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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.

LUIS A. HERRERA,

Defendant and Appellant.

G049686

(Super. Ct. No. 11CF1339)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

David McNiel Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury convicted defendant Luis A. Herrera of four counts of lewd and lascivious acts upon the body of a child less than 14 years of age (Pen. Code, § 288, subd. (a)) and found that, in the commission of the charged offenses, defendant committed an offense against more than one victim. The trial court sentenced defendant to a total aggregate term of 30 years to life and imposed a restitution fine of \$200.

Before trial started, defendant moved to exclude his statement to the police on the ground it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed2 694] (*Miranda*). The court denied the motion, and an issue in this appeal is whether this was error. It is undisputed no *Miranda* warning was given before the police interviewed defendant. Thus, the issue here is whether the police questioned defendant while he was in custody.

We previously affirmed the conviction, accepting the argument of the Attorney General we did not need to determine whether the interrogation violated the restriction of *Miranda* because defendant had elected to testify, making any error in denial of the motion harmless, because a statement taken in violation of *Miranda* “is admissible to impeach the defendant’s credibility as a witness, so long as the statement otherwise is voluntary.” (*People v. Peevy* (1998) 17 Cal.4th 1184, 1188.) We reached this conclusion because neither in the trial court nor here did defendant assert he would not have testified but for the denial of his pretrial motion, and defendant failed to respond to the Attorney General’s argument based on his decision to testify by failing to file a reply brief.

After we filed our opinion, defendant petitioned our Supreme Court for review, citing *People v. Spencer* (1967) 66 Cal.2d 158 (*Spencer*), a case neither party cited in their briefing on appeal and was first raised in defendant’s Petition for Rehearing, which we denied. An argument may not be raised for the first time in a petition for rehearing. (See, e.g., *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1092.) “It is well

settled that ordinarily new matter will not be considered on a petition for rehearing. [Citations.] Criticism of the practice of raising new points in petitions for rehearing was expressed by the Supreme Court as early as 1857 in the case of *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330, 334.” (*Traders etc. Ins. Co. v. Pac. Emp. Ins. Co.* (1955) 130 Cal.App.2d 158, 159 disapproved on other grounds in *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 429.)

The Supreme Court granted the petition for review and transferred the matter to this court “with directions to reconsider its decision in the light of [*Spencer*].” We have done so but conclude *Spencer* does not affect our prior decision.

FACTS

1. The victims’ testimony

Doe 1, who was 16 years old when she testified, was raised by her uncle Teodoro. When she was four or five years old, defendant, whom she also called her uncle, though she thought he really was her cousin, was living in the same house with Doe 1 and Teodoro. While Doe 1 was in defendant’s bed, under the blankets and completely naked, he would place his tongue on the inner part of her vagina. He asked her to put her mouth on his penis, but, although she first refused, later she complied, putting his penis inside her mouth. At times, defendant would touch her vagina over her clothes. Doe 1 first remembered these events as happening when she was in third grade. Defendant also put his penis inside her vagina and ejaculated. Sometimes he would use a condom. She recalled one incident when he did not. Later, she and Teodoro moved to another place without defendant. They made this move shortly after she had told Teodoro defendant had been touching her. This was when she was about to start fifth grade.

Doe 2, Doe 1’s cousin, was 20 years old when she testified. Defendant is either a cousin or an uncle of Doe 2’s father and she has known him since she was a

young child. On about 10 occasions, when she was about 7 to 9 years old, defendant would pick her up, swing her around, and tickle her. In doing so, he would lift her up, spread her legs, and put her vagina up to his mouth. When he did so, she was clothed. She testified that it would tickle and it did not bother her. When Doe 2 was about 12 years old, defendant came to her house and asked her to take him to a shed at the side of the house. When they got there, defendant asked Doe 2 whether she knew how girls got pregnant. Defendant then pulled down his zipper, pulled out his penis, and told her he would rub it against her and “some white stuff was going to come out, but not to worry [she] wasn’t going to get pregnant.” Doe 2 was scared, told defendant her dad was coming out, and walked away. A couple of months later, she told her mother about this incident. Her father was mad but told her mother he did not want to report it because it involved family.

2. Defendant’s statement to the police

The officer designated to investigate the case, Alan Gonzalez, first talked to Doe 1 and arranged for her to initiate three telephone calls to defendant wherein she attempted to gain statements implicating him in the conduct described above. No admissions from defendant were obtained during these calls.

