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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.

JOSE MANUEL ALVAREZ-RAMIREZ,

Defendant and Appellant.

G052414

(Super. Ct. No. 13CF3337)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed in part and reversed in part.

Athena Shudde, 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, Arlene A. Sevidal, Collette Cavalier, and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Juan Manuel Alvarez-Ramirez of six counts of oral copulation or sexual penetration with a child 10 years of age or younger between 2007 and 2011 (Pen. Code, § 288.7, subd. (b); counts 1-6)<sup>1</sup> and three counts of lewd act upon a child under 14 years of age (§ 288, subd. (a); counts 7-9), and found true the allegation that counts 7 and 8 involved substantial sexual conduct with a child (§ 1203.066, subd. (a)(8)).

The court sentenced him to an aggregate prison term of 75 years to life on counts 1, 3, 4, 5, and 6 (consisting of consecutive terms of 15 years to life), plus a determinate term of 10 years on counts 7, 8, and 9 (consisting of a six-year term on count 7 and consecutive two-year terms on counts 8 and 9). The court stayed execution of sentence on count 2 pursuant to section 654.

Defense counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, after finding no issues to argue on defendant's behalf. Upon reviewing the record, we identified an arguable issue for which we sought supplemental briefing. The arguable issue involved the continuation of a police interrogation after defendant potentially invoked his right to remain silent. Following our independent review of the record and the parties' briefing on the issue requested, we conclude defendant's rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) were prejudicially violated as to counts 1 through 6. Accordingly, we reverse the judgment as to those counts.

## FACTS

### *The Victim's Testimony*

The victim M.G. lived with defendant (her step-grandfather), her grandmother, and their two minor children, in a home where everyone slept in the same

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All statutory references are to the Penal Code.

room. M.G. slept on the top bunk of a bunk bed. Beginning when she was in the first grade, and continuing until she was in the third grade, defendant molested her. (RT 42.)

Defendant would get into bed with M.G., expose his penis while they were both nude, and, variously, put his fingers in her vagina, rub her breasts, kiss her, make her touch his penis, and/or orally copulate her. Another incident took place when M.G. was in the ocean at the beach. Another happened in the kitchen.

Once, when they were in the bunk bed and defendant was licking M.G.'s vagina, defendant's nose started to bleed. He got out of bed and went to the bathroom, leaving a stain on the bedding. M.G. lied to her grandmother about the stain, because she did not want her grandmother to know.

When M.G. was in the third grade, the molestations stopped.

But four years later, when M.G. was in the seventh grade and laying on the living room couch, defendant kissed her, rubbed his hands over her shoulders and across her chest, and told her he loved her. Twice, she told him to stop. Finally, defendant got up and walked to the kitchen.

M.G. told her friends about the incident. Later that week, M.G.'s school principal asked her if something was happening with her grandfather. M.G. eventually told the police the truth because she was afraid defendant might be molesting her brother or sister.

### *The Police Interrogation*

Officer David Juarez, a certified Spanish speaker, interviewed defendant in Spanish. Officer Fernandez was also present during the interrogation.

At the outset, defendant waived his rights under *Miranda, supra*, 384 U.S. 436. After some preliminary questions about the family and the living arrangement, Juarez told defendant that M.G.'s school principal had said that possibly someone in the home had touched M.G. Defendant admitted he "tried touching her not long ago." He

stated the incident had happened one week earlier, when he kissed M.G. on the cheek and touched her stomach, but she resisted him and he stopped touching her.

Juarez then asked defendant to talk about other times this had happened in other years. Defendant said, “Can I not answer? Or I have to answer . . .” Juarez said defendant did not have to answer, but the officers were there “to know the truth.” Juarez explained it was important for defendant to tell the truth, both for M.G.’s sake and so that people would not think defendant was an animal. Defendant said, “I prefer not to answer.” The officers then spoke to each other in English, with Fernandez saying, “Want to push him?” Juarez then asked defendant in Spanish, “Why don’t you want to talk about those things, sir?” Defendant replied, “I feel bad. I don’t . . . want to talk right now.” Juarez exhorted defendant to be a man and admit the mistake, and asked defendant if he needed help for his abnormal problems. Juarez then asked defendant whether he thought he would stop and not touch M.G. anymore. Defendant replied, “I think that it could . . . be like that. . . .” Juarez then talked about what M.G. had told them (including M.G.’s accusation defendant put his finger in her vagina when she was seven years old). Juarez asked defendant why he did it and whether he had had a relationship with his wife. Defendant said, “I prefer not to talk about that right now please.” Juarez asked, “What do you want to talk about then?” Defendant reiterated, “I think that I don’t want to talk right now, I don’t, don’t feel very good, I feel bad.”<sup>2</sup>

