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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ZENON FLORES,

Defendant and Appellant.

F067133

(Super. Ct. No. BF140406A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Zenon Flores was convicted of committing several sex acts against his stepdaughter between the time she was 9 and 13 years old. In this appeal, he argues that his confession should have been excluded from evidence because (1) it was obtained

during a custodial interrogation and his *Miranda*¹ rights were not read to him, and (2) it was obtained through psychological coercion. We affirm.

FACTS AND PROCEDURAL HISTORY

On July 10, 2012, the district attorney filed an information charging Flores with six counts: (1) sexual intercourse or sodomy with a child 10 years old or younger (Pen. Code,² § 288.7, subd. (a)) between July 17, 2007 and July 16, 2009; (2) oral copulation or sexual penetration of a child 10 years old or younger (§ 288.7, subd. (b)) between the same dates; (3) sodomy against the will of a victim under 14 years old by force, violence, duress, menace, or fear of bodily injury (§ 286, subd. (c)(2)(b)) between July 17, 2009 and October 31, 2011; (4) oral copulation by a perpetrator older than 21 with a person under 16 (§ 288a, subd. (b)(2)) between July 17, 2009 and October 31, 2011; (5) sodomy against the will of a victim under 14 by force, violence, duress, menace, or fear of bodily injury (§ 286, subd. (C)(2)(b)) between November 1, 2011 and December 31, 2011; and (6) a lewd act against a person under 14 (§ 288, subd. (a)) between November 1, 2011 and December 31, 2011. The victim in each count was Flores's stepdaughter.

At trial, the victim, then 14 years old, testified that she considered Flores to be her stepfather; he lived with her mother but was not married to her. She testified that, from the time she was 9 until she was 13, Flores subjected her to sex acts around 20 times. She said yes when asked whether, each time, “[h]e would put his penis in your butt” and “he would touch your boobs.” He made her touch his penis on about half of these occasions. She told him to stop or she would tell her mother. He did not stop. He said if she told, he would do something to her mother. He showed her pornographic movies and said she had to watch them.

¹*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

²Subsequent statutory references are to the Penal Code unless otherwise noted.

She did not remember seeing blood or feeling pain when Flores put his penis in her buttocks. She saw “white stuff” each time.

The victim testified about several specific instances of molestation by Flores. The first time, she was nine. Flores grabbed her while she was sleeping and took her to the bathroom. He put his hands inside her clothing and touched her breasts and buttocks. He grabbed her hands and made her touch his penis. She told him to stop but he did not stop. Flores made the victim touch his penis another time when she was nine and then made her bend over and, she said, “put his penis in my butt.” She did not know whether his penis entered her anus, but it at least pressed against her anus. Subsequently, “[w]hite stuff came out” of Flores’s penis and fell on the floor.

The victim testified that she did not think Flores ever put his penis in her mouth, but she was not sure. She also said he never touched her vagina.

Dr. John Digges testified that he examined the victim on January 30, 2012. Digges was a child abuse physician employed by Kern County at the Child Assessment Center at Kern Medical Center. The victim had been brought to him, he was told, because of allegations of sexual touching that took place starting when she was nine. The examination yielded normal results. There were no injuries indicating penetration of the genitals or anus. The anus, however, could have been penetrated repeatedly without any detectable injury remaining by the time of the examination. The findings were consistent with both anal penetration and abuse by rubbing the penis against the exterior of the anus.

Flores was interviewed at a police station by detectives César Ollague and James Conner. Flores spoke Spanish during the interview, and Ollague, who is bilingual, interpreted for both Flores and Conner. A recording of the interview was played for the jury. At first, Flores denied ever touching the victim sexually. Eventually, however, he said the victim touched his penis when she was about 9 or 10, and that he had vaginal intercourse with her three or four times starting when she was 13. Flores ejaculated but not inside the victim. Flores also said the victim put her mouth on his penis more than 20

times. He touched the victim's breasts and kissed her mouth when they had intercourse, but he denied that he put his mouth on her vagina. The last time he had sex with the victim was about 15 days before the interview. On that occasion, there might have been either vaginal or anal intercourse. Flores said the sex acts were consensual and the victim never told him to stop. At the end of the interview, Flores complied with the detectives' request that he write a letter to the victim. In the letter, Flores apologized and promised never to do "these things" again. Conner said Flores would need to be more specific, so Flores added that there would be no more sexual relations.

