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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTOS SOLANO FLORES,

Defendant and Appellant.

G044789

(Super. Ct. No. 10CF0334)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Nguyen Tran, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Santos Solano Flores of two counts of sexual intercourse or sodomy with a child 10 years or younger. (Pen. Code, § 288.7, subd. (a).) Defendant contends his trial lawyer violated the Sixth Amendment and rendered ineffective assistance of counsel by failing to seek suppression of his confession, which he claims was obtained in violation of his right to *Miranda* warnings. (See *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).) Because he voluntarily accompanied two investigators to the police station, and his interview there for less than an hour did not rise to the level of inherently coercive custodial interrogation that *Miranda* warnings safeguard against, defendant was not constitutionally entitled to the warnings. Consequently, his trial counsel was not required to make a futile objection based on the absence of warnings. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL HISTORY

Between the end of 2009 and February 2010, A. began work as early as 5:00 a.m. and therefore would drop her three children off at her sister's house in Santa Ana. Her sister and her sister's husband lived with their children, plus two of the husband's brothers, including defendant. When A. dropped her children off, they would sleep in the living room before heading to school around 7:00 a.m.

On February 7, 2010, as she prepared a routine family meal, A. spoke generally with her son, S., who the record indicates was eight or nine years old, about "good" and "bad" touches. When he began to cry, she asked him if someone had touched him and he revealed defendant molested him with his "private part," causing his (S.'s) "butt" to hurt. S. described the abuse explicitly at trial: defendant approached him from behind while he slept on the couch in the mornings before school, put his "private part,"

the part someone uses “to pee,” in S.’s butt, and it would go “back and forth” and defendant’s breath would get heavier until S. felt something wet inside or outside his butt, “like slime” or “water,” and then defendant would return to his room and S. would go to the bathroom. The abuse continued on multiple occasions over a long period of time. S.’s anal area hurt after each incident, but he did not disclose the abuse because he feared defendant would hurt him if he told anyone. A. intended to have S. examined by a doctor after he finally revealed the abuse but, unable to do so for two days, she contacted the police.

Forensic nurse Jan Hare examined S. on February 9, 2010, and he described how defendant sodomized him. Hare found S.’s anal area reddened, but concluded it was likely a hygiene issue. She noted, however, that S. was sensitive and tender near his anus and that he contracted his anal muscles, squirmed around, and pulled away as she examined the area. S. also complained of back and stomach pains. Hare could neither confirm, nor exclude a conclusion S. had been anally penetrated, but her findings were consistent with a history of sodomy. She noted children healed much faster than adults, especially in the anal area, and that the absence of manifest physical trauma could arise from lack of full penetration or from normal anal accommodation.

On February 10, 2010, Santa Ana Police Detectives Jaime Rodriguez and Robert Valdez contacted defendant at his home. The detectives dressed in suits and ties and were armed, but their clothing hid their service pistols. Speaking to defendant in his native Spanish, they identified themselves as detectives, showed defendant their photo identification and badges for verification, informed him his name had “come up” in an investigation, and asked if he would accompany them voluntarily to the police station for an interview. Defendant agreed and the officers drove him to the station in their

unmarked, city-issued, “regular looking” vehicle. They did not arrest defendant, mention arrest as a possibility, or handcuff him at any time. At the station, they escorted him to an interview room and spoke to him in Spanish about their investigation. The videotaped interview lasted 58 minutes. Rodriguez confirmed with defendant at the outset of the interview that he was there voluntarily and had not been threatened in any manner. The detectives reaffirmed he was not under arrest, adding specifically that he was free to leave at any moment.

Rodriguez and Valdez then alternated asking general questions about defendant’s living situation and his relationship with the children in the home, including A.’s. Rodriguez informed defendant one of A.’s children “is accusing you of something.” Asked about his relationship with S., defendant admitted he had hit S. once or twice, including pulling his ear when he did not listen, but he denied he touched him in any other way. Rodriguez told defendant S. accused him of touching him in a sexual manner several times. Rodriguez asked why S. might make such a claim, and defendant suggested it was retaliation because he scolded S. when S. viewed pornographic material on defendant’s laptop and tried to take the laptop from defendant’s room. According to defendant, the pornography involved sex scenes between men and women.

Rodriguez disclosed S. alleged defendant had inserted his penis into S.’s anus. Defendant denied the allegation, saying he “would be crazy in the head to do that.” He admitted he “like[d] men” and “I might be queer and everything,” but insisted “I have never gotten involved with a child or with an adult. I would never do it.”

