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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PRIMITIVO V. CAMPOS,

Defendant and Appellant.

H038965

(Santa Clara County

Super. Ct. No. C1095581)

Defendant Primitivo V. Campos appeals his convictions after jury trial for committing a lewd or lascivious act on a child under 14 (Pen. Code, § 288, subd. (a)) and misdemeanor battery (Pen. Code, § 242).¹ He was acquitted of five related felony counts (§§ 288, subd. (a), 288.7, subd. (b)). On appeal, defendant claims: (1) the trial court erred in allowing the jury to hear his allegedly involuntary admission; (2) his trial counsel provided ineffective assistance by not objecting to prosecutorial misconduct; (3) the trial court improperly relied on an element of the offense to deny probation; and (4) the abstract of judgment does not explain the bases for the penalty assessments imposed by the trial court. For the reasons stated here, we will modify the judgment to reflect the amounts and statutory bases for the various penalty assessments imposed and will affirm the judgment as modified.

¹ Unspecified statutory references are to the Penal Code.

I. TRIAL COURT PROCEEDINGS

Defendant, who was born in 1950, helped at his wife Celia Campos's day care facility (Campos Day Care) in San Jose by watching the children for brief periods of time when she was in another room and by picking up students from school to bring them to day care. The couple raised five children of their own. Defendant was born in Mexico but moved to the United States in the late 1970s.

A. DEFENDANT'S ARREST AND INTERROGATION

The victim, K.M., attended Campos Day Care from 2005 to 2010. On December 22, 2010, K.M., then five years old, told her mother that defendant touched her vagina and buttocks under her clothes on at least two occasions. On one occasion, while K.M. was at Campos Day Care in the living room with her sister and two other girls, defendant allegedly told K.M. to come to him and then touched her. On another occasion, while riding with K.M. in a car, defendant allegedly touched K.M.'s vagina and buttocks under the clothes and put his finger inside her anus. K.M.'s mother reported the matter to police and officers arrested defendant the next day.

Following defendant's arrest, San Jose Police Department Detectives Matthew DeLorenzo and Emilio Perez interrogated defendant in a sexual assault investigative unit interview room. The detectives placed defendant's left hand in a handcuff, which was attached to a table by a chain. Detective DeLorenzo stated that standard procedure called for handcuffing all felony suspects during interrogations. The detectives provided defendant with water and asked if he needed to use the restroom. According to the detective, defendant appeared "fairly comfortable" throughout the interrogation, which lasted approximately two hours, including two breaks.

The interrogation was conducted largely in Spanish, with Detective Perez acting as a translator for both defendant and Detective DeLorenzo. We rely on the translations of the Spanish-language sections of the interrogations, as reflected in the transcription admitted into evidence as exhibit 5A. Defense counsel pointed out to the trial court

translation errors in exhibit 5A, but the court denied the request to modify the transcript, noting that defense counsel had not raised the issue until late in the trial after the jury and the parties had relied on the exhibit extensively. The court also stated that the parties previously agreed, “not that the transcript was perfect ... but [that] it was a fairly accurate representation of the interrogation.”² Defendant does not challenge that decision. Defendant’s only reference on appeal to a translation error appears in his Opening Brief, where he states that the Spanish word “mal” was incorrectly translated as “back” instead of “bad” at page 30 of exhibit 5A.

Detective Perez confirmed defendant’s identity, asked some introductory questions, and provided defendant with *Miranda*³ warnings in Spanish. Defendant said he understood the warnings and Detective Perez questioned defendant about K.M.’s allegations. Early in the interrogation, the officers employed a ruse whereby they told defendant they were going to compare DNA and fingerprint evidence from K.M.’s body with samples taken from defendant. This supposed DNA evidence was a major theme of the interrogation that the detectives relied on to persuade defendant to describe his encounters with K.M.. The detectives repeatedly exhorted defendant to tell the truth and informed him that any lies he told would be recorded in their police report, which would then be seen by the District Attorney.

Midway through the interrogation, the detectives returned from a break with an envelope they claimed contained the results from the DNA testing. They told defendant that if the results were blue, the test was “positive.” Soon thereafter, they opened the envelope and told defendant, “They’re blue. Okay, so you’re lying to us.” The

² Defense counsel did not request an evidentiary hearing on the issue of the accuracy of the transcript. On appeal we are limited to considering the record as developed in the trial court.

³ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

detectives also told defendant that the District Attorney “isn’t going to like [it]” if defendant lied, and that “[e]verything will look bad if you don’t talk.”

Throughout the interrogation, defendant remained steadfast in his denial of intentionally touching K.M. inappropriately. As they continued to ask him why they found his DNA near K.M.’s private parts, the possibility of accidental contact arose. It is unclear who introduced the concept. In response to the detectives’ statements about his DNA, defendant stated: “if that’s the case I was going to [lay] her down, but ... I didn’t, I didn’t touch anything” Defendant later appears to explore the concept by saying “let’s say that I’ve touched her back just like this,” but is interrupted by the detectives before he finishes his thought. Soon thereafter, the detectives pursued questions about accidental contact. Eventually, defendant suggested that it was possible he accidentally touched K.M.’s private parts during an incident where he pushed K.M. away from him because K.M. was attempting to hug a baby defendant was holding. Even after discussing this incident, however, defendant continued to maintain that any contact was unintentional. Defendant ultimately requested an attorney, and the interrogation ended.

As part of the preliminary investigation, San Jose Police Department Detective Lauren Vidal interviewed K.M. at the Department’s children’s interview center. The interview was videotaped and later transcribed.⁴ K.M. told the detective that defendant “touched [her] private spot on [her] skin” using his hand. When asked to elaborate, K.M. told the detective defendant touched her in her “wee-wee hole” with his fingers and that he also touched and squeezed her buttocks under her clothes on her skin. The inappropriate touching occurred while K.M. was at Campos Day Care and also at least once when she was in defendant’s car. K.M. claimed defendant touched her while she

⁴ The videotaped interview with K.M., as well as the transcript of the interview, were admitted into evidence during trial as People’s Exhibits 3 and 3A, respectively, and played for the jury.

was playing and that her sister, “Selena, and (inaudible) saw and then Selen[a] started laughing.”

Based on the foregoing evidence, defendant was charged with one count of oral copulation or sexual penetration of K.M., a child 10 years old or younger. (§ 288.7, subd. (b).) At a preliminary hearing in March 2011, when she was six years old, K.M. testified that defendant touched her inside her vagina and anus, once in the living room at Campos Day Care and once in defendant’s car when he picked her up from school. K.M. testified that during the incident in the living room, her sister, C.M., and two other girls were present.⁵ The trial court held defendant to answer on all charges.

B. DEFENDANT’S MOTION TO EXCLUDE ADMISSIONS

In early July 2012, defendant moved under Evidence Code section 402, subdivision (b) to exclude the admissions obtained during his interrogation, claiming they were involuntary. The hearing on defendant’s motion occurred over multiple days, and the trial court heard testimony from: Detectives DeLorenzo and Perez about defendant’s interrogation; Dr. Richard Ofshe, a defense expert in “influence in police interrogation[;]” Dr. Michael Kerner, a defense expert in, among other things, “forensic interviewing of children[;]” and Linda B., K.M.’s mother.

After hearing testimony and reviewing the videotape of defendant’s interrogation, the court denied the motion. In finding that defendant’s statements were voluntary, the court analyzed both defendant’s characteristics and the details of the interrogation. The court noted defendant was 60 years old, an age that the court found was not an impairment. Regarding defendant’s level of sophistication, the court acknowledged that defendant had no prior experience with law enforcement, but also noted he has “been in the workforce for 17 years ... [and] raised five children.” Regarding the videotaped interrogation, the court stated defendant’s “emotional state appeared to be stable.” There

⁵ K.M.’s mother testified that the two other girls, C.C. and Ch.C., are sisters.

was no indication that defendant suffered from any mental health issues and while he apparently suffered from high blood pressure and diabetes, the court determined that these physical conditions did not impair defendant. In light of these characteristics, the court found that there was not “anything of detriment that ... could overcome his will looking at only that ... set of factors separately.”

Turning to the details of the interrogation, the court considered a number of factors and the conduct of the detectives. The court found that defendant did not display any fear and that, to the extent defendant was fearful, the officers did not attempt to magnify defendant’s emotional state. The court also noted that the detectives raised their voices during the interrogation, and that they repeatedly accused defendant of lying. Considering the totality of the circumstances, the court concluded that defendant made the admissions voluntarily.

C. JURY TRIAL AND SENTENCING

The case proceeded to trial on seven felony counts: oral copulation or sexual penetration of K.M., a child 10 years old or younger, at Campos Day Care (count 1) and in defendant’s car (count 2) (§ 288.7, subd. (b)); and lewd or lascivious acts on K.M., a child under 14, at Campos Day Care or in defendant’s car (counts 3-7) (§ 288, subd. (a)).