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<sup>2</sup> In the People’s trial brief (the brief), the prosecution conceded defendant invoked his right to remain silent at some point during the interrogation. The brief clarified the People were “not seeking to introduce any portion of the statement after the point in time that the Court determines Defendant invoked his right to silence.” The brief asked the court to review the transcript to determine the point at which defendant invoked his right to silence. The brief argued defendant invoked the right, and interrogation should have ceased, when he said, “I think that I don’t want to talk right now, I don’t, don’t feel very good, I feel bad.” The People stated the interview continued on after that point, but any post-invocation part of the statement was inadmissible in the prosecution’s case in chief.

The record does not reveal the court ever addressed the issue of when

At defendant's trial, the police interrogation (up to the last statement quoted above) was played for the jurors, who were also given a copy of the transcript.<sup>3</sup>

## DISCUSSION

In his supplemental opening brief, defendant contends he invoked his right to remain silent at some point during the interview and hence all "further prefatory statements and remarks by Juarez and [defendant's] replies were subject to exclusion."

### *The law on post-Miranda-waiver invocation of the right to silence*

In *Miranda*, the Supreme Court made clear that, even if an interviewee initially waives his or her *Miranda* rights,<sup>4</sup> he or she may later invoke them and thereby terminate the interrogation: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing

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exactly defendant invoked his *Miranda* right during the police interrogation. Nor do the parties' appellate briefs state the court made such a finding.

<sup>3</sup> Defense counsel did not object to the admission into evidence or use of the interview. On appeal the Attorney General does not argue defendant waived the issue by failing to object.

<sup>4</sup> "These warnings (which have come to be known colloquially as 'Miranda rights') are: a suspect 'has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (*Dickerson v. U.S.* (2000) 530 U.S. 428, 435.)

a statement after the privilege has been once invoked.” (*Miranda, supra*, 384 U.S. at pp. 473-474, fn. omitted.)

The Supreme Court revisited the foregoing passage from *Miranda* in *Michigan v. Mosley* (1975) 423 U.S. 96 (*Mosley*): “The critical safeguard identified in the passage at issue is a person’s ‘right to cut off questioning.’ [Citation.] Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person’s exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’” (*Id.* at pp. 103-104.)

In *Mosley*, when the defendant stated he did not want to discuss certain robberies, the detective “immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade [him] to reconsider his position. After an interval of more than two hours, [the defendant] was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete *Miranda* warnings at the outset of the second interrogation.” (*Mosley, supra*, 423 U.S. at p. 104.) The Supreme Court concluded: “This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.” (*Id.* at pp. 105-106.)

The right to invoke *Miranda* after initially waiving it “is ‘designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.’” (*Davis v. U.S.* (1994) 512 U.S. 452, 458 (*Davis*) [as to the *Miranda* right to counsel].) As to the *Miranda* right to counsel, the “cases hold that if a defendant indicates *in any manner* that he wishes to consult with an attorney, the interrogation must cease.” (*People v. Johnson* (1993) 6 Cal.4th 1, 27, disapproved on another point in *People v. Rogers* (2006) 39 Cal.4th 826, 879.) A court applies the same criteria to determine whether and when an accused has invoked the *Miranda* right to remain silent. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 381 (*Berghuis*).

But the invocation of a *Miranda* right must be made *unambiguously*. (*Berghuis, supra*, 560 U.S. at p. 381.) In contrast, a defendant’s statement potentially invoking a *Miranda* right is ambiguous when the statement — viewed objectively in light of the circumstances — is equivocal (*People v. Williams* (2010) 49 Cal.4th 405, 432 (*Williams*)) or conditional (*People v. Suff* (2014) 58 Cal.4th 1013, 1070 (*Suff*)). Stated another way, a statement is ambiguous or equivocal if “a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right . . . .” (*Davis, supra*, 512 U.S. at p. 459.) Officers under those circumstance may ask clarifying questions as to whether the defendant intends to invoke a *Miranda* right. (*Williams*, at p. 432.) And, if “the suspect himself reinitiates conversation,” he is “subject to further questioning.” (*Davis*, at p. 458.)

