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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.

RULIN HERNANDEZ LOAEZA,

Defendant and Appellant.

G047018

(Super. Ct. No. 09NF3583)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Stephanie Chow and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Rulin Hernandez Loeza of two counts of oral copulation by force (Pen. Code, § 288a, subd. (c) (2) (A));¹ counts 1 and 3), two counts of criminal threats (§ 422; counts 2 and 4), and one count of simple assault (§ 240), a lesser included offense of attempted oral copulation by force (§§ 664, subd. (a), 288a, subd. (c) (2) (A); count 5). The jury also found Loeza committed the offenses in counts 1 and 3 against more than one victim (§ 667.61, subds. (c) and (e) (4)).

The court sentenced Loeza to a total prison term of 32 years to life, consisting of a determinate two-year term on count 2, plus consecutive indeterminate 15-to-life terms on each of counts 1 and 3, a concurrent term of 16 months on count 4, and a concurrent term of six months on count 5.

Loeza contends certain pretrial statements were obtained in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and improperly admitted into evidence at trial. Loeza also contends the sentences imposed on counts 2 and 4 must be stayed under section 654. We agree with his latter contention only, order the sentences on counts 2 and 4 stayed, and affirm the judgment in all other respects.

FACTUAL BACKGROUND

1. R.F. (Counts 1 and 2)

Around 7:00 p.m. in early November 2009, R.F. saw Loeza, whom she did not know, at a cell phone store in Garden Grove. A short time later, Loeza offered R.F. a ride home and she accepted.

After driving less than 15 minutes, Loeza stopped his car in a deserted area, jumped on top of R.F., told her he had a knife, and said if she “[didn’t] suck his

¹ All further statutory references are to the Penal Code unless otherwise stated.

dick, [she was] going to die.” R.F. initially refused and resisted but ultimately complied because she believed Loaeza would kill her.

Once Loaeza ejaculated in her mouth, R.F. got out of the car, ran away, went to a police station and reported the sexual assault. The next day R.F. saw Loaeza’s car parked near the cell phone store, wrote down the license plate number and gave it to the police. R.F. identified Loaeza in court as the man who assaulted her.

2. *S.D. (Counts 3 and 4)*

About 10:35 p.m. in November 2009 Loaeza and S.D. were found in the back of his parked car. Loaeza was sitting on the driver’s side rear seat and S.D. was lying across the rear seat with her head towards the driver’s side. Loaeza had his pants down and his penis was exposed.

When a deputy sheriff opened the rear passenger door S.D. got out and said, “Thank, God, you’re here. He threatened to kill me and he has a knife.” A used condom was found on the floor below Loaeza’s feet and there appeared to be a semen stain on the rear seat. A folding pocket knife with the blade locked open was found between the driver’s seat and the center console.

3. *M.M. (Count 5)*

Sometime after 11:00 p.m. in early December 2007, M.M. was approached by Loaeza near the gate in back of her home. He asked her if Francisco Zamora lived there. When M.M. turned to open the gate, Loaeza pulled her hair with one hand and grabbed her vagina with his other hand. M.M. screamed and he let go and ran away. Loaeza was not wearing shoes at the time, but a pair of sandals with his DNA on them were later found in front of M.M.’s home. M.M. identified Loaeza in a photographic lineup as the man who assaulted her.

4. Loaeza's Pretrial Statements

On December 14, 2009 Loaeza went to the Anaheim Police Department and was interviewed by Detective Wang about the S.D. and R.F. incidents. The interview lasted for about 50 minutes and was videotaped. Wang did not advise Loaeza of his *Miranda* rights before or during the interview.

At the outset, Wang told Loaeza he was not under arrest, did not have to talk to Wang, and could stop the interview and leave anytime. Loaeza acknowledged he was there of his own free will. A second officer was present but stayed outside and could not be seen from inside the interview room. Loaeza was not handcuffed and the interview room door was not locked.

After collecting personal information and discussing Loaeza's interest in joining the military, Wang questioned him about the incident involving S.D. Later Wang showed him a photo of R.F. Loaeza initially denied knowing R.F., but eventually admitted having a conversation with her outside a cell phone store. He repeatedly denied going anywhere with R.F.

Wang then told Loaeza surveillance cameras showed Loaeza went somewhere with R.F., and beginning about 30 minutes after the interview began, the following exchange occurred:

“Q: Okay, you guys went somewhere in your car. You drove north on Harbor together, okay? Do you know there are businesses at different locations?”

“A: Uh huh.