The jury found Flores guilty on counts 1, 3, 5, and 6. It found him not guilty on count 2 and failed to reach a verdict on count 4. Count 2 was oral copulation or sexual penetration when the victim was 9 or 10. Count 4 was oral copulation when she was 11 to 13. The court sentenced Flores to 25 years to life on count 1; consecutive terms of 13 years each on counts 3 and 5; and a concurrent term of eight years on count 6.

DISCUSSION

I. Noncustodial interrogation

A criminal defendant's confession must be excluded from evidence if it was obtained during a custodial interrogation and the officers did not read the defendant his *Miranda* rights. (*Miranda, supra*, 384 U.S. at pp. 444-445.) Before trial, Flores moved unsuccessfully to suppress his confession on the grounds that it was obtained during a custodial interrogation before which he was not informed of his rights. He renews this contention on appeal. It is undisputed that the officers did not read Flores his *Miranda* rights, so the question to be decided is whether he was in custody when he made his statements in response to the detectives' questions.

The question of whether a defendant was in custody for *Miranda* purposes is a mixed question of fact and law that we review independently. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112-113.) To the extent the facts are disputed, we apply the substantial evidence standard to the trial court's factual findings regarding the

circumstances of the interrogation. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400 (*Leonard*)). Here, the facts are undisputed since they are preserved in the record in the form of a video recording of the interview and an audio recording of the discussion that took place when the detectives met Flores at his home and drove him to the sheriff's department. This leaves for our independent review the question of whether "a reasonable person in [the] defendant's position would have felt free to end the questioning and leave." (*Ibid.*)

This issue is judged by an objective test. Where, as here, the defendant has not been formally arrested, the question is whether a reasonable person would believe his or her freedom of movement was restricted to the degree associated with arrest. (*Leonard, supra*, 40 Cal.4th at p. 1400; *California v. Beheler* (1983) 463 U.S. 1121, 1125.) Some of the specific factors relevant to this determination involve the physical facts of the interrogation and its setting: how long the interview lasted; where the interview took place (e.g., in the defendant's home or in a closed interview room at a police station); whether there were physical restraints on the defendant's movement; how many officers were present; and whether the defendant was arrested at the end of the interview. Other factors pertain to the likely psychological impact of the circumstances on a reasonable person: whether the defendant was informed that he or she was not under arrest and was free to leave; whether the officers told the defendant he or she was a suspect, as opposed to merely a witness; whether the officers pressured the defendant or dominated the interrogation; whether the officers' demeanor and tactics were aggressive, confrontational, or accusatory; and whether the officers said they had evidence proving the defendant's guilt. (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) No one factor controls, and the determination is made based on the totality of the circumstances. (*People v. Morris* (1991) 53 Cal.3d 152, 197, overruled on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

The parties rely on the following facts about the interrogation. Flores, an unemployed farm laborer, had a sixth-grade education. He spoke only Spanish and had to rely on Ollague as an interpreter to communicate with Conner. When the detectives arrived at Flores's house, they told him they were investigating a case they thought he was involved in and they asked whether he would come voluntarily to the sheriff's department to talk. They would give him a ride there and bring him back home afterward. Flores agreed to go. The detectives asked whether he knew why they wanted to talk to him. Flores said he knew it was related to the fact that the children had been removed from the house by CPS.

At the sheriff's department, Flores, Ollague, and Conner sat down in the interview room. Ollague closed the door. The detectives told Flores he was not under arrest and could leave at any time. Flores said he understood. When asked if he knew why he had been brought there, Flores said it was because his stepdaughter had accused him of "violence, mistreatment and/or rape."

The detectives said Flores should not lie because they knew things about the case Flores did not know. When Flores denied wrongdoing, the detectives said they knew he was lying because they had evidence against him, including scientific evidence. If Flores talked about it, then "it can be resolved already and take off all the bad things that you did" Ollague said, "You touched [the victim] and that's okay but you have to say it right now." Flores emotionally confirmed the detectives' belief that he had been sexually abused as a child. Encouraging Flores to discuss this abuse, Ollague said he was not just a detective, but he had a heart and he understood. Ollague moved his chair closer to Flores, touched Flores's arm, and spoke in a confidential tone. Flores thanked him and said he trusted the detectives. Then Ollague insisted that the same thing, sexual abuse, had happened to the victim in this case. When Flores continued to deny the accusations, Ollague said God was watching and saw Flores lying. Flores had mentioned that he and his family attended church, and he agreed when Ollague said God knows everything.