In *Berghuis, supra*, 560 U.S. at page 381, the defendant contended “he ‘invoke[d] his privilege’ to remain silent by not saying anything for a sufficient period of time, so the interrogation should have ‘cease[d]’ before he made his inculpatory statements.” The Supreme Court found this argument unpersuasive because an accused who invokes the *Miranda* right to remain silent “must do so ‘unambiguously,’” rather than in a statement “‘that is ambiguous or equivocal’” or by making “no statement.” (*Ibid.*) Suppressing voluntary confessions based on *ambiguous* invocations of *Miranda*

rights “would place a significant burden on society’s interest in prosecuting criminal activity.” (*Id.* at p. 382.)

In *People v. Stitely* (2005) 35 Cal.4th 514, 534 (*Stitely*), the following colloquy occurred:

“DEFENDANT: ‘Okay. I’ll tell you. *I think it’s about time for me to stop talking.*’  
(Italics added.)

“[DETECTIVE]: ‘You can stop talking. You can stop talking.’

“DEFENDANT: ‘Okay.’

“[DETECTIVE]: ‘It’s up to you. Nobody ever forces you to talk. I told you that. I read you all that (untranslatable).’

“DEFENDANT: ‘Well, I mean (untranslatable) God damn accused of something that I didn’t do. I’m telling you the truth. And you’re not believe [*sic*] me. You’re not believing me. I’m telling you the truth.’”

*Stitely* held: “A reasonable officer in [the detective’s] position would have concluded that defendant’s first remark (‘I think it’s about time for me to stop talking’) expressed apparent frustration, but did not end the interview. Defendant agrees that this statement was ambiguous under *Davis, supra*, 512 U.S. 452 and that the police were not required to stop asking questions at that point. Nevertheless, [the detective] did stop the interrogation, and twice reminded defendant of his right to stop talking. This cautious approach gave defendant a chance to clarify whether questioning should proceed — something defendant concedes the officer was not constitutionally required to do.” (*Stitely, supra*, 35 Cal.4th at p. 535.) “[I]nstead of exercising the right to silence that [the detective] purposefully ‘reinforced,’ defendant protested his innocence and continuing talking about the crime. Under the circumstances, nothing prevented [the detective] from continuing the exchange.” (*Id.* at p. 536.)

*Suff, supra*, 58 Cal.4th 1013 held that the defendant’s statement, “‘I need to know, am I being charged with this, because if I’m being charged with this I think I need

a lawyer” (*id.* at p. 1068) “was ambiguous and conditional, and did not constitute an invocation of his right to counsel” (*id.* at p. 1070).

### *The police interrogation of defendant*

We describe and quote the interrogation in detail in order to view defendant’s statements objectively, in substantive context, and in the context of the circumstances. Juarez and defendant spoke in Spanish, while Fernandez spoke to Juarez in English.

Toward the beginning of the interview, defendant admitted the recent incident when M.G. was on the sofa in the living room, i.e., when M.G. was in the seventh grade. Specifically, he admitted he kissed M.G.’s cheek and touched her stomach because he thought she was pretty and he “felt an urge,” and because he had drunk two glasses of rum with coke.

The following colloquy ensued:

“JUAREZ: And the other times that this happened[,] tell me about . . . those times. . . . I know already that it happened some years . . . .

“[DEFENDANT]: Can I not answer? Or I have to answer —

“JUAREZ: If . . . you don’t want to answer you . . . don’t have to answer. We’re here to know the truth.

“[DEFENDANT]: Okay.

“JUAREZ: Okay. [W]e want the truth, because this is . . . serious for her.

“[DEFENDANT]: Yes.

“JUAREZ: No? If someone is touching a girl . . . she’s going to need help. She needs to talk to someone . . . so that she grows and . . . this thing . . . doesn’t affect her all of her life. Then we have to talk to you about this, if you don’t want to talk with us, you don’t have to talk with [us] but . . . I would like to talk with you. There’s people that do . . . these type of . . . things and . . . we think . . . those people are animals, but many

times they can explain why they did those things. And, . . . we say . . . they're not animals[;] they did it because this and this and that. Not just because they wanted to do it.