Gonzalez then went to defendant’s house together with several other detectives; all were in plain clothes. Gonzalez, accompanied by detective Valdez, went to the door, identified himself and stated he wanted to speak to defendant “about a case I’m investigating.” Gonzalez asked defendant if he would come to the station to talk to him about the case. He told defendant he was not under arrest, did not have to talk to him, and had no obligation to come to the station if he did not want to. Defendant agreed to accompany them. On the way to the station, they were in an unmarked vehicle. When they arrived, Gonzalez told defendant, “I appreciate you coming and speaking with me here at the station but, again, just so you know, you are not under arrest. If at any time

you don't want to [speak] to me you don't have to." They then walked to the elevator, took it to the third floor and entered an interview room. The room was equipped with video and audio recording equipment. Gonzalez denied making any threats or promises to defendant before the recording equipment was turned on.

The record contains a transcript of this interview, which took approximately one hour and 15 minutes. The interview was played to the jury and the jurors were furnished with copies of the transcript.

After having defendant identify himself, Gonzalez again repeated, "I want to ask you some questions about that case. . . . [Y]ou're free to, to leave at any time." And again assured defendant he was not under arrest. Some minutes later, "[Gonzalez]: [Y]ou're not under arrest. That at any time, if you do not want to talk to us. [¶] [Defendant]: Uh huh. [¶] [Gonzalez]: You just have to say; I don't want to talk with you guys or I want to leave. If you want to use the bathroom, tell us and – [i]f you want something to drink – just let us know what you want. [¶] . . . [¶] [And] [i]t's not that you have to come, that's why we asked you if you are here voluntarily. [¶] [Defendant]: Yes. [¶] [Gonzalez]: Do you understand? [¶] [Defendant]: Yes, that's fine."

Defendant, discussing his conduct with Doe 1 stated that she was a bed-wetter and that he would sometimes "touch her to see if she was peed." Referring to Doe 2, he stated that she and her sisters pulled down his pants while he was sleeping and saw "my part." Defendant then threatened the girls he would look at "their part" in turn. The girls did not touch his penis. On another occasion when he was swinging Doe 2 around, his hand touched her chest. In one incident, when he had Doe 2 up in the air, her legs opened and his mouth was on her vagina over her clothes. This happened because Doe 2 was falling. Then he explained the incident, "No, it wasn't like I grabbed her and I put my mouth on her vagina. If they're telling you the fact, she jumped on me and the other girl was there."

Gonzalez then returned to defendant's conduct with Doe 1. But first Gonzalez stated, "I haven't been disrespectful." Defendant responded, "No, I know." Defendant stated Doe 1 would jump on him, to kiss him. He would also notice that she would masturbate and "[o]nce . . . I would just touch her part and that's it." He stated she would tell him to do it again. This happened about four times.

At the conclusion of the interview, defendant again acknowledged he came voluntarily. Gonzalez thereupon arrested him.

3. Defendant's testimony

Defendant testified Doe 1 lived with himself, Teodoro, and another couple. Doe 1 had a bed-wetting problem. At times, defendant would check her to see if she had wet her bed. In 2004, he was visited by a social worker who inquired whether he had abused Doe 1. He denied he had done so to the social worker. In 2006, he was again contacted by a social worker who stated someone suspected he was molesting her. He again denied having done so. Around 2007 or 2008, Doe 1 and Teodoro moved out. He denied that Doe 1's testimony about his molesting her was true. The reason Teodoro moved out was because defendant had found Teodoro with his boyfriend in the house and this resulted in an argument because defendant did not think it appropriate for Teodoro, who is gay, to sleep in the same bedroom with Doe 1 and his boyfriend. Defendant denied ever sexually molesting Doe 1 while they were living in the same house.

Defendant denied the truth about Doe 2's testimony he had put his mouth on her vagina. He also denied the truth of Doe 2's allegation about the incident at the shed. When Doe 2's father accused defendant of molesting Doe 2, he denied it and he was not asked to cease coming to their house. Nor was he told to stay away from Doe 1.

Regarding the police interview, defendant testified there were six police officers at his house and he recognized them as such when he saw a weapon. His statement to the police that he touched Doe 1 when he saw her masturbating was untrue.

He never touched her vagina or saw her masturbate. He made the statement to the police by “invent[ing] something to get rid of the eight years of torture of them telling me something that did not happen.” He thought the officers would let him go if he told them something like that; he just wanted the interview to end. This was the same reason he told them he placed his mouth on Doe 2’s vagina. He also told the officers the girls had pulled his pants down, which never happened, because he “wanted to get rid of the situation which they were accusing me.”

Defendant denied ever sexually molesting either of the girls or ever exposing his genitals.

On cross-examination, defendant acknowledged the detectives never used any force or violence against him, never made any threats, told him repeatedly he could leave any time. But he continued to maintain his complete innocence.

