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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. CODY CHARLES JOHNSON, Defendant and Appellant.	G051089 (Super. Ct. No. 11WF1405) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary Paer, Judge. Affirmed.

Sheila Quinlan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor, and Kristen Hernandez Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant was charged with three counts of lewd act upon a child under 14 years old (Pen. Code, § 288, subd. (a))[1] between January 28, 1991 and January 28, 1998. Due to the amount of time that transpired between the acts and when defendant was charged, the People alleged the statute of limitations was tolled pursuant to section 803, subdivision (f)(1) (statute tolled until one year following the date of a report of the crime to law enforcement provided the crime involved substantial sexual conduct and the report is independently corroborated). The People alleged the crime involved substantial sexual conduct, masturbation, and that the crime report was corroborated by defendant's admissions in an interview with an investigator. The jury convicted defendant on two counts, but found defendant not guilty as to a third charge. The court sentenced defendant to the low term of three years on count 1 and two years on count 2 (one-third of the midterm), to run consecutively for a total prison term of five years.

On appeal, defendant contends the court prejudicially erred by admitting his confession to an investigator. Defendant argues his confession was the product of a custodial interrogation and he had not been given *Miranda* warnings.[2] We disagree and affirm the judgment.

FACTS

Because the focus of defendant's appeal is on his interview with the investigator, we provide only a brief statement of the background facts and focus our discussion on the circumstances of the interview.

The victim is defendant's adopted stepdaughter. When the victim was five or six years old, defendant took a personal massager and used it on the victim's clitoris.

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[1] All statutory references are to the Penal Code.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

The victim testified that this happened over 20 times between then and when she was 11 years old. The victim reported the abuse in 2011 when she was 25 years old.

Investigator Margie Sheehan was the lead investigator assigned to follow up on the report. She and another investigator, Carol Almaguer, visited defendant's house a little before 7:00 a.m. in June 2011. The conversation with defendant was recorded, and both the audio and the written transcript were provided to the jury. The investigators were wearing plain clothes, and their weapons were covered by clothing but sometimes visible.

The transcript begins with Sheehan knocking on the door and introducing herself and her partner to defendant. Sheehan asked, "I wanted to know if we could, uh, speak with you someplace privately?" Defendant then invited them in and directed them to have a seat at a kitchen table where defendant joined them. Sheehan began by complimenting defendant's four-year-old daughter and their dog, and for apologizing for stopping by so early. Sheehan then mentioned that the reason for their visit was that his stepdaughter had made a report about something that happened a long time ago. She then said, "You're not in any trouble. . . . [Y]ou're not under arrest." "If you don't want to talk to me, you can tell me to go away." "That's totally up to you." Sheehan mentioned that the report had something to do with a personal massager, and while he confirmed he and his ex-wife used a personal massager, he denied that anything of significance happened with the massager and his stepdaughter.

Sheehan then got more specific and mentioned there was a reported incident where the massager was used on the victim's vagina, but defendant denied any recollection of that. Shortly after, defendant stated there was a time when he had hurt his knee and was on pain medications and stated, "I vaguely remember a conversation about something happening." Shortly after, Sheehan stated, "Okay, well, I just want to level with you here. I just want to be very clear. [the victim] has, throughout her life, made disclosures to more than one person." She mentioned that the disclosures were over a

long period of time to multiple people, and that these disclosures were consistent. She continued, "I just want to be honest with you about that." "I don't want to do the dance where we're trying to remember, or we don't remember, or it might have happened, or I would have never — I don't want to do that dance today." "I mean, . . . I know this happened. You know this happened. We know this happened." "I just need you to be honest with me."

Defendant then mentioned a time when the victim caught him masturbating in the bathroom, and he explained to her what semen is. Though still denying that he ever personally used a vibrator on the victim, he recalled an incident where the victim used a vibrator on herself for two minutes.