“[DEFENDANT]: I prefer not to answer.

“JUAREZ: No? Okay.

“(PAUSE)

“FERNANDEZ [in English]: Want to push him \*\*\*?

“JUAREZ [in English]: [I]t's up to you, what should we ask him?

“FERNANDEZ [in English]: . . . I only got . . . pieces of it.

“ . . .

“JUAREZ [in English]: He [is] saying that he did try to touch her about a week ago. Kissed her on her cheek, touched her stomach.

“FERNANDEZ [in English]: What about . . . way back?

“JUAREZ [in English]: . . . Yeah, that's what he's saying he doesn't [want] to talk about that.

“FERNANDEZ [in English]: Why not?

“JUAREZ [to defendant in Spanish]: [W]hy don't you want to talk about those things, sir?

“[DEFENDANT]: I feel bad I don't, don't want to talk right now.

“JUAREZ: [I]t's normal to . . . feel bad . . . , but part of the process is you also have to like a man say, . . . I made a mistake. . . . I'm here like a man saying what I did, we can't continue hiding it all of days. . . . [S]he already told us what happened. . . . [A]lready told us everything, you're telling us a little bit. And people are going to know why you did it? If you say that . . . I don't want to talk, . . . they're going to . . . think that you're an animal that you did those things just because . . . .

“FERNANDEZ [in English]: Does he need help?

“JUAREZ: [Y]ou need help, sir?

“[DEFENDANT]: No.

“JUAREZ: [F]or those problems? Because the things that you did . . . are not normal. A normal man doesn't do things with a girl . . . you think you need help with that?

“[DEFENDANT]: No I don't think so.

“JUAREZ: No? Like if I'm an alcoholic . . . and I'm going to need help to quit drinking. Do you think you need help to quit doing this?

“[DEFENDANT]: I think that —

“JUAREZ: Touching a girl . . . You think that you're going to stop . . . and . . . you're not going to touch her anymore again?

“[DEFENDANT]: I think that it could, could be like that.

“JUAREZ: You think or believe?

“[DEFENDANT]: I think that it could be \*\*\* . . . .

“JUAREZ: [M.G.] gave us many, many details on what happened. Of when she is . . . How old is she?

“FERNANDEZ [in English]: She had to be about seven.

“JUAREZ: Like when she was seven years old . . . you kissed her . . . cheek and you touched her private parts and . . . put your finger inside her vagina. Okay? So we . . . already know that happened. [B]ecause a girl isn't going to . . . tell the police those things if they're not true. And we want to know why you did it . . . . [Y]ou didn't have a relationship with your wife? You wanted to touch a woman and she was there and it seemed easy? How did that happen?

“[DEFENDANT]: I prefer not to talk about that right now please.

“JUAREZ: What do you want to talk about then?

“[DEFENDANT]: I think that I don't want to talk right now I don't, don't feel very good, I feel bad.”

*The officers violated defendant's right to remain silent*

We must determine at what point in the interview defendant invoked his right to remain silent. In making this determination, we ask, Did defendant make an unambiguous “statement that can reasonably be construed to be an expression of a desire” to remain silent? (*Davis, supra*, 512 U.S. at p. 459.) Did he “articulate his desire . . . sufficiently clearly that a reasonable police officer in the circumstances would understand” (*ibid.*), without asking further clarifying questions, that he wanted to invoke his *Miranda* right? (*People v. Cunningham* (2015) 61 Cal.4th 609, 646.)

The first potential invocation occurred when defendant asked whether he could “not answer” or whether he had to answer. Because this was a question, not an affirmative statement of a wish to stop talking, Juarez properly asked clarifying questions and also immediately told defendant he did *not* have to answer.

Shortly thereafter, however, defendant stated, clearly and unambiguously, “I prefer not to answer.” The Attorney General argues this statement was ambiguous because, “viewed objectively, it appeared to convey that [defendant] did not want to answer a specific question, as opposed to a clear expression that he wished to no longer speak to police.” This argument is unpersuasive. The question defendant did not wish to answer was whether he had touched M.G. in years past. Juarez understood exactly what defendant meant. Indeed, Juarez told Fernandez in English that defendant was “saying he doesn’t [want] to talk about” the allegations relating to “way back.” Unfortunately, the officers (initiated by Fernandez) decided to “push” defendant on the subject, rather than “scrupulously honor[ing]” his invocation. They “persist[ed] in repeated efforts to wear down his resistance and make him change his mind.” (*Mosley, supra*, 423 U.S. at pp. 105-106.) They ramped up their coercive tactics.