The jury heard testimony from a number of witnesses, only a few of which are material to the issues raised on appeal. K.M.’s testimony was generally consistent with her statements to her mother, her interview with Detective Vidal, and her preliminary hearing testimony. She stated that on one occasion in the living room of Campos Day Care defendant touched her under her underwear on her “wee-wee” and “butt,” which were the words she used to describe her private parts in “front” and “back.” K.M. testified that on another occasion, while in the car after defendant picked her up from kindergarten, defendant touched her under her underwear, both on and inside her “wee-wee” and “butt.” Finally, K.M. stated defendant touched her on her private parts “almost every day” that she went to Campos Day Care. K.M. was seven years old at trial.

The jury also heard testimony from Mary Ritter, the physician's assistant who performed a sexual assault response team examination of K.M. on December 23, 2010. Ritter testified that K.M. did not complain of any pain and that K.M.'s general physical examination did not indicate any obvious physical injuries. Ritter reported seeing some redness inside K.M.'s labia majora but no swelling, abrasions, or lacerations in the vaginal area. Ritter opined that despite the lack of physical evidence of assault, K.M.'s examination results were "consistent" with a sexual assault because "the vast majority of the children that we see, even when they come describing painful sexual contact, have normal exams."

K.M.'s mother, Linda B., testified regarding her interactions with defendant and Celia, as well as K.M.'s report of abuse. K.M. told Linda that her sister C.M. and two other girls, C.C. and Ch.C., were present when defendant touched her private parts in the living room of Campos Day Care. The girl identified as C.C. also testified, stating that she attended Campos Day Care and was friends with K.M. and C.M. She testified that she never saw defendant pull K.M.'s pants down or touch K.M.'s private parts.

Experts testified on behalf of the People and defendant. Carl Lewis testified for the People regarding Child Sexual Abuse Accommodation Syndrome, explaining that it "provid[es] a basis for understanding some of the unexpected counter-intuitive things that tend to come up" in cases involving sexual assault of children. Dr. Ofshe testified for the defense about psychological influence and police interrogations, consistent with his testimony from the Evidence Code section 402 hearing. The defense also called Dr. Kerner, who testified regarding the possible influence interviewing techniques can have on children's reports of sexual abuse and the "behavior of child victims of sexual abuse as a class."

Defendant also testified on his own behalf. On direct examination, defendant explained his role at Campos Day Care, which included running errands, playing with the children, and picking up some of the children (including K.M. and C.C.) from school.

Regarding his interrogation by the police, he testified that he “wasn’t really scared because, I mean, nothing was true” but also that he was “very nervous.” On cross examination, the prosecutor read back several statements from defendant’s interrogation and asked defendant to confirm whether they accurately described what he told the officers. The prosecutor relied on the English translation of statements from defendant’s interrogation in his questions to defendant.⁶

Defendant confirmed that the transcript was mostly accurate as to his statements during the interrogation, but he continued to deny ever touching K.M. inappropriately and stated that the only concept he was trying to impart to the officers was “that I was just pushing [K.M.] away [from the baby.]” At one point, the prosecutor asked defendant: “Would it be fair to say that throughout the interview, you kept saying that if you touched her it was accidentally and that you didn’t do it intentionally?” Defendant responded, “Yes.” Defendant also stated: “To make things clear, everything that I just wanted to say to them was that I just was pushing her away, just pushing her away.”

Defense counsel conducted a brief re-direct examination of defendant. Defense counsel asked defendant: “Do you know what you actually said [during the interrogation]? Do you remember?” Defendant responded: “I do remember because it was the same thing over and over and over that I was repeating.” Defendant did not elaborate further on that point but explained that during the interrogation “I felt fear. I felt I was desperate. I just wanted to collapse there.”

⁶ The prosecutor provided the interpreter with a copy of exhibit 5A so that the interpreter could follow along during the examination. The reporter comments ambiguously in the transcript that “the interpreter read the transcript to the defendant” As exhibit 5A contained side-by-side English and Spanish translations of the interrogation, this could mean that the interpreter read the Spanish-language transcript to defendant or, alternatively, that the interpreter translated the English translation back into Spanish. The interpreter noted that exhibit 5A translated the phrase “si a caso” as “if that’s the case” but suggested that phrase actually meant “if that.” In a bench conference, the parties agreed to change the exhibit to reflect that translation (though the correction does not appear to have been made on the admitted exhibit).

During closing arguments, defense counsel discussed defendant's interrogation by Detectives DeLorenzo and Perez, the videotape of which was admitted into evidence and shown to the jury. In addition to questioning the accuracy of the written translation of the interrogation provided by the People, the defense discussed defendant's admissions that he might have accidentally touched K.M.'s private parts. Defense counsel referred to a diagram that Dr. Ofshe had used, which charted an interrogation subject's confidence over time in response to tactics used by interrogating officers. Referring to the point on the diagram where a defendant says "I did it," defense counsel told the jury: "We didn't get here. We didn't even get to 'I did it' in this particular interrogation. He never says 'I did it.' He never acknowledges responsibility." Defense counsel noted that defendant was only "trying to explain to detectives how ... he could have accidentally got his hand on her. ... And if you read to the end of the interview, you see that he keeps trying to explain that incident to them and they reject every explanation he gives them. So that's not a narration is my point. There's no acknowledgement of guilt, ever." Defense counsel also argued that "I can stand here and recite line and page number of every one of the 35 plus denials that [defendant] made, and they're all in here. But the bottom line is you won't find an admission that isn't somehow twisted or tweaked by interested parties." In rebuttal, the prosecutor stated, "I will concede that there was no confession in this case. We didn't get to that point because the defendant stopped the interview as you saw"

The jury found defendant guilty of committing a lewd or lascivious act on K.M. between December 1, 2010 and December 22, 2010 at Campos Day Care or in defendant's car (§ 288, subd. (a); count 7) and of misdemeanor battery on K.M. between December 20, 2010 and December 22, 2010 at Campos Day Care (§ 242; a lesser included offense of count 1). The jury acquitted defendant on the five remaining counts relating to allegations from August, September, October, November, and December 2010.

The court conducted a closed hearing with counsel and defendant present a few weeks after the jury reached its verdict upon learning that a juror had “expressed some concerns” to a courtroom clerk. The court allowed the juror to describe her mental processes during the case and then had the following colloquy: “THE COURT: Sure. Sure. But I guess my real point is that at any time during the course of the deliberations, did you feel coerced? [¶] JUROR NO. 4: No. I would not stand that. [¶] THE COURT: And when you stood up on the date the verdict was read, and I asked you whether or not that was your verdict, was that, indeed, your verdict? [¶] JUROR NO. 4: Yes. After reading everything and going over everything.”

At sentencing, the court considered the probation officer’s report and arguments from counsel before denying probation and imposing a prison sentence. In finding defendant ineligible for probation, the court stated it reviewed the factors in California Rules of Court, rule 4.414, and reasoned as follows: “[The victim was] 5 years old. She’s very vulnerable. Not only because she’s small in nature [*sic*], but adults have such authority over children that makes a child very vulnerable. [¶] In addition to that, when you’re in a day care -- or school or young member of a team, the person who’s sort of in charge of you is in a position of trust. And when that is violated, it has, sort of, a profound impact on the person who has been violated. [¶] And so those are some of the main reasons why I do not feel that ... [defendant] will be eligible for probation.”

The court sentenced defendant to the middle term of three years in prison for count 7. The court also imposed a one-year sentence for the simple battery misdemeanor, to run concurrent with the felony sentence. Defendant received 734 days of presentence credit. Among other fines and fees levied against defendant, the court imposed a \$300 fine pursuant to section 290.3 and \$900 in penalty assessments related to the section 290.3 fine.

II. DISCUSSION

Four issues are raised on appeal, which we will address in turn: (1) whether defendant's admission during his interrogation was obtained involuntarily, in violation of the Fourteenth Amendment to the United States Constitution; (2) whether his trial counsel provided ineffective assistance by failing to object to prosecutorial misconduct, in violation of the Sixth Amendment to the United States Constitution; (3) whether the trial court improperly relied on an element of defendant's criminal offense in denying probation; and (4) whether the trial court erred in failing to explain the bases for the penalty assessments imposed in the abstract of judgment.

A. VOLUNTARINESS OF DEFENDANT'S INTERROGATION ADMISSION

Defendant claims his admission that he might have touched K.M.'s private parts accidentally was involuntarily obtained, in violation of the Fourteenth Amendment. He alleges that the detectives' interrogation techniques overcame his will. Specifically, defendant points to the detectives' DNA and fingerprint ruses, as well as alleged promises of leniency.