Rodriguez asked if he could search through defendant’s computer at home and defendant agreed. He maintained he never touched S. sexually. Rodriguez then employed a ruse and falsely informed defendant adult male DNA had been recovered in

S.'s medical exam. Rodriguez asked whether defendant would be willing to supply a DNA sample to prove his innocence, explaining it was defendant's decision, but if the samples did not match then it would prove his innocence, while if they did match, it would prove that he had touched S. Defendant asked, "And what are you going to do to me?" Rodriguez replied, "Excuse me?" Appellant asked again, "What are you going to do to me? Are you going to put me in jail?" Rodriguez replied "What do you think? What do you think?" Rodriguez paused and continued, "It did occur didn't it?" He paused again and then questioned, "It, it did happen right?"

At this point, a little less than halfway into the hour-long interview, according to the length of the transcript, defendant described an occasion when S. entered the bathroom while defendant sat on the toilet. The boy refused to leave, so defendant told him to handle his penis ("I said come grab it and that was all"). Defendant claimed S. approached, touched defendant's penis, and then turned around and asked appellant to "put it in his butt." Defendant claimed he only put his penis on S.'s butt and did not penetrate him, but when Rodriguez asked if he were sure, defendant admitted he had penetrated S., though he (defendant) "didn't feel it because I believe I was drunk that day." Defendant used a pen to demonstrate he penetrated S. an inch or two with the tip of his penis. Rodriguez asked how many times defendant touched S. this way, and he admitted, "One time I suppose," but denied it happened many times as S. claimed.

Throughout the remainder of the interview, defendant continued to ask if he was going to jail and pleaded with detectives to not put him in jail. The detectives did not threaten him with jail, but rather asked him each time what he thought would happen and informed him the decision would be up to a judge.

II

DISCUSSION

Defendant contends his right to effective assistance of counsel was violated when his attorney failed to move to suppress his interview statements on grounds he did not receive *Miranda* warnings. An appellant in these circumstances must demonstrate the suppression motion would have been successful. (*People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437.) This follows from the test for ineffective assistance of counsel, which requires deficient lawyering so serious that it invades the defendant's right to a fair trial and undermines confidence in the verdict. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) But if a motion is meritless, it by definition could not affect the trial outcome and an attorney is not deficient for failing to make a futile motion. As we explain below, the detectives were not required to provide defendant *Miranda* warnings because their interview was not "custodial" within the meaning of *Miranda* and its progeny. A suppression motion therefore would have failed, and defendant was not denied effective assistance of counsel.

The prosecution may not use statements elicited by the police during custodial interrogations unless preceded by a valid waiver of the defendant's *Miranda* rights. (*People v. Mickey* (1991) 54 Cal.3d 612, 647-648.) *Miranda* warnings are required only when a suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda, supra*, 348 U.S. at p. 444.) The Supreme Court later explained that "*Miranda* become[s] applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440, quoting *California v. Beheler* (1983) 463 U.S. 1121, 1125 (*Beheler*)). Whether an individual is in custody is a mixed question of law and fact.

(*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403 (*Pilster*.) We defer to the trial court's findings of fact to the extent that they are supported by substantial evidence, but independently evaluate whether the defendant was in custody. (*Ibid.*)

“Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] [Fn. omitted.] The totality of the circumstances surrounding an incident must be considered as a whole. [Citations.] Although no one factor is controlling, the following circumstances should be considered: (1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of [the] questioning. [Citation.]” (*Pilster, supra*, 138 Cal.App.4th at 1403, internal quotation marks omitted.) “Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect’s freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were ‘aggressive, confrontational, and/or accusatory,’ whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation.]” (*Id.* at pp. 1403-1404.)

Informing a suspect he is not under arrest can be a significant factor (see, e.g., *United States v. Salvo* (6th Cir. 1998) 133 F.3d 943, 951[informing suspect he was not under arrest, was free to leave and would not be arrested after the interview was an “important factor in finding the suspect was not in custody”].) Here, the detectives informed defendant at the outset of the interview that he was not under arrest and could

leave at any time. Defendant voluntarily agreed to accompany the detectives to the station for an interview, which he reaffirmed before the interview began. The detectives were armed, but dressed in plain clothes, transported defendant in an unmarked car, and never handcuffed him or threatened him with arrest or in any other manner. At this point, a reasonable person, barring some other aggravating circumstance, would conclude the circumstances were not tantamount to formal arrest.