Ollague told Flores the situation could be “resolved,” his heart could be “repaired,” and “[w]e can repair all of this” if Flores told the truth. If Flores told the truth, Ollague said, Flores could “go to church saying, ‘Okay, everything left me from my body now because now I told the truth.’”

After Flores confessed to having sex with the victim and wrote the apology letter, he told the detectives he felt relieved, even more than when he prayed to God about it. When the detectives arrived at his house, Flores wondered what would happen to him, but now he trusted God and the detectives and felt better. Ollague said that Conner would now handcuff Flores and arrest him for having sex with a minor, and would explain what would happen next. Ollague continued, “Number one is help, okay? Number two is to try to figure out how we’re going to fix all this, okay?” Flores thanked him. The interview lasted about an hour and 30 minutes.

We consider, first, the factors that might be thought to weigh in favor of finding that Flores was in custody. Flores was an unsophisticated interview subject. The interview took place at a police station, in an interview room, with the door closed. Two officers confronted Flores. He was driven to the station by the officers and would have had to find his own way home had he decided to leave. It was made clear that Flores was a suspect and not just a witness. The officers were dogged and persistent in their questioning; they insisted that they already knew the truth and that Flores was lying when he denied wrongdoing. They used powerful persuasive techniques, saying that if he confessed, the situation would be repaired, things would be better for him and his family, he would experience an emotional release, and he would put himself right in the eyes of God. At the end of the interview, Flores was arrested.

Against these, we weigh factors that tend to show Flores was not in custody. Flores left his home and went voluntarily to the police station after confirming he knew why the detectives wanted to question him. The detectives told Flores he was not under arrest and was free to leave. He said he understood this. In the video recording, there

appear to be no physical barriers that would have prevented Flores from leaving the interview room at any time. The detectives were seated throughout the interview except when entering or leaving the room. Although they accused him of crimes and could be said to be applying psychological pressure, they never raised their voices, used an angry or intimidating tone, or struck physically domineering or menacing postures. Their tone throughout was determined but polite and calm.

In our view, the balance of these factors tips against a determination that Flores was in custody. An objective person might indeed find the persuasive and emotional pressure to confess to be strong under these circumstances. But we do not think such a person would have felt he or she could not leave.

Flores cites *People v. Aguilera*, *supra*, 51 Cal.App.4th 1151, several times to support his argument that the various psychological tactics the detectives used—saying they already knew what happened and Flores was lying, for instance—meant he would reasonably conclude he could not leave. Certain key facts in *Aguilera* distinguish it from this case, however. *Aguilera*'s interrogators said the interview would end only “*after* he told them the truth,” implying that he could not leave until he said what they wanted him to say. They also expressly told him he could not leave if they had to go interview a witness he had said could provide an alibi. (*Id.* at p. 1163.) The officers said *Aguilera* was not in custody, but they did not say he was free to leave when he wished. (*Id.* at p. 1164.) The interrogation went beyond being intense and persistent and became “threatening and intimidating.” (*Id.* at p. 1165.) These factors are not present in this case.

Flores cites *People v. Esqueda* (1993) 17 Cal.App.4th 1450. This case also is distinguishable. There was no evidence that *Esqueda* voluntarily agreed to accompany police to a police station from a gas station where he was found. (*Id.* at p. 1482.) Further, “[t]hroughout the interview *Esqueda* was crying, moaning, and often confused,” and “had been drinking and was hysterical at times,” rendering his mental condition

“suspect.” (*Id.* at pp. 1482-1483.) Relying on this case, Flores says his mental condition also was suspect because he had just revealed that he had been molested as a child. The situation is not similar, however. Flores expressed a certain amount of emotion, but he never cried or moaned or became confused or hysterical.