The People bear the burden to show by a preponderance of the evidence that defendant's admission was voluntarily made. (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) A statement is involuntary if "defendant's choice to confess was not 'essentially free' because his will was overborne. [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 827.) Determination of whether defendant's admission was voluntary "depends upon the totality of the circumstances." (*Carrington, supra*, 47 Cal.4th at p. 169.) We review de novo the trial court's legal determination of voluntariness. (*Ibid.*) The parties disagree, however, on the proper standard of review of the trial court's factual findings regarding the circumstances of the admission. Defendant argues the standard is de novo (at least as to the facts surrounding the making of the statement) because the interview was tape-recorded, relying on *People v. McWhorter* (2009) 47 Cal.4th 318, 346. The People disagree, arguing that the trial court's factual findings regarding the

defendant's characteristics and the details of the interrogation are reviewed for substantial evidence, citing *People v. Jones* (1998) 17 Cal.4th 279, 296. (See also *Carrington, supra*, 47 Cal.4th at p. 169 [stating standard of review for factual findings of confession circumstances is substantial evidence].)

Fact-finding is better left to the sound discretion of trial courts and should not be disturbed if supported by substantial evidence. (See *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 ["When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."].) Further, *McWhorter* would compel a de novo standard of review only for factual determinations based on information gleaned from reviewing the video-recording. (See *McWhorter, supra*, 47 Cal.4th at p. 346 [" "When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness." [Citation.]' [Citation.]"].) Other determinations, such as defendant's level of sophistication, would still be subject to review for substantial evidence. We find defendant's admission was voluntary under either standard.

We consider the totality of circumstances surrounding defendant's admission and review both defendant's characteristics and the details of the interrogation. (*People v. Williams* (1997) 16 Cal.4th 635, 660.) Regarding defendant, at 60 years old he was neither so old nor so young as to make him particularly susceptible to coercion. There was also no evidence defendant suffered from any mental or physical disability that might make him more susceptible to coercive influence. Defendant's level of sophistication is inconclusive because while he had no prior history with police, he raised five children and was a member of the workforce for a number of years. Finally, we agree with the trial court that defendant did not appear fearful during the interrogation and his emotional state seemed stable. Thus, defendant's characteristics do not support a finding that his admission was involuntary.

The details of the interrogation also do not support defendant's argument. Before asking about his interactions with K.M., Detective Perez read defendant a Spanish-language translation of his *Miranda* rights and defendant confirmed he understood each of those rights. There was nothing unduly coercive about the interrogation room. Although one of defendant's hands was handcuffed to a table, defendant did not complain of discomfort. The detectives raised their voices during the interrogation, but they did not do so to an excessive degree. The detectives offered defendant water, took two breaks, and offered to let defendant use the restroom. The interrogation lasted less than two hours and the detectives immediately concluded it when defendant requested an attorney.

The detectives' tactics do not compel a finding of involuntariness when considered in the totality of the circumstances. Deceptive tactics, such as the DNA and fingerprint ruses used here, “ ‘ [do] not necessarily invalidate an incriminating statement.’ [Citation.]” (*People v. Smith* (2007) 40 Cal.4th 483, 505.) These tactics do, however, factor into the totality of the circumstances and weigh against a finding of voluntariness. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209 (*Shawn D.*.)

While promises of leniency by police in exchange for a confession can render a confession involuntary (*Shawn D.*, *supra*, 20 Cal.App.4th at p. 214), mere exhortations by interrogators to tell the truth are permissible. (*Carrington*, *supra*, 47 Cal.4th at p. 174; see also *People v. Howard* (1988) 44 Cal.3d 375, 398 [“ ‘ “[w]hen the benefit pointed out by the police ... is merely that which flows naturally from a truthful and honest course of conduct,” the subsequent statement will not be considered involuntarily made. [Citation.]’ [Citation.]”) The detectives repeatedly made statements to defendant to the effect that the District Attorney, who “makes the decision,” “isn’t going to like” it if defendant lies and that it would “look very bad for [defendant]” if his statements were inconsistent with the supposed DNA evidence. The detectives never mentioned particular outcomes or intimated that they had any control over the punishment defendant

might receive. We believe these statements are more properly characterized as urging defendant to tell the truth rather than making promises of leniency.

Defendant also claims that his admission was involuntary because the police introduced the accidental contact concept. However, providing a possible explanation for defendant's contact with K.M., even considered along with the more deceptive tactics used by the detectives here, does not support a finding that defendant's "will was overborne." (*Memro, supra*, 11 Cal.4th at p. 827.)

Further, the cases relied on by defendant are distinguishable because each contains factual circumstances not present here that rendered the confessions involuntary. (See *Shawn D., supra*, 20 Cal.App.4th at pp. 207, 212, 215 [finding confession by 16-year-old with post-traumatic stress disorder involuntary after interrogator made an implied promise of leniency by saying he would "personally talk to the D.A." if defendant cooperated]; *People v. McClary* (1977) 20 Cal.3d 218, 229 [interrogator failed to respond to 16-year-old defendant's repeated requests for an attorney], overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17; *People v. Brommel* (1961) 56 Cal.2d 629, 633-634 [interrogators told defendant they would write "liar" on his statement if he did not cooperate and that the judge " 'is not going to believe [defendant] because ... [he would be] branded as a liar' "], overruled on other grounds by *Cahill, supra*, 5 Cal.4th at p. 509, fn. 17; *United States v. Harrison* (1994) 34 F.3d 886, 891 ["Although the agents thinly veiled their implied message behind a rhetorical question, Harrison could only conclude that she might suffer for her silence."].)

In sum, after reviewing the totality of the circumstances surrounding defendant's interrogation as well as the testimony of Officer DeLorenzo, Officer Perez, Dr. Ofshe, Dr. Kerner, and Linda B. at the Evidence Code section 402 hearing, we conclude the People have shown by a preponderance of the evidence that defendant's statements regarding the possibility of accidental contact were voluntarily made. (*Carrington, supra*, 47 Cal.4th at p. 169.)

B. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE

Defendant claims that the prosecutor committed misconduct in his rebuttal argument by improperly commenting on defendant's post-*Miranda* silence. Because defense counsel did not object to the prosecutor's statements, defendant claims he was provided ineffective assistance, in violation of defendant's right to counsel under the Sixth Amendment to the United States Constitution.

In closing argument, defense counsel discussed the interrogation in the context of Dr. Ofshe's expert testimony and diagram regarding the ways "ploys or lies" used by the police can influence defendants and lead to false confessions. Counsel then referred to the diagram, which "shows the competence line going down as the interview goes along ... [until] the confidence level gets down to a point where the suspect says, 'I did it.' You need to get to the 'I did it' phase before you can get an admission or a confession." Defense counsel then states, "We didn't get here. We didn't even get to 'I did it' in this particular interrogation."

In rebuttal, the prosecutor responded to defense counsel's confession discussion: "I will concede that there was no confession in this case. We didn't get to that point because the defendant stopped the interview as you saw, okay?"

To prevail, defendant must show his trial counsel's performance was deficient and that he was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) To prove prejudice, defendant must affirmatively show a reasonable probability that, but for his trial counsel's errors, the result would have been different. (*Id.* at pp. 217-218.) A reasonable probability is one " 'sufficient to undermine confidence in the outcome.' " (*Id.* at p. 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Finally, "[i]f a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel's performance was deficient." (*In re Crew* (2011) 52 Cal.4th 126, 150, citing *Strickland, supra*, at p. 697.)

Implicit in both the Fifth Amendment's privilege against self-incrimination and the rationale behind *Miranda* warnings is an understanding "that exercise of the right of silence will not be penalized." (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520.) In *Doyle v. Ohio* (1976) 426 U.S. 610, the United States Supreme Court held that the prosecution cannot use a defendant's silence after being read *Miranda* warnings to impeach a later statement made by defendant. (*Id.* at pp. 618-619.) However, an exception to this general rule arises when a prosecutor's reliance on defendant's post-*Miranda* silence is a "fair response to a claim made by defendant or his counsel" (*United States v. Robinson* (1988) 485 U.S. 25, 32; *People v. Champion* (2005) 134 Cal.App.4th 1440, 1448 ["A violation of due process does not occur where the prosecutor's reference to defendant's postarrest silence constitutes a fair response to defendant's claim or a fair comment on the evidence."].)