But the Attorney General cites *Williams, supra*, 49 Cal.4th at pages 433-434; *People v. Ashmus* (1991) 54 Cal.3d 932, 968-970 (*Ashmus*); and *People v. Silva*

(1988) 45 Cal.3d 604, 629-630 (*Silva*) for examples of “more extreme ambiguous statements,” which courts have held were not invocations of a *Miranda* right.<sup>5</sup>

In the interrogation in *Williams*, the defendant told two detectives that it was hearsay that he killed someone and that the police had to show “more than this.” (*Williams, supra*, 49 Cal.4th at p. 432.) Detective Salgado responded, “You’re right. . . .” (*Id.* at p. 432.) “Defendant interrupted: ‘*I want to see my attorney cause you’re all bullshitting now.*’ (Italics added.) [Detective] Salgado continued: ‘I know. You know we have to show more than this. You’re right.’ [Detective] Knebel interrupted: ‘You want your attorney now?’ [¶] [Detective] Salgado continued: ‘But what we wanted . . . an opportunity now to see if you wanted to tell the truth or not and obviously you’re not ready to tell the truth.’ Defendant responded: ‘Tell the truth about what?’ [Detective] Salgado began: ‘Well . . . your . . .’ and defendant repeated: ‘I haven’t killed nobody.’ [Detective] Salgado replied: ‘I’m not saying you killed

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<sup>5</sup> The Attorney General also cites *People v. Castille* (2003) 108 Cal.App.4th 469 (*Castille I*), but that case was superseded by *People v. Castille* (2005) 129 Cal.App.4th 863 (*Castille II*), after the United States Supreme Court, in *Shields v. California* (2004) 541 U.S. 930, granted certiorari and vacated the judgment in *Castille I*. In the interrogation in *Castille II*, the defendant “asked, ‘Do I have to talk about this right now?’ [The officer] answered, ‘Yeah[,] I’m afraid you have to.’ [The defendant] replied, ‘I already talked about it.’ [The officer] then asked, ‘[W]as he shot? Is that what you[’re] saying?’ [The defendant] answered and continued responding to questions.” (*Castille II*, at p. 884.)

The Court of Appeal, in describing the context of the foregoing exchange, noted: “The tape recording reveals that [the defendant] was emotional during parts of the interview, and appeared to be crying during the challenged portion of the statement. However, [he] gave no indication he actually wanted to stop the interview. He merely demonstrated his discomfort with the particular question about seeing the body of the clerk, who had been shot in the head with a large-caliber slug.” (*Castille II, supra*, 129 Cal.App.4th at p. 885.) An expression of such discomfort is not an assertion of the right to remain silent. (*Ibid.*)

The question asked by the defendant in *Castille II* is similar to defendant’s question here whether he had to answer. We have concluded that question did not constitute an invocation of defendant’s right to remain silent.

anybody. You put her in the trunk.’ Defendant responded: ‘I didn’t put nobody in the trunk.’ [Detective] Knebel interrupted: ‘*Wait a minute. Do you want your attorney now or do you want to talk to us?*’ Defendant replied: ‘*I’ll talk to him.* But you sittin’ up here telling me that I done killed somebody.’ [Detective] Knebel responded: ‘You did.’ Defendant replied: ‘No I didn’t.’ [Detective] Knebel asked: ‘*Do you want to talk to him without the attorney?*’ Defendant responded: ‘*Oh yeah I talk to him.*’ (Italics added.) [Detective] Knebel stated: ‘Alright I’ll shut up.’” (*Ibid.*) *Williams* held: “Considering the totality of the circumstances, we find that defendant’s statement in the present case constituted an expression of frustration and, as the trial court suggested, game playing, and was not an unambiguous invocation of the right to counsel precluding even the asking of clarifying questions.” (*Ibid.*)

Thus, in *Williams*, unlike the case at hand, the defendant reinitiated the conversation by making self-serving comments, and then affirmatively agreed to continue talking with Detective Salgado.