For all the above reasons, we conclude that, under the totality of the circumstances, a reasonable person in Flores’s shoes would not have believed he lacked freedom to leave, as if he had been under arrest.

II. Voluntary confession

Flores argues that his confession was involuntary and therefore its admission into evidence violated his right to due process of law. He contends that if his trial counsel forfeited this issue by failing to raise it in the trial court, then this failure denied him effective assistance of counsel. We review the issue of involuntary confessions independently, except that we review for substantial evidence the trial court’s findings on disputed facts about the circumstances surrounding a confession. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093, overruled on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Again, the facts are undisputed here in light of the video recording. As we will explain, there was neither a violation of due process nor ineffective assistance of counsel through failure to object because Flores’s confession was not involuntary.

State and federal constitutional due process principles bar the use against a criminal defendant of the defendant’s involuntary confession. (*Jackson v. Denno* (1964) 378 U.S. 368, 376; *People v. Massie* (1998) 19 Cal.4th 550, 576.) A confession is involuntary if it is not the product of the defendant’s free will and rational intellect. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398; *Miller v. Fenton* (1985) 474 U.S. 104, 110; *People v. Maury* (2003) 30 Cal.4th 342, 404.) The test is whether the defendant’s will was overborne at the time of the confession. (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534; *Maury, supra*, at p. 404.) When a defendant challenges the voluntariness of a

confession, the prosecution has the burden of proving voluntariness by a preponderance of the evidence. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *Massie, supra*, at p. 576.)

Both physical and psychological forms of coercion are relevant. (*Rogers v. Richmond* (1961) 365 U.S. 534, 540.) Factors specific to a particular defendant are among those that should be considered. (*People v. Guerra, supra*, 37 Cal.4th at p. 1093.) Factors courts have deemed significant include violence; threats; promises; deception; the length and location of the interrogation; and the defendant's age, maturity, education, sophistication, experience with the criminal justice system; and physical, mental, and emotional condition. (*People v. Williams* (1997) 16 Cal.4th 635, 660; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 209; *People v. Maury, supra*, 30 Cal.4th at pp. 404-405.) A court must consider the totality of circumstances surrounding a defendant's statement when deciding whether the statement was voluntarily or involuntarily made. (*Dickerson v. United States* (2000) 530 U.S. 428, 434; *Guerra, supra*, at p. 1093.)

The record in this case demonstrates by a preponderance of the evidence that Flores's confession was voluntary. Having come voluntarily to the police station, and having been persuaded by reasons of conscience that it was the right thing to do, Flores described specific sex acts in which he engaged with the victim. The detectives' persistence and use of psychological techniques undoubtedly had a role in Flores's decision to change his story and confess. In the recording of the interview, however, we see scant indication that his ability to act according to his own will was taken away from him by these techniques. Instead, the impression given by Flores in the recording is that of a man who has been persuaded to make his own decision to be truthful.

Flores argues that his will was overborne by the detectives' invocation of God, which, he maintains, was an improper exploitation of the detectives' knowledge of Flores's religious beliefs. He also suggests the detectives' references to religion were especially coercive because the detectives drew a parallel between Flores's abuse of the

victim and the abuse Flores suffered as a child; and they alluded to God's knowledge of both situations.

To support the notion of religious coercion, Flores relies on *People v. Adams* (1983) 143 Cal.App.3d 970, overruled on other grounds in *People v. Hill* (1992) 3 Cal.4th 959, 995, footnote 3. Adams was suspected of murder. The sheriff, who knew Adams from church and knew she was suffering from nervousness and sleeplessness, interviewed her. Citing specific biblical passages, the sheriff told Adams that if she denied her guilt, God would turn his back on her. Then he told her about a book written by a minister that described a woman who was placed in a mental institution because she was consumed by debilitating guilt over the sin of an adulterous relationship. The sheriff told Adams she was similar to the woman in the book and might have a nervous breakdown unless she confessed because of her failure to adhere to God's law. (*Id.* at pp. 979-981, 988-989.) The book said people in mental institutions are not mentally ill but are debilitated by guilt over their sins. Adams also thought she was similar to the woman in the book because she had been living with but not married to the murder victim. She feared she would go to a mental institution and then suffer eternal damnation if she did not change her story. She said she confessed for these reasons. (*Id.* at p. 986.) Primarily because of these facts, the Court of Appeal held that Adams's statement was involuntary and should have been excluded from evidence. (*Id.* at p. 990.)