The prosecutor's rebuttal was a fair response to statements in defense counsel's closing argument. Defense counsel referred to the point on the diagram where a hypothetical defendant confesses to a crime and said "We didn't get here." The prosecutor's rebuttal responds with a reason the case did not get to "that point." But even if the prosecutor's statement went beyond a fair response, we find no reasonable probability of a different result had defense counsel made and the trial court sustained an objection and admonished the jury. Though defendant argues the evidence supporting his conviction was "noticeably weak," evidence obtained at trial, including K.M.'s testimony, which was consistent with her previous statements to her mother, the police, and at the preliminary hearing, provided evidence from which a rational trier of fact could have found defendant guilty beyond a reasonable doubt. (See *People v. Jones* (1990) 51 Cal.3d 294, 316 [generic testimony can support conviction if it describes (1) "the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct"; (2) "the number of acts committed with sufficient certainty to support each of

the counts alleged in the information or indictment”; and (3) “*the general time period* in which these acts occurred ... to assure the acts were committed within the applicable limitation period.”].) Because defendant has not shown prejudice, his ineffective assistance argument fails.

In reaching our conclusion we do not consider the statements of the juror at the closed hearing that occurred weeks after the jury had returned its verdict.⁷ Evidence of “statements made, or conduct, conditions, or events occurring, either within or without the jury room” is only admissible to determine whether it is “of such a character as is likely to have influenced the verdict improperly.” (Evid. Code, § 1150, subd. (a).) “No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.” (*Ibid.*; see *People v. Steele* (2002) 27 Cal.4th 1230, 1262 [“Not all thoughts ‘by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such [thoughts] cannot impeach a unanimous verdict; a jury verdict is not so fragile.’ [Citation.]”]; *People v. Guerra* (2009) 176 Cal.App.4th 933, 942 [“As a rule, courts may not embark on ‘speculation into what transpired in the jury room.’ [Citation.]”].)

C. DENIAL OF PROBATION

Defendant contends the trial court abused its discretion in denying probation based on, among other things, K.M.’s vulnerability due to her young age. According to defendant, because K.M.’s youth was an element of his felony conviction, her age-based vulnerability could not be used as a factor to support the decision to deny probation.

Defendant principally relies on *People v. Parrott* (1986) 179 Cal.App.3d 1119, which held that the vulnerability of a victim based on his or her age cannot be used to

⁷ On our own motion, we augmented the record with the transcript from the closed hearing. As we did not consider the testimony from that hearing, we did not request supplemental briefing. (See Gov. Code, § 68081.)

deny probation when the age of the victim is also an element of the crime for which a defendant is convicted. (*Id.* at pp. 1124-1125.) The court adopted this rule by comparing probation to the sentencing context, where a rule of court provided that “[a] fact which is an element of the crime may not be used to impose the upper term.” (*Parrott, supra*, 179 Cal.App.3d at p. 1125, quoting former California Rules of Court, rule 441(d).)⁸

The People argue defendant forfeited this issue by failing to raise it during sentencing. Anticipating this claim, defendant argues in his Opening Brief that his trial counsel preserved the issue by pointing out to the trial court that “any 5 year old is a vulnerable victim” in response to the probation report’s discussion of K.M.’s vulnerability. Assuming that statement preserved the issue, we find no abuse of discretion in denying probation.

When the victim’s age is an element of the crime for which a defendant is convicted, a trial court may still find that a victim is “particularly vulnerable because of other factors” including “extreme youth within the given age range” to support a lengthier sentence and, by extension to the probation context, denial of probation. (See *People v. Garcia* (1985) 166 Cal.App.3d 1056, 1069-1070.) Here, section 288, subdivision (a) prohibits lewd or lascivious contact with anyone up to 14 years of age. (§ 288, subd. (a).) Because K.M. was five years old when the contact with defendant occurred, she was young within that broad age range.

Even without the court’s findings on the victim’s youth and vulnerability, denial of probation was not an abuse of discretion because the court provided an independent justification when it found that defendant was in a position of trust or confidence and took advantage of that position. (Cal. Rules of Court, rule 4.414(a)(9).) That finding is

⁸ The rule of court cited in *Parrott* has since been modified and recodified as California Rules of Court, rule 4.420(d). Rule 4.420(d) currently provides: “A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term.”

amply supported by the record. It is undisputed that defendant assisted his wife at Campos Day Care, and he was apparently trusted by parents to provide transportation and supervision for children there. The trial court did not abuse its discretion in denying probation based on defendant's taking advantage of the access afforded by that trust. (Cf. *People v. Williams* (1991) 228 Cal.App.3d 146, 152-153 ["A single factor in aggravation is sufficient to justify a sentencing choice."].)

D. PENALTY ASSESSMENTS

Defendant argues, and the People concede, that the trial court erred by failing to separately list in the abstract of judgment each penalty assessment related to the \$300 fine imposed under section 290.3. At the sentencing hearing, the court stated "[a] fine plus penalty assessment of \$300 will be imposed pursuant to Penal Code section 290.3." The abstract of judgment lists a \$300 fine pursuant to section 290.3 plus "PA \$900." In *People v. Hamed* (2013) 221 Cal.App.4th 928, 934-937, this court adopted the statement of the Third Appellate District's opinion in *People v. High* (2004) 119 Cal.App.4th 1192, that trial courts must provide "a detailed recitation of all the fees, fines and penalties on the record" (*High, supra*, at p. 1200.) In *Hamed*, we encouraged trial courts to specify all fines, fees, and penalties on the record to "help the parties and the court avoid errors in this area." (*Hamed, supra*, at pp. 939-940.) We also noted that imposition of a base fine and penalty assessments without specifying the various assessments was "unauthorized sentence[] that may be corrected on appeal." (*Id.* at p. 941.)

The trial court correctly imposed a \$300 fine pursuant to section 290.3 because the fine mandated by that section is \$300 for a first offense. (§ 290.3, subd. (a).) The trial court imposed \$900 in penalty assessments without specifying the various applicable assessments. Although we find the trial court's total of \$900 accurate based on the following, that figure must be broken down to show its components: (1) \$300 state penalty assessment (§ 1464, subd. (a)(1) [100% of base fine]); (2) \$210 county penalty assessment (Gov. Code, § 76000, subd. (a)(1) [70% of base fine]); (3) \$60 state surcharge

(§ 1465.7, subd. (a) [20% of base fine]); (4) \$150 state court construction penalty (Gov. Code, § 70372, subd. (a)(1) [50% of base fine]); (5) \$60 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1) [20% of base fine]); (6) \$30 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1) [10% of base fine]); and (7) \$90 DNA penalty (former Gov. Code, § 76104.7, subd. (a)(1) [30% of base fine]).

III. DISPOSITION

The clerk of the trial court is directed to prepare an amended abstract of judgment that sets forth the amount and statutory basis for the section 290.3 fine and the amount and statutory basis for each associated penalty assessment, and to send a copy of the amended abstract to the Department of Corrections and Rehabilitation.

The amended abstract shall specify the following penalty assessments attaching to the \$300 section 290.3 base fine: (1) \$300 state penalty assessment (§ 1464, subd. (a)(1)); (2) \$210 county penalty assessment (Gov. Code, § 76000, subd. (a)(1)); (3) \$60 state surcharge (§ 1465.7, subd. (a)); (4) \$150 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); (5) \$60 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)); (6) \$30 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); and (7) \$90 DNA penalty (former Gov. Code, § 76104.7, subd. (a)(1)).

As so modified, the judgment is affirmed.

Grover, J.

I CONCUR:

Bamattre-Manoukian, Acting P.J.

Márquez, J.-I respectfully dissent. The majority concludes the trial court properly admitted Campos' statements made during a lengthy interrogation by police. Given the totality of the circumstances, I would conclude that the interrogation violated Campos' due process rights, and that the court therefore erred in denying Campos' motion to exclude the improperly obtained evidence. Furthermore, based on the inconsistent and contradictory state of the evidence and the prosecution's reliance on the interrogation during cross-examination and in closing argument, the Attorney General cannot show the error was harmless beyond a reasonable doubt. Accordingly, I would reverse the judgment of conviction, and I would not reach the remaining claims on appeal.

I. *Legal Principles*

The prosecution bears the burden of showing by a preponderance of the evidence that the defendant's statement was voluntary. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176.) The fundamental test for voluntariness is whether the "defendant's will was overborne" by the circumstances surrounding the taking of the statement. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 (*Schneckloth*); *Dickerson v. United States* (2000) 530 U.S. 428, 434 (*Dickerson*); *People v. McWhorter* (2009) 47 Cal.4th 318, 346.) This test depends on both the characteristics of the defendant and the external circumstances of the interrogation. "The determination 'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.'" (*Dickerson, supra*, 530 U.S. at p. 434, quoting *Stein v. People of State of New York* (1953) 346 U.S. 156, 185.)

