence of improper inducement or any indication that the deputies took unfair advantage of Castro's ignorance or innate processing difficulties to convince him to waive his *Miranda* rights.

Here, as in *Brian W.*, "The record is devoid of any evidence that the minor made his statement after a lengthy interrogation. There was no atmosphere of coercion, no prolonged questioning or coercive tactics, no threats or promises of leniency. He was not threatened, tricked or cajoled into a waiver by any promise of the police. There was no deliberate ploy to 'soften up' the minor. There exists in the record no improper

inducements which were the motivating cause for the minor to waive his constitutional rights.” (*Brian W.*, *supra*, 125 Cal.App.3d at p. 603.)

Based on the totality of the circumstances, we affirm the denial of the suppression motion.

II. The Sentences on Counts 4 and 5

Castro challenges the aggravated terms the trial court imposed on count 4, sodomy, and count 5, forcible lewd acts on a child. He contends the trial court abused its discretion by imposing the upper term on these counts because it improperly considered as aggravating factors his lack of criminal history, that his conduct was “cold and calculated,” and that he was aware of what he was doing when he committed the crimes. He asserts the court’s reasoning was irrational and we must remand for resentencing because the upper term would be wholly unsupported in the absence of the irrational reasoning. Castro asserts his trial counsel preserved the claim when she argued the upper term should not be imposed and the sentence should be stayed pursuant to section 654, and any failure to object was ineffective assistance of trial counsel. The Attorney General asserts both that the claim is forfeited for failing to object and lacks merit, as there was no abuse of discretion.

We begin, however, with an issue the parties did not raise on appeal, namely the applicability of section 654 to both the sodomy and lewd acts counts.⁴ At trial, the prosecutor asked the court to consider two theories of murder, namely felony murder, based on the argument that the sodomy and murder were “one continuous transaction,” and first degree premeditated murder. In both its oral and written verdicts, the trial court (1) found Castro guilty of murder, (2) fixed the degree as first based on both

⁴ As we shall explain, in the interest of judicial economy, we address this issue and order modification of the judgment without requesting supplemental briefing, but if either party files a timely petition we will grant a rehearing on the issue. (See Gov. Code, § 68081.)

premeditation and deliberation, and felony murder, and (3) found true the special circumstances that Castro committed the murder while engaged in the commission of the crimes of sodomy and lewd and lascivious conduct upon a child under the age of 14.

In the probation report, the probation officer recommended that the sentences on the sodomy and lewd acts counts, counts 4 and 5, be stayed pursuant to section 654, as the offenses were alleged as special circumstances in count 1 and used to enhance the base term of confinement. The probation officer recommended the court impose and stay the aggravated term on both counts, “as factors in aggravation outweigh those in mitigation.” The probation officer listed the circumstances in aggravation as (1) “[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other facts disclosing a high degree of cruelty, viciousness, or callousness,” (2) “[t]he victim was particularly vulnerable,” and (3) Castro “has engaged in violent conduct which indicates a serious danger to society.” The only circumstance in mitigation was that Castro had no prior criminal record.

At the sentencing hearing, the prosecutor disagreed with the probation officer’s recommendation that count 4 was subject to section 654 consideration. While the prosecutor acknowledged that Castro was charged with the special circumstances of sodomy and lewd and lascivious conduct, which were found true, he asserted the “net effect of those special circumstances is at zero in this case,” as Castro, given his age, was not subject to life without parole. The prosecutor argued that therefore count 4 was a “stand alone count” and there was no merging of acts between the sodomy and murder, since the two acts were “separate and distinct” as the facts showed Castro committed the sodomy first and then, as a result of his belief that Alex was going to tell on him, committed the murder. The prosecutor asked the court to impose the upper term of eight years on count 4, as section 654 did not apply. In response, Castro’s trial counsel asked the court “not to give him the eight years on Count 4, and I think it is a 654 issue. I agree

with probation's evaluation and agree that because of the conviction, the appropriate sentence is 25 to life." She asked the court to follow probation's recommendation.