Despite some strong language in the opinion,³ we do not understand *Adams* to hold that an interrogator's suggestion that God wants a suspect to tell the truth necessarily renders a subsequent confession involuntary. The test of voluntariness is unchanged by

³"Religious beliefs are not matters to be used by governmental authorities to manipulate a suspect to say things he or she otherwise would not say. The right to worship without fear is too precious a freedom for us to tolerate an invasion and manipulation by state officials of the religious beliefs of individuals, including those accused of crime." (*People v. Adams, supra*, 143 Cal.App.3d at p. 989.)

the use of this tactic: We still must determine, in light of the totality of the circumstances, whether the suspect's will was overborne. The *Adams* court acknowledged this and described the totality of the circumstances there as "an overwhelming and calculated appeal to the emotions and beliefs, focusing appellant's fears in an area the sheriff knew appellant to be particularly vulnerable." (*People v. Adams, supra*, 143 Cal.App.3d at p. 986.)

In this case, Flores may well have been concerned about God's knowledge of his actions, but the detectives used nothing comparable to the interrogator's methods in *Adams*. The detectives did not tell Flores that, because of his failure to conform to God's law, he would be consumed with feelings of guilt, have a nervous breakdown, and be confined to a mental institution. There is no indication that Flores believed he would suffer eternal damnation if he did not confess. The detectives' references to God and to Flores's religious feelings in this case amounted to no more than an appeal to his conscience or a way of saying that telling the truth was the right thing to do. This kind of appeal is not an unconstitutional form of pressure. We see no indication here that it deprived Flores of his power of voluntary action.

Flores also relies on *People v. Montano* (1991) 226 Cal.App.3d 914, in which the interrogator used "religion to conjure up in defendant's mind the picture of confessing to avoid going to hell." (*Id.* at p. 935.) This was only one of many factors in *Montano*, however. The officers ignored Montano's 10 invocations of his right to remain silent. He was 18 years old and drunk when the interrogation began. (*Id.* at pp. 935-936.) The officers "conveyed the unmistakable message that defendant's rights were meaningless." (*Id.* at p. 936.) Montano was interrogated through the night despite his pleas of fatigue and lack of sleep. (*Ibid.*) Flores's case is not similar.

Flores next argues that his confession was involuntary because it was made in response to implied promises of leniency. He says the detectives implicitly promised

lenient treatment when they said he could fix, repair, and resolve matters by admitting to the abuse.

People v. Vasila (1995) 38 Cal.App.4th 865, which Flores cites, actually shows that this argument lacks merit. The *Vasila* court quoted the standard for the promised-leniency doctrine as stated by our Supreme Court in *People v. Hill* (1967) 66 Cal.2d 536, 549: “When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.” It was later specifically held by our Supreme Court that, to render a confession involuntary, a promise of leniency must be “the motivating cause of defendant’s admissions.” (*People v. Williams, supra*, 16 Cal.4th at p. 661.)

Vasila was told that if he gave the police specific information, a federal prosecution would not be instituted, and Vasila would be released on his own recognizance. (*People v. Vasila, supra*, 38 Cal.App.4th at p. 874.) The Court of Appeal held that Vasila was motivated by this promise to make incriminating statements, which, consequently, were inadmissible. (*Id.* at p. 876.)

In this case, the detectives did not expressly offer Flores any reduction in the consequences he might face from the authorities. We also do not think they impliedly offered any such leniency. The detectives’ references to repairing, resolving, and fixing the situation were undoubtedly meant to focus Flores on the idea that his feelings of tension might be relieved if he confessed and perhaps also to distract him from the idea that he will be punished. We do not think this tactic can, by itself, be reasonably

interpreted as a promise of lenient treatment by the authorities. There is no evidence that Flores interpreted it that way.

In sum, the record shows by a preponderance of the evidence that Flores's confession was not involuntary. The kinds of persuasion the officers applied in the interview, while effective, were not the kinds that have been deemed by courts to be coercive.

DISPOSITION

The judgment is affirmed.

Smith, J.

WE CONCUR:

Kane, Acting P.J.

Poochigian, J.