I respectfully disagree with the framework used in the majority's analysis, which separates the defendant's characteristics from the external details of the interrogation and the tactics used by the police. The United States Supreme Court has held that these factors must be considered together as part of the same test under the totality of the circumstances. "The due process test takes into consideration 'the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the

interrogation.’ ” (*Dickerson, supra*, 530 U.S. at p. 434, quoting *Schneckloth, supra*, 412 U.S. at p. 226.)

The voluntariness inquiry “is not limited to instances in which the claim is that the police conduct was ‘inherently coercive.’ ” (*Miller v. Fenton* (1985) 474 U.S. 104, 110, quoting *Ashcraft v. Tennessee* (1944) 322 U.S. 143, 154.) Courts must consider the physical environment of the interrogation and the tactics used by the police in light of the defendant’s vulnerability to these factors. “Each of these factors, in company with all of the surrounding circumstances-the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him [or her], his [or her] physical and mental state, the diverse pressures which sap or sustain his [or her] powers of resistance and self-control-is relevant.” (*Culombe v. Connecticut* (1961) 367 U.S. 568, 602.) “Characteristics of the accused which may be examined include the accused’s age, sophistication, prior experience with the criminal justice system and emotional state.” (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.)

“ ‘A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it “does not itself compel a finding that a resulting confession is involuntary.” [Citation.] The statement and the inducement must be causally linked. [Citation.]’ [Citation].” (*People v. McWhorter, supra*, 47 Cal.4th at p. 347.) Both express *and implied* promises or threats may invalidate a confession. “ ‘It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.’ ” (*In re Shawn D., supra*, 20 Cal.App.4th at p. 210, quoting *People v. Sultana* (1988) 204 Cal.App.3d 511, 522.)

Another police tactic that weighs against a finding of voluntariness is the use of false information-or as the officers here deemed it, a “ruse” that consisted of lying to the defendant about the evidence against him. “[A] lie told to a detainee regarding an important aspect of his case can affect the voluntariness of his confession or admission.” (*In re Shawn D.*, *supra*, 20 Cal.App.4th at p. 209.) “While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness [citations].” (*People v. Hogan* (1982) 31 Cal.3d 815, 840-841, overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) This factor is particularly relevant here. As set forth in detail below, the officers repeatedly and continually lied to Campos throughout the interview by claiming they had irrefutable evidence of his guilt. They falsely told him that another girl saw him molest K.M.; that two doctors examined K.M. and found physical evidence showing he had touched her vagina; that his fingerprints had been found on K.M.’s vagina and buttocks; and that they had discovered his DNA on her vagina and buttocks.

II. *The Trial Court Erred in Denying the Motion to Exclude*

A. *Circumstances of the Interrogation*

As an initial matter, I note the many defects in the quality of the evidence at issue. Two detectives interviewed Campos: Detective DeLorenzo, who primarily spoke English; and Detective Perez, who attempted to act as an interpreter between Campos and DeLorenzo, in addition to asking his own questions.¹ However, DeLorenzo frequently interrupted Perez’s Spanish translation, and both officers frequently interrupted Campos’ answers. As a consequence, portions of both the audio and the transcript of the interrogation are confusing or incomprehensible; the transcript is potentially misleading in places-a fact the prosecution used to its advantage, as described below.

¹ At trial, outside the presence of the jury, the certified court interpreter assigned to assist Campos described Perez’s Spanish as “lousy.”

Campos was arrested in his home just before the interrogation. Police took his fingerprints, drew his blood, and swabbed his hands, ostensibly for DNA. The interrogation lasted about two hours and took place in the sexual assault investigative unit interview room, a small room with one door, a small table, and a “small porthole window.” Campos’ left hand was handcuffed to the table throughout the interrogation. The police exited the room and left Campos alone several times.

After the officers *Mirandized* Campos and gathered his basic information, they asked him about his duties at the daycare. He told them he helped his wife watch the children, took out their mattresses, helped with the food, and drove two children-including the alleged victim-between school and the daycare. He also told police he had been watching the children the day before the interrogation, when one of the assaults allegedly took place.

The officers reminded Campos about the various pieces of evidence they had gathered from him-including his DNA, his blood, and his fingerprints-and they told him a doctor had examined K.M. They falsely claimed they would be able to detect his fingerprints and other physical evidence on K.M. for up to several weeks or a month after he touched her. Officer DeLorenza then left the room and returned with an envelope which he claimed contained the results of DNA tests they had performed on the evidence.

The officers then confronted Campos with K.M.’s accusation-that he had touched the inside of her vagina and her buttocks-and they instructed him to tell the truth before they opened the envelope to discover the results of the tests. Pointing to the envelope, they emphasized that “this is what is going to tell us the truth.” Campos then repeatedly denied abusing K.M. or touching her vagina. The officers falsely told him another girl had witnessed him doing so. They then informed him that K.M. had also alleged he touched her on a second occasion after he had picked her up in his truck. Campos denied that allegation as well.

Officer Perez again admonished Campos to tell “the truth.” But Officer Perez added that if Campos gave a statement contradicting the results of the DNA test in the envelope, it would “look bad” for Campos when the evidence was sent to the prosecutor:

“[Officer Perez:] Because what’s happening here-you’re going to tell me what happened. The truth. And the District Attorney is the one that decides what’s going to happen with you. But if you lie to me, if you lie, that’s what’s going to come out in the police report, and when this-[pointing to the envelope]-we’re going open it; we’re going to send it to the District Attorney too, okay. *If you tell me something, and this [the envelope] says something else, it’s going to look very bad for you* or that, that you lied to me. But if you speak with the truth, it’s very different.” (Italics added.)

Campos again repeatedly denied touching K.M.’s vagina, but he allowed that his hand might have touched her back when he was trying to put the children to sleep. The officers responded that they had not gathered their evidence from K.M.’s back, but “from her intimate parts.” The officers again warned Campos that they were about to open the envelope, and stated:

“[Officer Perez:] This is the last opportunity because the D.A. makes the decision. But if you lie to us and that evidence, we’re going [inaudible] we’re going to send it and the other thing that you don’t say, will look real bad for you.”

Campos again denied touching K.M.’s vagina and stated that he had patted her on the back while attempting to put her to sleep. The officers once again explained that they were about to open the envelope, but they told Campos they already knew the results would show that he had touched K.M.’s vagina. To emphasize their claim, Officer DeLorenzo moved closer to Campos by leaning forward, and aggressively pointed his finger at Campos while stating:

“[Officer DeLorenzo:] I already know you touched her on the back. Let’s-look at me. I know that you touched her on the back. I know every place that you touched her. And the reason why I know is because your DNA fingerprints-the DNA fingerprints, the

regular finger prints, and DNA fingerprints are in different parts of her body. *So what I want to know from you is how it happened.*” (Italics added.)

The officers then suggested to Campos that he might have touched her by accident:

“[Officer Perez:] We, we already know that something happened to the girl because they already took her the [*sic*] hospital and we already know that the nurse already checked her. And we want to know if it was something that just-that you were playing. Or that, maybe it was something that was, that accident. [*Sic.*] Possibly something that was an ac-something, okay.”

At that point, the officers opened the envelope, and they falsely told Campos that the “test results” showed he had touched K.M.’s vagina. They accused him of lying, and again demanded that he tell “the truth”:

“[Officer Perez:] Okay, *so you’re lying to us. You have to tell us the truth. Why?*”

“[Campos:] I told you that I had, had touched the back . . . but not, not, not, not here like it says.”

“[Officer Perez:] But that’s not from the back, it’s from the vagina-and in front. Not just from the vagina, but on top of the skin or in this area too.” (Italics added.)

The officers then told Campos they had found his fingerprints on the skin of K.M.’s buttocks, and they suggested that perhaps Campos had helped K.M. go to the bathroom. They again demanded that he explain how his DNA had gotten on K.M.’s vagina. When Campos once again denied touching K.M.’s vagina, the officers insisted the evidence was irrefutable, and that if Campos did not tell them “the truth,” they would tell the prosecutor:

“[Officer Perez:] But this [the evidence] is here, it doesn’t lie. This doesn’t tell us lies, okay. What motive-*This is the truth. So you’re going to tell me that you didn’t do*

anything and the DA is going to see this, what's he going to say? That it's-you're lying."
(Italics added.)

Campos continued to deny that he had touched K.M.'s vagina, and he again stated that he had only touched K.M.'s back accidentally. The officers continued to insist that the evidence proved he had touched her vagina, and they continued to demand that he explain how that could be. They told Campos that K.M. had been examined by doctors twice, and that the evidence from both exams was against him. Officer Perez again suggested that Campos might have touched K.M.'s vagina accidentally. Officer Perez also suggested that it happened because Campos himself had been sexually abused when he was a boy. Campos denied both possibilities and continued to state that if he patted K.M., he did so accidentally. The officers continued to reject his statements.