The location and length of the interview are also significant factors; the interview here lasted slightly less than an hour and was conducted in the station house, where defendant admitted his guilt promptly and without any coercion. Even though the interview took place in a police interview room, that fact alone is not dispositive. (See, e.g., *Oregon v. Mathiason* (1977) 429 U.S. 492, 493 (*Mathiason*); *Beheler, supra*, 463 U.S. at p. 1122.) The defendants in *Mathiason* and *Beheler* were each asked and voluntarily agreed to come to the police station for questioning. Once there, the police informed each defendant he was not under arrest, although *Mathiason* was told he was a suspect, and in both cases the high court held the interrogations were not “custodial” within the meaning of *Miranda*. (*Beheler*, at p. 1125.)

Mathiason is particularly instructive because there, as here, police used a ruse to encourage a confession. (*Mathiason, supra*, 429 U.S. at p. 493.) In *Mathiason*, the police officer falsely told the defendant his fingerprints had been found at the crime scene. The defendant then confessed and subsequently received *Miranda* warnings. The police interviewed the defendant for another 25 minutes and then released him. (*Mathiason*, at p. 494.) Here, the ruse was less deceptive than the one employed in *Mathiason* because there the officer accused the defendant with false evidence *his* fingerprints were found at the scene of a crime. Here the detectives told defendant that

adult male DNA was found on S., but they did not claim the DNA belonged to defendant, which arguably would have made his free departure less likely and the circumstances more akin to formal arrest, though even the supposed fingerprint evidence in *Mathiason* did not render the circumstances custodial there. The detectives here questioned defendant's guilt and held open the possibility DNA testing would prove his innocence, but they did not demand he take a test or suggest a sample would be taken without his consent. The next step, including taking a test, therefore remained within defendant's choosing, unlike for a suspect placed under arrest.

Defendant argues the interrogation became custodial after the ruse led into a discussion concerning jail time. Specifically, defendant argues that when he asked, "What are you going to do to me? Are you going to put me in jail?" and Rodriguez replied to him, "What do you think?" — the interview transformed into a custodial interrogation requiring a *Miranda* admonishment. The tenor of the interview, however, did not change dramatically; rather, Rodriguez simply mirrored the question back to defendant and nothing in the record suggests he did so in an aggressive or accusatory fashion. He did not threaten defendant with arrest or in any other manner, and the next step, including whether to adjourn the interview to take a DNA test or to ask to depart, appeared to remain open to him. The detectives did not change the ruse to suggest the DNA matched his; instead, the case remained S.'s word against defendant's with no decisive evidence requiring the detectives to arrest defendant.

Defendant relies on *People v. Boyer* (1989) 48 Cal.3d 247, overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1, and *People v. Aguilera* (1996) 51 Cal.App.4th 1151 (*Aguilera*) to argue the interview constituted a custodial interrogation. Both decisions are readily distinguishable. In *Boyer*, the police

detained the defendant as he attempted to leave his home by the backdoor, other officers having sought entry at the front door. The defendant agreed to accompany officers to the police station where he was subjected to more than an hour of intense and accusatory questioning. The officers directly accused the defendant of the homicide under investigation and told him they possessed undisclosed information incriminating him and that he would be unable to live with himself if he did not confess. The officers proclaimed they knew the defendant was guilty, they intended to charge him, and expressed confidence their evidence would hold up in court. Perhaps most importantly, the officers rebuffed the defendant's requests to have a lawyer present and to end the interview altogether, demonstrating he was at the mercy of the police in circumstances tantamount to formal arrest. But here, defendant was never subjected to a rigorous and accusatory back-and-forth examination, the detectives did not claim to know he was guilty, and the false evidence the detectives claimed to possess was inconclusive. Nor did defendant ask to end the interview.

Aguilera is similarly distinguishable. There, police came to the home of a suspect in a gang-related homicide, asked to search the house for evidence, and asked both the defendant and his mother to accompany them to the station. Once at the station, the defendant was subjected to a two-hour interrogation the trial court described as “intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating.” (*Aguilera, supra*, 51 Cal.App.4th at 1165.) The detectives informed the defendant they had evidence he participated in the homicide, and told him the interview would only end when he admitted the “truth,” which in context implied the interview would continue until he confessed. (*Id.* at pp. 1163-1164.) Defendant's interview here shares few features with the interrogation in *Aguilera*; the interview was half as long,

there was no suggestion it would continue until defendant confessed, and the tenor of the interview bore no coercive traces. To the contrary, the record reveals the two detectives were largely cordial with defendant and the tone of the interview was not aggressive or domineering.

Considering the totality of the circumstances surrounding defendant's interrogation we conclude that his interview with police was not "custodial" and therefore he was not entitled to *Miranda* warnings before officers could question him about his interactions with S. The suppression motion he claims his attorney should have made therefore would have been futile, and he was not denied effective assistance of counsel.

III

DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.