DISCUSSION

1. People v. Spencer

In *Spencer*, a death penalty case, defendant was convicted of kidnapping for the purpose of robbery and first degree murder. (*Spencer, supra*, 66 Cal.2d at p. 160.) During a recorded interview by the police, “defendant confessed that he had committed the robbery and the shooting. He said that he had fired the shots only to induce the [victims] to keep their heads down and that he had not intended to hit either of them. In another recorded statement, however, [his co-defendant] stated that defendant had told him that he intended to shoot the [victims]; [co-defendant] claimed that defendant’s declaration took him by surprise and that he tried to persuade defendant to abandon any such plan. [¶] After the court admitted into evidence all of these recorded statements, both [co-defendant] and defendant testified. [Co-defendant’s] testimony coincided in substance with his earlier statements. Defendant’s testimony consisted generally of a

repetition of the statement that he had given during the second interrogation. He again admitted picking up the [victims] with the intention of robbing them; he said that after he had robbed them he told them to get out of the car and onto the ground; he admitted shooting one of the [victims] but insisted that he had only intended to fire some shots to frighten them into keeping their heads down.” (*Id.* at p. 161.)

“Defendant contend[ed] that his confession was improperly admitted at the guilt trial because he had not been informed of his rights to silence and to counsel prior to the time he confessed.” (*Spencer, supra*, 66 Cal.2d at p. 160.) The California Supreme Court, in its opinion authored by Justice Tobriner, agreed and held “that the trial court committed reversible error in admitting defendant’s confession in evidence.” (*Id.* at p. 162.) The court based its decision on *Escobedo v. Illinois* (1964) 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977] (*Escobedo*) and *People v. Dorado* (1965) 62 Cal.2d 338, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17 (*Dorado*). Although *Miranda* had been decided by the time the court issued the *Spencer* decision, it followed the trial in *Spencer* and was not the basis for the court’s decision. (*Spencer, supra*, 66 Cal.2d at p. 162, fn. 1.)

In *Escobedo, supra*, 378 U.S. 478, the United States Supreme court had held: “that where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied ‘The Assistance of Counsel’ in violation of the Sixth Amendment to the Constitution as ‘made obligatory upon the States by the Fourteenth Amendment,’ [citation], and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.” (*Id.* at

pp. 490-491.) *Dorado, supra*, 62 Cal.2d at p. 353 is to similar effect. For present purposes, the admissibility of defendant's statement is governed by *Miranda*.

The *Spencer* court held that, the mere fact defendant's testimony was identical to his previous statements to the police, which was obtained in violation of his constitutional rights, would not be a basis for sustaining his conviction. The court stated, "In determining the effect of defendant's extrajudicial confession upon the outcome of the instant trial, we must consider the likelihood that it contributed to the verdict by *inducing* the defendant to admit his guilt in open court." (*Spencer, supra*, 66 Cal.2d at p. 163-164, fn. omitted.) Significantly, the court stated, "To overcome the likelihood that the erroneous introduction of defendant's extrajudicial confession impelled his testimonial one, the State bears the burden of showing that the causative link between the two confessions had been broken. '[T]he beneficiary of a constitutional error [must] prove *beyond a reasonable doubt* that the error complained of did not contribute to the verdict obtained.' . . . [Citation.] The prosecution has failed to do so here. Instead, the prosecution urges us to speculate upon the defendant's motives for testifying and to infer, from a record which leaves the issue completely unexplored, that his decision to confess in court did not emanate from the erroneous receipt in evidence of his extrajudicial statement of guilt. We cannot posit so important a determination upon so conjectural a base." (*Id.* at p. 168.)

Nothing in *Spencer* indicates the defense advised the trial court that, but for the illegal pretrial statement, defendant would not testify. Thus, the court clearly placed the burden on the prosecution to show that defendant's decision to testify was not motivated by the pre-trial statement.

In *Spencer*, defendant's pre-trial statement made it clear there was no question defendant shot at his victims. The only question was whether he intended to shoot and possibly kill his victim or whether, as he stated in his pre-trial statement and during his testimony, he only intended to frighten them into keeping their heads down.

(*Spencer, supra*, 66 Cal.2d at p. 161.) But for the admission of the pre-trial statement, it might have been disputed whether it was defendant or his co-defendant who actually fired the shots. Our Supreme Court apparently considered that, had the pre-trial statement not been admitted and if defendant therefore had not testified, or, if he had testified he was not the shooter, the question of whether the co-defendant's testimony that defendant fired the shots would have been believed, and, if left uncertain might have persuaded the jury not to impose the death penalty.

The present case evidences a different set of circumstances. If we compare the testimony of the two victims, the pre-trial statement, and defendant's testimony it is clear that he was aimed at contradicting the victims' testimony and the pre-trial statement, and not, as in *Spencer*, to adopt the statements made during the interrogation.