Officer Perez again warned Campos that if he denied doing what had been proven by the "evidence," the prosecutor would not like it:

"[Officer Perez:] Primitivo, the evidence is here, okay. The girl-two doctors will-have seen her. The scientists already have your DNA. If you lie to me, the DA isn't going to like that you're lying to me, okay."

Officer Perez once again suggested to Campos that he touched K.M. accidentally, and Officer Perez offered that it was only "human" to make such mistakes. Campos again reasserted that if he had touched K.M., he only patted her accidentally. The officers rejected his explanation and told him again that "it's going to look bad for you," and that their report would go to the prosecutor.

The officers pressed Campos to tell them exactly how he had touched K.M. accidentally. Campos explained that he was holding a baby, and when K.M. attempted to hug the baby, he pushed her away using his hand and one of the baby's boots. As the officers continued to reject his explanations, Campos bemoaned his situation, complaining that "everything's finished. My, my wife and I live off of that." Officer

DeLorenzo warned Campos that “*The only part that’s over is if you keep trying to fight.*” (Italics added.)

At this point, the record of the interrogation becomes increasingly difficult to parse. Both officers frequently shouted over each other, and shouted over Campos as well. The audio of the recording is highly distorted, and the text of the transcript is fractured and disjointed. Throughout the remainder of the interrogation, the officers continually demanded that Campos explain the “evidence” of his guilt. Portions of the transcript show that Campos admitted accidentally touching K.M. after his interrogators suggested accidental touching as a possible way his DNA was found on K.M. But the questions posed about accidental touching did not always specify exactly what part of K.M.’s body was at issue, or whether the touching consisted of some sexually abusive form of contact as opposed to something innocuous, such as accidentally touching K.M.’s back when placing her on a portable mattress for a nap. In any event, and most importantly, at no point did Campos state that he touched K.M.’s vagina or buttocks. He steadfastly maintained that, if it was true his DNA was found somewhere on K.M., it must have been the result of accidental touching.

B. The Coercive Effect of the Police Tactics

I acknowledge that “mere advice or exhortation by the police that it would be better for the accused to tell *the truth*” are generally permissible. (*In re Shawn D.*, *supra*, 20 Cal.App.4th at p. 210, italics added.) But the police did not exhort Campos to tell “the truth”—they exhorted him to explain a “truth” that was in fact *a lie*, and furthermore, they implicitly threatened him with negative consequences if he did not do so.

First, in referring to the purported “evidence,” the officers told Campos “this is the truth,” and “this doesn’t tell us lies.” They were unrelenting in asserting this “truth” as scientifically proven. Thus, while the officers were purportedly demanding that Campos tell the truth, they simultaneously declared “the truth” to be the fact that he touched K.M.’s vagina and buttocks. In other words, the officers demanded that Campos agree to

their specific version of “the truth”-a version of that was, of course, predicated on lies. And having dictated “the truth” to him, they made it abundantly clear that they would reject any statement inconsistent with it. Throughout the interrogation, they continually demanded that he explain how his DNA and fingerprints were found on K.M. And when Campos continued to deny touching K.M.’s vagina, the officers put forth an even more specific version of “the truth”-that Campos had touched her vagina accidentally.²

Second, the officers coupled their demands with implicit threats of harsher consequences if Campos did not explain the “evidence” and give them a statement consistent with it. (See *In re Shawn D.*, *supra*, 20 Cal.App.4th at p. 210 [exhortation to tell the truth does not render a statement involuntary, provided the exhortation is unaccompanied by a threat or promise].) The officers referred to the prosecutor seven times during the interrogation. They emphasized that the prosecutor “makes the decision” and “decides what’s going to happen to you.” They repeatedly told Campos that if he failed to explain how his DNA and fingerprints ended up on K.M.’s vagina, they would report to the prosecutor that he was lying. Furthermore, they warned Campos that the prosecutor would “not like it,” and it would “look real bad for you” if Campos did not give them an explanation consistent with the “evidence.” And they warned him that it was “over” if he did not comply with their demands for an explanation. While they did not explicitly threaten him with increased charges or a harsher sentence, their warnings constituted implicit threats of negative consequences. Indeed, there is no other reasonable way to interpret these statements.

² The majority states that it is unclear which party first raised the concept of accidental touching, Majority Opinion at p. 4, but the record shows the officers suggested it first, just before opening the envelope with the purported evidence. The defendant’s previous statements, quoted by the majority, do not suggest inadvertent touching, and do not refer to K.M.’s vagina; rather they are conditional statements explaining how his hand might have touched K.M.’s back.

For all these reasons, I would conclude that the police tactics used here—the repeated lies about the existence of scientific evidence proving a specific “truth,” and the insistence that Campos explain this “truth,” coupled with implicit threats of harsh consequences from the District Attorney’s Office when he failed to do so—weigh heavily against a finding of voluntariness.

C. Characteristics of the Defendant

The defendant’s characteristics also weigh against a finding of voluntariness. First, Campos was not sophisticated according to any relevant definition of that term. He grew up in Mexico, where he left school in the third grade. He spoke little English, and he had worked as a farm laborer and a forklift driver for most of his life. Campos had no criminal record, he had never been arrested, and he had no experience with police interrogations. His lack of sophistication was particularly relevant in this case because it made him highly susceptible to the officers’ aggressive tactics. While someone reasonably familiar with forensics might have doubted the claims of DNA and fingerprint evidence, the video and the transcript of the interrogation show that Campos genuinely believed his DNA was somehow found on K.M.’s buttocks and vagina. Furthermore, his lack of experience with the legal system made him susceptible to their threats of harsher treatment by the prosecutor. In combination, these factors enabled the officers to exert great pressure on Campos to adopt their proffered explanation—that he somehow touched K.M. accidentally. (Compare with *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1404, review den. Oct 15, 2014, S220560 [although police used improper tactics to elicit statement, defendant’s confession was voluntary based on his sophistication and experience with interrogations].)

Second, while the trial court described Campos’ emotional state as “stable,” the record belies this characterization. Instead, the record demonstrates that Campos suffered a substantial degree of psychological distress as a result of the interrogators’ tactics. As Campos testified, “I felt fear. I felt I was desperate. I just wanted to collapse there. [¶] I

felt the worst I've ever felt.” The video of the interrogation corroborates his testimony, as does common sense. The officers repeatedly warned Campos they had irrefutable, scientific evidence of his guilt. As the interview wore on, he became increasingly despondent, bemoaning the fact that “everything’s finished,” that he was “buried,” and that his family’s sole source of income was gone. When the officers left the room, Campos hung his head and cursed to himself. Officer DeLorenzo testified that as the interview progressed, “His body language was such that he was leaning forward more at the waist, shoulders slumped, chin started to hang down, eyes cast down to the table; a look of, in my opinion, was *resignation*.” (Italics added.)

It is not surprising that Campos found himself in a state of psychological distress. As Officer DeLorenzo admitted, the officers’ tactics were intentionally designed to exacerbate his emotional state:

“[Defense counsel:] And were you trained to use things like ruses and lies to make a suspect feel helpless?

“[Officer DeLorenzo:] Yes.

“[Defense counsel:] And were you trained to tell them that you had overwhelming evidence against him to make him feel that way?

“[Officer DeLorenzo:] Yes.

[¶]

“[Defense counsel:] And these are standard police tactics to wear down a suspect; isn’t that correct?

“[Officer DeLorenzo:] Yes.

“[Defense counsel:] And it makes him feel like he’s in a terrible situation, doesn’t it?

“[Officer DeLorenzo:] *I hope so.*” (Italics added.)

On this record, I would conclude that the trial court’s factual findings on Campos’ mental state—that he did not display any fear, and that the police did not do anything “that

would magnify his emotional state or his uncertainties or his fears”-are unsupported by substantial evidence. To the contrary, as the record demonstrates, that is exactly what the interrogators intended to do, and they did so successfully. Thus, this factor also weighs against a finding of voluntariness.

D. Totality of the Circumstances

Weighing the totality of the circumstances-the officers’ insistent lies about the evidence, their demands that Campos explain the evidence, and their implicit threats of harsh consequences, coupled with Campos’ inherent susceptibility to these tactics-leads me to conclude that his will was overborne, and his statement was therefore involuntary. (*Schneekloth, supra*, 412 U.S. at p. 226.) I acknowledge that any one of these factors, when considered in isolation, does not necessarily render a statement inadmissible. But my review of the video and the transcript has convinced me that the confluence of the various police tactics and Campos’ vulnerability placed an overwhelming degree of pressure on him, causing his will to be overborne. Indeed, Officer DeLorenzo himself described Campos’ mental state as one of “resignation”-a textbook description of one whose will has been overborne.