At this point, Investigator Almaguer, who had largely been silent, got up to play with defendant's daughter. To give a sense of timeframe, this occurs on page 18 of 71 pages of questioning.

Sheehan then asked defendant not to tell her "some mistruth or minimization . . ." and claimed to know that he touched the victim's vagina. "And I understand" "this is terrifying — you have a police officer sitting in your home, and she's asking you questions that, that probably are embarrassing, humiliating, and I get that you're not that same person." "Okay? I'm here to make sure that I can articulate, this is not the same person who did those things."

Still denying ever having touched her, defendant then recalled an incident where the victim complained that her vagina was itching, and defendant pulled down her pants and spread her labia to look for a rash. Sheehan asked further questions about defendant using a massager on the victim, and defendant continued to deny any recollection of such incidents, and attributed the victim's report to retribution for him having taken her car away.

A few pages later in the transcript, Sheehan stated, "It's not often in life that we have an opportunity to . . . right a wrong." "This is your opportunity to do that."

She expressed sympathy for how hard this must be for him, but in response to his explanations up to this point, stated, "that's not flying." "So, again, I don't want to have to write in my report that we sat here for, you know, hours and hours and hours. I just want to be able to . . . write it in good conscience, knowing that this is something that happened at a time in your life that is totally different now. You're a totally different man. I mean, you're — you work for the District. [No] complaints that I'm aware of. I mean, you know, I mean, help me to show, yes, this, this was a mistake, these were the errors that I made" "but this is what I did to change that. Help me do that." Defendant responded, "Agreed," and "Okay."

After that defendant admitted that he would use a vibrator on the victim and manipulate it for her to find the spot that felt best. He admitted he was masturbating while doing so, though not to the point of ejaculation. He also admitted that his interaction with the victim was sexually arousing for him. He remembered the mutual masturbation happening three times. These incidents occurred when the victim was 7 or 8 years old to when she was 11 years old.

Defendant recognized that, in hindsight, what went on was sexual abuse. He explained that it was difficult for him to remember the abusive conduct because, "Maybe Psychologically I suppressed it, because I felt, um, guilty about it."

Sheehan asked defendant if he was "open to writing [the victim] an apology letter." He said, "Sure." He wrote the letter, which stated, "I want to say I'm sorry for the inappropriate behavior when you were younger. I was completely out of line for us to be using the massager on you. I know what I did was wrong. You were not at fault at any point, and I'm sorry."

Afterwards, Sheehan patted him down for weapons, placed defendant under arrest, and read his *Miranda* rights. Sheehan then stated, "I just need to ask you, are you comfortable continuing to talk about what we were talking about earlier, . . . about the incidents with the massager? Or do you not want to talk to me anymore?" Defendant

answered: "Um, I'll talk to you." Having received that permission, however, Sheehan did not initiate any further discussion of the matter. What occurred next was various officers made arrangements to take defendant's young daughter (not the victim) for a CAST interview, to pick up defendant's wife and bring her home to explain the situation, and to arrange for transporting defendant to the jail.

After a lengthy discussion about the procedural aspects of being arrested, *defendant* brought the conversation back around to the past events and began accusing his ex-wife of being complicit. Sheehan responded by thanking him for his honesty, and empathizing with the fact that his "whole life is, in this moment, coming unhinged." But she reminded him that regardless of any family dynamics between defendant, the victim, and defendant's ex-wife, he acknowledged that he used the massager on the victim to sexually arouse himself. Defendant's response was, "I agree," and, "I'll do what I got to do."

Sometime later, defendant again brought up issues relating to his ex-wife, and the victim, but again Sheehan steered him back to his own conduct with the massager, and while he noted that his memories were somewhat vague, he again stated, "I'm relatively sure I did that."