“Q: Most businesses have cameras, okay? Just because you guys walk away from Metro PCS, I only need to know which direction you guys walked to, I can access—I can go to look at other cameras. There's also cameras on every intersection. You know, I don't know if you ever noticed that, but there's a little camera on top of the light, okay?”

“A: The lights?”

“Q: I only need to know which direction you guys went to, and what time, and I can go back and look at the cameras, okay? So, with that said, would you like to tell me—would you like me to tell you what I saw in the camera, or would you like to be honest and tell me what happened today? I know exactly what happened. And I talked to her. And now you’re telling me nothing happened, and I’m telling you that’s not the truth, okay? Why don’t you tell me? You’ve been honest so far with, with the other girl. And I believe you with the other girl. But this one, you know, at the Metro PCS girl, that you’re not telling me everything. So why did you stop?

“A: Well—

“Q: Why, why didn’t you tell me the whole truth about the other girl, the second one, the one that you met at the Metro PCS? The one that you guys—you know, don’t know who you are—she is? Tell me, what happened?

“A: Can I ask you a favor, sir?

“Q: Sure.

“A: Can, uh, can I come like tomorrow for sure?

“Q: What’s that?

“A: Can I come tomorrow?

“Q: Why? Why do you want to come back?

“A: ‘Cause—well, ‘cause I want, like, like, I’m, I’m, I’m, I’m not feeling, like, all right. (..?)

“Q: Okay, that’s fine, but—

“A: I’ll, I’ll come back—

“Q: Well—

“A: --even if I have to miss work, you know?

“Q: Rulin. . . .

“A: To tell you the truth. I’m, I’m going to put my mind—

“Q: Rulin. . . .

“A: -- and think about it right.

“Q: You just have to tell me the truth, okay? You don’t have to think about what to tell me.

“A: Yeah.

“Q: Just tell me the truth.

“A: That’s what I’m telling you.

“Q: Okay. If I give you time to think about it, you’re going to come up with some—

“A: No I won’t.

“Q: -- lies.

“A: I won’t, I promise. I’ll give you what you, what you want to hear, when—what you, what you know already.

“Q: I don’t want to hear what you want me to hear. I want you to tell me what happened.

“A: That’s what I’m telling you.

“Q: Yeah, I know what happened, okay? Why wouldn’t you want to tell me what happened?

“A: Oh, I’m scared.

“Q: You’re scared? Scared about what?

“A: I don’t know.

“Q: Did you do something wrong?

“A: Not wrong.

“Q: Okay, then tell me.

“A: Can I please come back tomorrow? I, I promise I’m going to come back any time you want.

“Q: Okay, but we’re not done yet.

“A: Okay.

“Q: I’m not done yet.

“A: Okay.

“Q: Do you want me to tell you what happened?

“A: Yes. And I’ll say if it’s right or not.

“Q: Okay. You drove—you gave her a ride.

“A: Yes, sir.

“Q: The bus didn’t come, she took the ride. Okay? She told you that she lives, yes, in Anaheim. You guys went on Harbor. You guys went to Santa Ana, and then you made a turn, Santa Ana Street, and you made a turn. She said, ‘Wait a second, you did the wrong turn.’”

This entire exchange lasted about three and one-half minutes. Wang never yelled at Loaeza or threatened him in any way. Thereafter, the interview continued for another 16 minutes and Loaeza never repeated his request to come back the next day. During this portion of the interview, the questions and answers continued much as before the exchange quoted above. Loaeza confirmed certain details of the incident involving R.F. but denied others. Loaeza eventually admitted he forced her to orally copulate him but insisted he did not have a knife, did not say he was going to kill R.F., and did not hit her. At the conclusion of the interview Wang arrested Loaeza.

Additional facts relating to Loaeza’s challenged pretrial statements are set out in the procedural background and discussion sections below.

PROCEDURAL BACKGROUND

At trial Loaeza moved to suppress the statements he made to Wang after the exchange quoted above, on the grounds those statements were obtained in violation of his

Miranda rights.² Before the jury was selected, Wang testified as to the circumstances surrounding the interview and the court reviewed the interview videotape. Following the arguments of counsel, the court took the matter under submission and reviewed the interview videotape again. The next day the court denied the motion to suppress the challenged statements and found Loaeza was never in custody for purposes of *Miranda* based on the totality of the circumstances. At trial the prosecutor introduced both the interview videotape and a transcript of the interview into evidence.

DISCUSSION

1. *Miranda*

Loaeza contends his convictions for oral copulation by force and criminal threats arising out of the R.F. incident (counts 1 and 2) must be reversed because the trial court erroneously denied his motion to suppress and admitted the challenged pretrial statements into evidence. Specifically, he argues the trial court erred in finding he was never in custody for purposes of *Miranda*. We disagree.