I would therefore find the interrogation inadmissible, and I would conclude the trial court erred in denying Campos’ motion to exclude the statement.

III. The Trial Court’s Error Requires Reversal

Because the trial court’s error violated Campos’ federal due process rights, we must reverse the judgment unless the Attorney General can prove the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained]; *People v. Neal* (2003) 31 Cal.4th 63, 86.) The Attorney General cannot meet that burden on this record.

Without Campos’ statement, the only evidence against him consisted of K.M.’s uncorroborated statements, which were inconsistent and contradicted by other evidence.

The jury clearly discredited some of her statements, as demonstrated by the acquittals on six of the seven charged counts. And although Campos never confessed to any crime during the interrogation, the prosecutor in his cross-examination and closing argument relied heavily on Campos' interrogation. Focusing on snippets of the interrogation taken out of context from a poorly translated, misleading transcript, the prosecutor contended the admissions of accidental touching proved that Campos sexually molested K.M. Furthermore, it appears the jury attached some significance to the interrogation because they requested a copy of the transcript as well as the video at the start of deliberations. These facts establish a reasonable possibility that the jury might have acquitted Campos on all counts if the interrogation had been properly excluded. Because the Attorney General cannot show otherwise, the trial court's error in admitting the improperly obtained evidence requires reversal.

A. The Weak State of the Evidence Against Campos

Campos was 60 years old at the time of the alleged assaults, and he had been married for more than 30 years. Campos and his wife, Celia, had raised five children to adulthood. He had no criminal record, much less any record of sexually molesting children. Dr. John Brady, a clinical and forensic psychologist, testified for the defense as an expert in forensic psychological testing. Based on the psychological tests he administered to Campos, Dr. Brady opined that Campos was not a pedophile. Dr. Brady testified that it was clinically improbable for a person of Campos' age, stable background, and lack of criminal history to become a child molester.

1. K.M.'s Statements and Testimony

The only evidence supporting the charges against Campos consisted of K.M.'s uncorroborated statements. The prosecution offered no other eyewitnesses to the alleged assaults, and the SART physical examination of the child was inconclusive.³ I

³ As the majority notes, the prosecution's expert, Mary Ritter, testified that the results of the SART exam were "consistent" with sexual assault despite the lack of any

respectfully disagree with the majority's characterization of K.M.'s trial testimony as "consistent with her previous statements to her mother, the police, and at the preliminary hearing. . . ." (Majority Opn. at p. 16.) To the contrary, her statements and testimony suffered from numerous inconsistencies.

K.M. had attended the Campos' daycare since she was an infant. On December 22, 2010, K.M. told her mother for the first time that Campos had been touching her on her "wee-wee and her butt." K.M. said that he had touched her that day in front of two other children and in front of her younger sister. K.M. said Campos touched her "all the time," and that it made her butt and "wee-wee" feel "nauseous."

In her interview with Detective Vidal the next day, K.M. stated that Campos put his fingers in her "wee-wee" hole every time she went to the daycare. She said Campos began doing this when she started kindergarten, which was in August 2010. K.M. said she told Campos' wife, Celia, about the incidents, but that Celia refused to believe her. Referring to the alleged assault at the daycare, K.M. stated-consistent with her statement to her mother-that her sister and two other girls saw Campos touch her. K.M. said one of the girls-her friend, C.C.-started laughing and thought it was funny. K.M. said Campos put his "whole hand" inside her "wee-wee hole."⁴ She also stated that he took her pants off during the incident, "to show my legs." In describing the alleged assault in Campos' truck, K.M. stated several times that she was looking into the "trunk" of the vehicle when it happened, and that she did not see him do touch her. She said Campos took her pants off again, just like he did when she was in the daycare.

physical evidence. (Majority Opn. at p. 7.) I find that characterization misleading; it would be more accurate to say that the lack of physical evidence does not rule out the possibility of sexual assault.

⁴ The SART exam showed K.M. had suffered no acute injuries, and her hymen was in normal condition.

At the preliminary hearing, K.M.'s testimony was partly consistent with her statement to her mother and the police.⁵ She testified that C.C., another girl, and her sister were present when Campos touched her vagina at the daycare. She testified that C.C. laughed about it. She also testified that Campos took her pants off at the time, while C.C. was there. She reaffirmed her statement to Detective Vidal that Campos put his entire hand inside her vagina, and that "all the fingers went in there." However, in describing the alleged assault in the truck, she stated that she was not looking in the trunk, but rather, that she was looking out the window of the truck at Christmas lights. She stated for the first time that Campos put his finger inside her anus while she was in the car. And she could not remember ever telling Campos' wife that Campos had touched her.

K.M.'s trial testimony also differed from her prior statements in several respects. She testified for the first time at trial that when Campos touched her at the daycare center, she was lying on a sleeping bag on the floor,⁶ and she was wearing "maybe a skirt." In response to a leading question, she then testified that Campos touched her inside her pants. When the prosecutor first asked if Campos "put his finger inside of your wee-wee and inside of your butt," she twice responded "No." The prosecutor then asked if Campos "put his finger inside of your wee-wee," and she responded, "No, I don't think so." The prosecutor asked if Campos put his finger inside her butt, and she responded, "I don't-maybe." The prosecutor then asked if she recalled testifying at the preliminary hearing that Campos had put his finger inside her wee-wee, and she responded, "Yes." The prosecutor asked, "Did that happen?" and she responded, "Yes."

⁵ A redacted version of the preliminary hearing transcript was read to the jury and entered into evidence.

⁶ Campos and his wife testified that the daycare never used sleeping bags, and that licensing requirements prohibited the use of sleeping bags at daycare facilities.

When the prosecutor asked how often Campos touched her “privates” at the daycare, she responded: “maybe every day” and “maybe, like, one day he didn’t.” When asked again, she testified that Campos touched her “almost every day.” She testified that he did it when she was in a sleeping bag. When the prosecutor asked if any other children saw it happen, she responded: “They did not see,” even though she previously said her younger sister and two friends had witnessed the alleged inappropriate touching.

When asked about the incident in the truck, K.M. testified that she was in the back of the truck looking at Christmas lights at the time. She testified that she was wearing a skirt when Campos put his finger inside her “wee-wee” and inside her anus.

The prosecutor asked K.M. if she ever told Campos’ wife about the touching, but K.M. did not answer the question. The prosecutor then asked K.M. if she remembered telling Detective Vidal about complaining to Campos’ wife, and K.M. responded “Yes.” K.M. then agreed that she had told Campos’ wife that he had been touching her.

On cross-examination, K.M. could not recall telling Detective Vidal that Campos put his entire hand in her “wee-wee.” She could not recall telling Detective Vidal that C.C. saw it happen and laughed about it. She testified that there were other children there at the daycare when it happened, but that they were all asleep. When counsel asked if she could remember any other incident in which Campos touched her at the daycare, she responded “I don’t think I can remember another one. He just did it, so . . .”

On re-direct examination, the prosecutor again asked K.M. if Campos put his finger inside the hole in her “wee-wee,” and K.M. responded “No.” She then testified that she did not know if his finger went inside her. The prosecutor asked if it felt like his finger went inside her “wee-wee,” and she responded “Yes.” When the prosecutor asked if Campos put his finger inside “the hole in your butt,” she responded: “Well, not really; it just felt like he put it in my butt.”

2. C.C.'s Testimony

The defense called K.M.'s friend, C.C., who had attended the daycare together with K.M. C.C. testified that she never saw Campos "do anything bad" to K.M. or anyone else at the daycare. C.C. never saw Campos pull K.M.'s pants down, "touch K[.M.] on her pee-pee," or "touch K[.M.] on her butt" at the daycare. C.C. testified that she sometimes rode in Campos' truck with K.M., and they both sat in the back. C.C. testified that she never saw Campos pull K.M.'s pants down, "touch K[.M.]'s pee-pee," or "touch K[.M.]'s butt" in the truck.

3. Inconsistencies in the Evidence

As detailed above, K.M.'s trial testimony departed substantially from her prior statements. She had previously stated twice that other children saw Campos touch her vagina at the daycare center, and that C.C. had laughed at it. At trial, she testified that none of the other children saw Campos touch her at the daycare center. C.C.'s testimony unambiguously contradicted K.M.'s earlier statements.

In her earlier statements, K.M. also said Campos had pulled her pants down, both at the daycare and in the truck. She made no mention of being in a sleeping bag at the daycare. At trial, however, she testified that she was wearing a skirt in the truck, and that she was possibly wearing a skirt at the daycare. She also testified that she was in a sleeping bag at the daycare when Campos touched her, and she said nothing about Campos pulling her pants down.