Furthermore, after the California Supreme Court decided *Spencer*, in *Oregon v. Hass* (1975) 420 U.S. 714 [95 S.Ct. 1215, 43 L.Ed.2d. 570], the United States Supreme Court held that a defendant's statement taken in violation of *Miranda* that was nonetheless voluntary could be used at trial for impeachment purposes. Since it is obvious defendant's testimony was primarily designed to contradict the victims' testimony, the pre-trial statement, even if it had been obtained in violation of *Miranda*, would have been admissible in any event once he elected to testify. But this does not answer the question of whether he would have testified if the trial court erred in finding the circumstances surrounding the taking of the statement did not violate defendant's rights under *Miranda*.

But, even if defendant's testimony was induced by the introduction of his pre-trial statement, *Spencer* would only require a finding his rights were violated if the statement was taken in violation of defendant's rights under *Miranda*. We concur with the trial court that it was not.

2. *Miranda v. Arizona*

Miranda, supra, 384 U.S. 436 holds “if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.” (*Id.* at pp. 467-468.) Further, “that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation.” (*Id.* at p. 471.) It is clear the conditions imposed on law enforcement during interrogations are limited to situations when the defendant is “a person in custody.” “The *Miranda* rule precludes the use of statements resulting from the *custodial interrogation* of the defendant unless the procedural safeguards have been complied with.” (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) 110, § 111, italics added; see *People v. Lopez* (1985) 163 Cal.App.3d 602, 605.) Here, the interrogating officer made it very clear to defendant that he was not in custody.

As we noted above, from the outset, Gonzalez repeatedly told defendant he was not under arrest, did not have to talk to him, and had no obligation to come to the station if he did not want to. Defendant agreed to accompany the officers. After having defendant identify himself, Gonzalez again repeated he was “free to . . . leave at any time.” And again assured defendant he was not under arrest. He repeated this fact several times during the interrogation. And defendant acknowledged several times he was acting voluntarily.

As we also noted, at the conclusion of the interview, the following exchange took place, “[Officer]: . . . you came here voluntarily to talk to us regarding this case. . . . I hope that we haven’t been disrespectful to you. I think that we were respectful at all times, right? [¶] [Defendant]: Yes, and I appreciate that. [¶] [Officer]: And I also appreciate you being respectful with us. . . . and, and I told you, thank you for coming

and talking to us here. [¶] [Defendant]: No, thank you. [¶] [Officer]: . . . do you have any doubts? Any questions or anything for me? [¶] [Defendant]: No, that's fine. No. [¶] . . . [¶] [Officer]: you did come here voluntarily, right? [¶] [Defendant]: yes.”

Following defendant's motion in limine to exclude the statement, the trial court carefully considered the facts which might indicate defendant was in custody during the interview, including the fact the interview took place at the police station, the presence of other officers, the length of the interview, the fact defendant was accused of lying and that there was evidence against defendant.

The trial court then compared these facts to the “[f]actors weighing against custody.” The court noted, these included “the defendant was invited to the police station. He was asked if he could speak to them. He was told at his residence, you are not under arrest. He was told at his residence, you don't have to come with us. He was told at this residence, you don't have to talk to us. So the way the contact initiates the officers did everything, in the court's view, that they possibly could have done to let him know that he has absolutely no obligation to participate in this and he is not in custody. He's not under arrest. No cuffs or restraints of any kind appear to have been used at any time prior to his actually being arrested at the end of the interview. No weapons were displayed or pointed at him. Other than the brief period of time where the defendant after exiting his residence observed additional detectives in the driveway he was contacted throughout the entire incident by only officers who contacted him at his door and were with him at the interview room. It's clear that the defendant was not searched as a booking search. Pockets are bulging with personal property. It's clear he was not deprived of his cell phone. His cell phone actually went off during the interview so he at all times had means of communication outside of the interview room.

“When he was first placed in the interview room, after some additional identifying information, the officers repeat, he's free to leave. He's not under arrest. They tell him that a couple [of] times. He doesn't have to talk to them. He can leave at any

time. They confirm on numerous occasions throughout the interview at the beginning, in the middle and at the end that this is - - that he is there voluntarily to speak with them.

“During the interview, it does not appear that law enforcement used any type of a ruse. . . . It does not appear they confronted him with false evidence. Does not appear they confronted him with any of the details or the specifics of the allegations regarding two young ladies that are the subject matter of this case. It does not appear that any threats or promises were made to him throughout the course of the interview.”

During the interview, the officer stated that “if you don’t [tell us what happened], this is just going to take longer.” With respect to this remark, the court stated, “in context, and in looking at all the surrounding circumstances, I don’t find that the officers placed the defendant in de facto custody when they made the remarks about this taking longer.” The trial court concluded defendant was not in custody during the interview and denied the motion in limine.

We cannot disagree with this analysis and therefore agree, with the trial court, that no *Miranda* warnings were required.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O’LEARY, P. J.

IKOLA, J.