In the interrogation in *Ashmus*, *supra*, 54 Cal.3d at pages 968-969, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117, the following colloquy occurred:

“Ashmus: (Interrupting) you’re gonna try to con-, now I ain’t saying no more.

“[Police Officer]: Pardon?

“Ashmus: You ain’t gonna, no. I’m not gonna get accused of somethin’. I love people too much.

“[Police Officer]: Um hum.

“Ashmus: I wouldn’t even kill a fly, I’m sorry.

“[Police Officer]: Who said anything about killing anybody?

“Ashmus: I wouldn’t even hurt a fly or kill a fly, I’m sorry, don’t say no more (inaudible)

“[Police Officer]: (Interrupting) Troy, . . . who said anything about killing anybody?

“Ashmus: The way you guys are talkin’ to me, I’m sorry, it’s what it sounds like.

“[Police Officer]: Nobody said anything about that. How come you’re bringing that up[?]”

“Ashmus: He told me there’s a serious offense.

“[Police Officer]: Who told you what’s a serious offense?”

“Ashmus: The cop that . . . brought me in.”

Thus, in *Ashmus*, unlike the case at hand, the defendant himself kept the conversation going by making self-serving comments.

In the interrogation in *Silva, supra*, 45 Cal.3d 604, the defendant waived his *Miranda* rights and then made some admissions. (*Id.* at p. 629.) But, when asked if he was driving the truck, he said, “I don’t know,” and when asked the same question about driving the truck again, he said, “I don’t know. I really don’t want to talk about that.” (*Ibid.*) The interview continued, with the officer asking “questions involving areas *other than* the identity of the person driving the truck.” (*Ibid.*, italics added.) Although “there were other areas which [the] defendant indicated he did not wish to discuss,” he continued “to answer other questions.” (*Ibid.*) Our Supreme Court held the trial court properly rejected the defendant’s argument that he invoked his right to remain silent “and that any further questioning occurred in violation of his *Miranda* rights.” (*Ibid.*)

Thus, in *Silva*, unlike the case at hand, after the defendant invoked his right to remain silent on a particular subject, the officer ceased his questioning on that subject.

In sum, Juarez and Fernandez violated defendant’s right to remain silent by pressuring him to answer questions about incidents in years past, after defendant stated he preferred not to talk.

### *The error was prejudicial*

“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” (*Chapman v.*

*California* (1967) 386 U.S. 18, 24.) This standard applies to a confession adduced in violation of *Miranda*. (*People v. Sims* (1993) 5 Cal.4th 405, 447.)

The Attorney General argues any error was harmless: “[E]ven if [defendant’s] statements made post-invocation should have been excluded, any error was harmless as the jury already heard [his] confession that he tried to touch [M.G.] after feeling ‘urge[s]’ during the first part of his interview. Under these circumstances, the admission of [his] post-invocation statements, consisting of about three pages of transcript, even if it had been obtained in violation of *Miranda*, *supra*, 384 U.S. 436 [citation] was harmless beyond a reasonable doubt.”

This argument ignores the fact that defendant’s pre-invocation admissions concerned only the most recent incident with M.G., i.e., counts 7 through 9 (lewd acts on a child under 14 years of age). As to counts 1 through 6 (oral copulation or sexual penetration with a child 10 years of age or younger), defendant invoked his right to remain silent. Nonetheless, the officers pressured him to continue talking and to explain why he preferred not to talk. As a result, *post-invocation*, defendant stated twice that he felt bad. The jury may have inferred from these statements that defendant felt bad because he was indeed guilty and had molested M.G. when she was in the first through third grades. Also, post-invocation, Juarez asked defendant whether he was going to stop and not touch M.G. anymore. Defendant replied he thought “it could be like that.”

The court sentenced defendant to 75 years to life in prison on counts 1, 3, 4, 5, and 6. It also sentenced him to a consecutive 15 years to life term in prison on count 2, but stayed execution of sentence pursuant to section 654. We cannot conclude beyond a reasonable doubt that the jury would have convicted him of any or all of counts 1 through 6 based solely on M.G.’s testimony, i.e., without the additional evidence of defendant’s post-invocation statements. Accordingly, the judgment as to counts 1 through 6 must be reversed.

## DISPOSITION

As to counts 1 through 6, the judgment is reversed. As to counts 7 through 9, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.