In her earlier statements, K.M. twice stated that Campos put his entire hand inside her vagina—a claim that was inconsistent with the SART exam showing no acute injuries to her vagina and that her hymen was intact. At trial, K.M. could not recall her earlier statements, and she was highly equivocal about whether Campos even put his finger inside either her vagina or her anus. She initially testified that he did not, and she only changed her position when the prosecutor impeached her with her own prior statements.

On redirect, she changed her statement again and ultimately testified that she was unsure about what happened.

K.M. also alleged that Campos molested her almost every time she went to the daycare center, and she testified at the preliminary hearing that he had molested her many times in the truck. But the prosecution presented no witnesses to any of these alleged assaults, and K.M. could not recall any details of any of these other incidents. The jury must have discredited much of K.M.'s testimony, because they acquitted Campos on both charges of penetration, and they acquitted him on the four charges of lewd conduct alleged to have occurred in August through November of 2010.

B. The Prosecution's Reliance on the Erroneously Admitted Statement

Although the prosecutor in closing argument conceded that "there was no confession in this case," he nonetheless relied heavily on the interrogation in both cross-examination and closing argument. In cross-examination, the prosecutor confronted Campos with 14 separate excerpts from the transcript, which the prosecutor displayed on an overhead projector for the parties and jurors to observe.

The prosecutor's cross-examination strategy was simple: he repeatedly pressed Campos to admit he had made the statements in the transcript. But the prosecutor formed his questions to Campos by quoting from the English translation of the interrogation. Thus, by asking Campos whether he had made the statements in question, and by referring to the English translations, the prosecutor was pressing Campos to agree that he had made statements that *Campos did not literally make*. Of course, Campos, who testified through a translator, heard the prosecutor's questions in Spanish.

This might not have mattered if the interrogation had been accurately translated; unfortunately, that was not the case.⁷ The first excerpt quoted by the prosecutor demonstrated the problem:

“[Prosecutor:] Now this is Detective Perez and this is page 22 of item 5A marked in evidence. I’m gonna read you this section and then I’ll ask you if that’s what you said, okay?”

“[Campos:] Yes.”

“[Prosecutor, quoting from the transcript:] ‘PEREZ: So it’s going to be on top of the clothes or you touched her underneath the clothes on the butt?’ ‘CAMPOS: No. On her back.’ ‘PEREZ: On the-on the back on the skin?’ ‘CAMPOS: Back, yes.’ ‘PEREZ: On the skin?’ ‘CAMPOS: It-it-that’s the case.’ Did you say the words that were said from you?”

In response, Campos agreed that he made the quoted statement. At this point, the interpreter interrupted and informed the court that the phrase “that’s the case” had been incorrectly translated in the transcript of the interrogation. The court then held a bench conference outside the hearing of the jury to determine the accuracy of the translated phrase. The interpreter stated that Campos’ response in Spanish-“si a caso”-was more accurately translated as “not even,” “not even that,” or “if that.”⁸ The prosecutor

⁷ The transcript of the interrogation was produced by the prosecution, but the record does not show exactly who made the translation or whether they were qualified to do so.

⁸ The cross-examination continued without further corrections, but my examination of the record-which contains the original Spanish-revealed many other errors in the translation, including several other statements quoted by the prosecutor in his cross-examination. The translation accepted here--“if that” at the beginning of a sentence--makes no sense in English. Indeed, defense counsel subsequently informed the court that the court-certified interpreter for Campos had found in the first 12 pages of the transcript “44 instances of inaccurate translation by the transcription translator, which means the jury is not reading what my client actually said.” Defense counsel proposed several possible cures for the problem, but the court found the objections untimely and denied the proposed cures.

accepted “if that” as an accurate translation, and promised to have the transcript corrected. At the conclusion of the bench conference, the prosecutor noted the correction for the jury, and Campos agreed that he had made the corrected statement. However, the transcript in the record, marked People’s Exhibit 5a, shows no such correction.

The prosecutor also quoted many of Campos’ statements out of context, taking advantage of the poorly created transcript. First, in forming his questions, as well as his citations to the interrogation transcript, the prosecutor repeatedly emphasized Campos’ admissions of accidentally “touching” K.M. without specifying the location of the touching at issue. Second, because the officers and Campos were often talking simultaneously, the transcript often separated Campos’ statements into several independent statements, which the prosecution quoted separately and out of context.

In closing argument, the prosecutor quoted from several portions of the statement in which Campos discussed accidentally touching K.M. The prosecutor argued that “a truly innocent person,” even when confronted with false evidence, would never admit to accidentally touching the victim. “Any individual confronted with that kind of evidence, if they did nothing, would maintain their innocence always.” Second, the prosecutor argued that Campos’ demeanor showed he was guilty because an innocent person would have been outraged if they were falsely accused of molesting a child. The prosecutor claimed Campos appeared insufficiently outraged and instead appeared “smug and condescending.” “There’s never any statement of outrage from the defendant; not in the interrogation, not in court. Where is the outrage? You would be out of your mind if someone confronted you with something like that. That, you didn’t hear. Instead, what we get in the video in the court is someone who appears to be smug and condescending and in control, not outrage, as you would expect someone wrongfully accused of an incredibly serious, horrible crime.”

4. *Post-Verdict Testimony by Juror No. 4*

Finally, the record conclusively demonstrates that at least one juror was persuaded to vote guilty based on Campos' supposed admission in the interrogation that he had touched K.M. Three weeks after the jury rendered its verdict, Juror No. 4 contacted the court to express concerns about the verdict. The court held a closed hearing at which the juror testified.

The juror explained that she contacted the court because "I couldn't get this case out of my head. [. . .] It was bothering me so much." She stated that it was a "really hard" case for the jury, and that "Nobody got any sleep." She testified that she had discredited K.M.'s statements in part because of the lack of physical evidence corroborating K.M.'s allegations of daily abuse:

"[Juror No. 4:] So then when they showed the film again and someone asked the little girl: When did this happen? Every day. All the time. Every day. All the time. I'm thinking: Come on. There is no physical evidence. I mean there should be some bruising. There should be some irritation. There should be-it's not as if I don't know the female body. Okay. And then the size of this man. Little 5-year-old kid. I just-and I just had a lot of trouble thinking that-I couldn't believe it."

She added that "this was bothering me." She then testified that she voted guilty for the lesser included charge of battery on Count One because Campos had admitted touching K.M.:

"[Juror No. 4:] So when there was a question, I kept going back to the book and reading what it said. And so when-when it was between assault and battery, right, I said assault and battery. Said, no. You got to read it. Okay. So when you read it, it says battery is *when you touch somebody. So he admitted it. I had to go with that.*" (Italics added.)

The court questioned Juror No. 4 about whether she felt she had been coerced into voting guilty, and she replied that she had not been coerced. After the court reminded her

that the court had individually polled her as to her verdict, she affirmed that she had voted as stated when polled.

Juror No. 4's testimony unequivocally established that she voted guilty on at least one count based on Campos' admission that he had touched K.M. This suggests she would have voted not guilty had the court properly excluded the statement. And even a hung jury-compared to a unanimous vote of guilty-is a "more favorable outcome" for purposes of harmless error analysis. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521 ["common sense compels the conclusion that a hung jury is a more favorable result than a guilty verdict"].) Furthermore, Juror No. 4's testimony showed that the entire jury struggled with their verdict, making it more likely the jury would have voted more favorably for Campos if they had not heard his improperly admitted statements.

The majority gives no weight to Juror No. 4's testimony on the ground that it was inadmissible under Evidence Code section 1150. (Majority Opn. at p. 17.) But that provision is inapplicable here. First, the prosecutor failed to object to this testimony, even after the trial court asked him whether he had any objections. Second, Evidence Code section 1150 only governs evidence offered "Upon an inquiry as to the validity of a verdict. . . ." (Evid. Code, § 1150, subd. (a).) As such, it usually arises in the context of juror misconduct. Here, Campos is not "inquir[ing] as to the validity of the verdict" within the meaning of section 1150. Rather, his claim concerns the erroneous admission of evidence and the hypothetical question of whether the verdict would have been different if the jury had not been exposed to the inadmissible evidence.

In any event, Juror No. 4's testimony is hardly necessary to the analysis. Her statements merely underscored evidentiary weaknesses that are obvious from the record. For these reasons, I would conclude that the Attorney General cannot show beyond a reasonable doubt that the jury would not have reached a more favorable outcome if Campos' statements from the interrogation had been properly excluded. The error was therefore not harmless beyond a reasonable doubt.

IV. Conclusion

Because the trial court erred in denying Campos' motion to exclude statements made during his improper interrogation by police, and because the error was not harmless beyond a reasonable doubt, I would reverse the judgment of conviction.

MÁRQUEZ, J.