Sometime later in the conversation, defendant stated, "You know? I, um — should I have a lawyer, talking to you about this, or is this just —" At that point, Sheehan reminded him that she had read his *Miranda* rights, and that he does have the right to an attorney, and for good measure she read his *Miranda* rights again. She also reiterated, "If you don't want to talk to me, you don't have to answer another question." She went on, "earlier you said that you were okay talking about it. So, if you've changed your mind about that . . . ." Defendant cut in that he had not changed his mind and was still willing to talk. He went on to admit that all of this had "been eating [him] up for a long time."

Eventually his wife returned home, and defendant began making arrangements for her to handle finances in his absence. He stated, "I don't know how long I'm going to be gone." His wife replied, "Well, it shouldn't be long, because nothing happened." Defendant replied, "There's some things that happened." His wife asked, "Like?" Defendant replied, "There were, there were a couple of times, um, where she used a vibrator, and I was there. And I helped her with it —." Nothing of significance occurred after that point.

Prior to playing the conversation for the jury, defendant moved to exclude the evidence on the ground that defendant had not been read his *Miranda* rights at the outset, and he was constructively in custody. The court denied the motion. The court listened to the conversation and characterized it as "a civil conversation between the officers and the defendant. There is no coercion. There are no threats." "And at no time do I believe that it rises to the level of a custody interrogation." The court acknowledged there were some "pointed questions," but concluded they did not convert a voluntary conversation into a custodial interrogation. The court also concluded the investigator's ruse — suggesting there were witnesses when there were not — was permissible. "There was never any screaming or yelling or banging on the table. It was a conversation. [¶] And it was a little over an hour until he's arrested, then he's read his *Miranda* rights."

DISCUSSION

Defendant's sole contention on appeal is that his statements to Investigator Sheehan were involuntary and obtained in violation of *Miranda* because he was subject to a constructively custodial interrogation without proper admonitions. We agree with the trial court that defendant was not in custody and thus affirm the judgment.

"In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if

substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained." (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

"Under the familiar requirements of *Miranda*, . . . a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent." (*People v. Sims* (1993) 5 Cal.4th 405, 440.) "An interrogation is custodial, for purposes of requiring advisements under *Miranda*, when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] Custody consists of a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. [Citations.] When there has been no formal arrest, the question is how a reasonable person in the defendant's position would have understood his situation." (*People v. Moore* (2011) 51 Cal.4th 386, 394-395.)

"Courts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and

whether the person was arrested at the end of the interrogation. [Citations.] [¶] No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

From this list, defendant points out several circumstances that favor a finding of custody in this case. Police initiated the contact. Defendant was a suspect. Sheehan indicated her belief that defendant was guilty. Sheehan tried to pressure defendant into confessing. And defendant was arrested after his confession. We agree that these circumstances weigh in favor of a finding of custody.

However, those factors are overwhelmed by circumstances indicating defendant's confession was not under circumstances tantamount to an arrest. The interview took place at defendant's home, with defendant's permission, and in defendant's place of choosing. There were no restrictions on his movement. He was told very clearly that he did not have to speak with Sheehan and could end the discussion at any time. The tone of the interview was conversational. There was no show of force or aggression. For most of the interview, there was only one officer participating. Although Sheehan asked some pointed questions, she did not utilize overly coercive techniques. The interview prior to arrest lasted only one hour. Defendant was cooperative throughout the interview. And after defendant was arrested he was read his *Miranda* rights twice, and twice he volunteered to continue talking, despite clear instructions that he did not have to.

Without a doubt, Sheehan regarded defendant as the prime suspect in the case and made no secret of that fact. However, "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." (*Stansbury v. California* (1994) 511 U.S. 318, 325; see *Oregon v. Mathiason*

(1977) 429 U.S. 492, 495-496 [suspect not in custody where interviewed for one and one-half hours at police headquarters, told by police they thought he was involved and had found his fingerprints at the scene of the crime]; *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 65 [suspect not in custody despite being interviewed at police station and told he was suspected to have been involved in a robbery].) Here, the totality of the circumstances indicates that, despite being a prime suspect, defendant was not subject to circumstances tantamount to an arrest at the time of the interview.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.