“In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant’s rights under *Miranda v. Arizona*, *supra*, 384 U.S. 436, the scope of our review is well established. ‘We must accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.’ [Citations.] We apply federal standards in reviewing defendant’s claim that the challenged statements were elicited from him in

² Loaeza also moved the trial court to suppress these statements on the grounds they were the product of coercion and therefore involuntary. Loaeza has abandoned this alternative argument on appeal and we express no opinion on it.

violation of *Miranda*. [Citations.]” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033; see also *People v. Waidla* (2000) 22 Cal.4th 690, 730.)

Custody for *Miranda* purposes is a mixed question of law and fact. (*People v. Moore* (2011) 51 Cal.4th 386, 395.) An appellate court must apply a deferential substantial evidence standard to the trial court’s factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, a reasonable person in the defendant’s position would have felt free to end the questioning and leave. (*Ibid.*)

In making an objective assessment of the *Miranda* custody issue, the linchpin is whether a reasonable person in the particular circumstances would feel his freedom of movement has been restricted to the degree associated with formal arrest. (*Yarborough v. Alvarado* (2004) 541 U.S. 652; *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.) The standard is an objective, reasonable man standard — not the subjective views of the police or the “suspect.” (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.)

The following are objective “indicia of custody for *Miranda* purposes: (1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.” (*People v. Foster* (1994) 29 Cal.App.4th 1746, 1753.) The determination is made on the unique facts of each case, based on the totality of the circumstances — no one fact is dispositive. (*California v. Beheler* (1983) 463 U.S. 1121, 1125; *People v. Boyer* (1989) 48 Cal.3d 247, 272.)

In this case the trial court concluded “there was nothing coercive about the beginning of the interview.” The trial court found Loaeza voluntarily scheduled the interview, he voluntarily drove his own car to the Anaheim Police Department, he was questioned by one detective in plain clothes in a nondescript office, he was not in handcuffs, and the interview room door was unlocked. The trial court also found Wang

told Loaeza at the outset he was not under arrest, did not have to talk to Wang, and was free to go.

Under these circumstances a reasonable person would not feel his freedom of movement had been restricted to the degree associated with a formal arrest. The fact that roughly three-fifths of the way through the interview Loaeza asked two questions about coming back the next day did not materially alter these circumstances. In response to Loaeza's first question about coming back the next day, Wang said "Okay, that's fine, but. . . ." In response to Loaeza's second question about coming back the next day, Wang said, "Okay, but we're not done yet." More importantly, after those two questions, Loaeza agreed to let Wang tell him what happened, and the interview continued uninterrupted without any further indication Loaeza wanted to leave. In fact, as the trial court noted, Loaeza felt sufficiently comfortable to correct Wang's version of events in the questioning that followed.

Loaeza points out the accusatory or nonaccusatory nature of the questioning is another relevant factor to consider. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162, 1164 (*Aguilera*)). But Loaeza's reliance on *Aguilera* is misplaced. Here unlike in *Aguilera*, there was no "tag team" interrogation, the interview lasted 47 minutes — not two hours, and the questioning was never "intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating." (*Id.* at pp. 1164-1165.)

Here the nature of the questions was not accusatory, even though Wang told Loaeza he did not believe portions of Loaeza's story. As the trial court put it, "taken in its entirety, the . . . questioning was [not] likely to create a coercive environment in which the defendant did not feel free to leave." Finally, we note the trial court specifically found, "I did not believe there was anything about the tone of the officer's voice or any other action that implied that the defendant's compliance with the questioning might be compelled."

In sum, we agree with the trial court. Nothing happened during the interview “that would make an objective, reasonable person believe that something . . . changed from the beginning . . . [when] Wang made clear to the defendant that he didn’t have to be there and didn’t have to talk.” Thus, Loaeza was never “in custody” for purposes of *Miranda* and the interview was properly admitted into evidence.

2. *Section 654*

Loaeza next contends section 654 required the trial court to stay the sentences for his criminal threats convictions in counts 2 and 4, because those offenses were committed with the same intent and objective as his oral copulation by force convictions in counts 1 and 3. The Attorney General agrees and so do we.

DISPOSITION

The judgment is modified to stay the sentences on counts 2 and 4 under section 654. The clerk of the Orange County Superior Court shall prepare an amended abstract of judgment reflecting this modification, and send a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O’LEARY, P. J.

BEDSWORTH, J.