The trial court sentenced Castro to 25 years to life, plus the aggravated term of eight years, consecutive, for "the additional sexual act of sodomy that occurred." The court explained: "The Court was the finder of fact in this matter. The Court heard all of the evidence. The Court finds that the aggravating factors prevail over the mitigating factors. I do recognize that the defendant has absolutely no criminal history. In this Court's mind, that almost aggravates and it provides no basis for this Court to find there was any explanation for the defendant's conduct. It was simply cold and calculated. ¶¶ The Court does find, as it did at the verdict, that Mr. Castro did know and have full knowledge [and] intent of his actions. He was fully aware of those actions when he took them." The court also imposed an eight year aggravated term on count 5, which it stated would run concurrent "pursuant [to] Penal Code section 654."⁵

The sentences for both sodomy and lewd acts should have been stayed because both crimes were also the basis for the felony murder conviction. In order to convict Castro of felony murder, the trial court was required to find that while committing sodomy and lewd acts, Castro caused the death of another person. (CALCRIM No. 540A.) In order to find the sodomy and lewd acts special circumstances true, the trial court had to find that the murder was committed while engaged in the commission of sodomy and lewd acts, which includes findings that those crimes and the act causing the death were part of one continuous transaction and there was a logical connection between the two crimes and the act causing death. (CALCRIM Nos. 549, 730.) Thus, although the trial court also found the murder was first degree based on premeditation and

⁵ While the court stated the sentence on count 5 would be concurrent, the minute order of the hearing states the sentence was stayed pursuant to section 654 and the abstract of judgment lists that count as stayed pursuant to section 654.

deliberation, it specifically found the murder was felony murder and found the special circumstances true. Accordingly, the sodomy and lewd acts were clearly the same acts that made the killing first degree murder and that supported the special circumstance. For this reason, the trial court should have stayed Castro's sentence for both sodomy and lewd acts pursuant to section 654, which prohibits punishment for both felony murder and the underlying felony. (See *People v. Holt* (1997) 15 Cal.4th 619, 692 [terms for underlying felony properly stayed under § 654 when defendant was also convicted of felony murder]; *People v. Wader* (1993) 5 Cal.4th 610, 670 [term imposed for robbery properly stayed when defendant also convicted of felony murder based on commission of that offense]; *People v. Boyd* (1990) 222 Cal.App.3d 541, 575-576.)

Given that the sentences on the sodomy and lewd counts should both have been stayed under section 654, we need not decide whether the trial court erred in imposing the aggravated terms on those counts. We note that Castro forfeited his claim of sentencing error by failing to object to any of the aggravating factors listed in the probation report or cited by the trial court during the sentencing hearing. “[A] defendant waives review of error, such as a sentencing court’s reasons or asserted lack of reasons for imposing an upper or consecutive term, by failing to object at the time of sentencing.” (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311; *People v. Scott* (1994) 9 Cal.4th 331, 353, 356 (*Scott*).)

Moreover, even if defense counsel had objected to the trial court’s reasons for imposing aggravated terms on counts 4 and 5, it is not reasonably probable he would have received a more favorable result. (See *People v. Williams* (1997) 16 Cal.4th 153, 215 [to prevail on ineffective assistance of counsel claim, the defendant must demonstrate a “reasonable probability” that absent the error the result would have been different].) The probation report listed three circumstances in aggravation, none of which Castro challenges. Even one proper aggravating factor can support imposition of an upper term. (*People v. Carron* (1995) 37 Cal.App.4th 1230, 1241.) Based on the trial

court's statements at sentencing, such as that its sentencing decision was "strict," there is no chance that the trial court would have imposed anything less than the upper term. (See *People v. Coelho* (2001) 89 Cal.App.4th 861, 889-890 [where it is "virtually certain" trial court would impose same sentence on remand, remand would be an idle act exalting form over substance].)

The trial court's failure to stay the sodomy count despite its express findings of felony murder based on the sodomy and that the murder was committed in the commission of the sodomy, resulted in an unauthorized sentence. (See generally *Scott*, *supra*, 9 Cal.4th at p. 354 [appellate court may modify unauthorized sentence even absent objection in trial court "because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing"].) Accordingly, we do not remand for resentencing, as it would result in a waste of resources and have no effect on the term Castro is serving – he will serve a term of 25-years-to-life on count 1, period. Instead, we conclude the appropriate resolution is to order the term on count 4 stayed pursuant to section 654.

DISPOSITION

The judgment is modified by staying the sentence on count 4 pursuant to section 654. The matter is remanded with the directions to so amend the abstract of judgment

and to send a certified copy to the Department of Corrections and Rehabilitation. Castro has no right to be present at those proceedings. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.) Otherwise, the judgment is affirmed.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Franson, J.