Filed 11/26/07 P. v. Martinez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOEL MARTINEZ, Defendant and Appellant.	B193976 (Los Angeles County Super. Ct. No. BA272802)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Ryan B. McCarroll, Deputy Attorney General, for Plaintiff and Respondent.

Joel Martinez appeals from the judgment entered following a jury trial in which he was convicted of committing lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (a); counts 1 and 2) and forcibly committing a lewd act on the same child (*id*., § 288, subd. (b)(1); count 3). He contends that his confession should have been suppressed and that he was improperly sentenced. We affirm.

BACKGROUND

In 2004, defendant was employed at an apartment complex in South Los Angeles where 11-year-old Stephanie C. lived with her mother. In October of that year, when Stephanie had just turned 12, a test at a nearby clinic revealed that she was pregnant. After first telling clinic personnel that her 13-year-old boyfriend had got her pregnant, Stephanie said that defendant, who was waiting outside in a car, had raped her. The police were summoned and arrested defendant, who told officers that he had had sexual relations with Stephanie. In a tape-recorded interview with detectives later that day, defendant waived his *Miranda*[1] rights and again admitted having had sexual relations with Stephanie but denied using force.

Stephanie testified at trial that in January or February 2004, defendant summoned her to a vacant apartment where he rubbed his hands over her clothes in the areas of her breasts and genitals. Defendant then threatened to hurt Stephanie or her mother if Stephanie reported the incident to anyone. Defendant later began to date Stephanie's mother. In September 2004, defendant had forcible sexual intercourse with Stephanie. Defendant again threatened to harm Stephanie if she told anyone about the incident.

Stephanie had an abortion on October 18, 2004. An ultrasound indicated that conception had occurred five weeks and two days earlier. No tests were conducted to determine paternity.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602] (*Miranda*).

In defense, defendant denied having molested Stephanie. He claimed his confession was coerced by officers yelling at him and saying that a confession would make things go easier.

DISCUSSION

1. Confession

Before the start of trial, defendant moved under Evidence Code section 402 to suppress his confession to police detectives, arguing that he did not unequivocally waive his *Miranda* rights. At the hearing on defendant's motion, it was established that defendant had been admonished under *Miranda* in Spanish by Detective Soto. The admonitions and waivers were translated into English as follows:

"Soto: You have the right to remain silent. Do you understand? [¶] [Defendant]: Yes. [¶] Soto: Anything you say may be used against you in a… a… a court of law. Do you understand? [¶] [Defendant]: Yes. [¶] Soto: You have the right to... to have an attorney present before and during any interrogation. Do you understand? [¶] [Defendant]: Yes. [¶] Soto: If you do not have the money to pay an attorney, one will be appointed for you free of charge before any interrogation, if that is what you wish to do. Do you understand? [¶] [Defendant]: Um. [¶] Soto: Do you wish to talk about what happened? [¶] [Defendant]: Well, I don't know. Whatever you guys want. [¶] Soto: O.K. You… you want to talk with us about what happened? [¶] [Defendant]: Yes." Following this waiver, defendant made oral and written statements that were incriminatory.

The court denied suppression of the confession as follows: "Over the years I have reviewed many cases that support the proposition that where a defendant is unclear or equivocal in his responses, that a question to clarify is permitted. If the defendant thereafter indicates he wishes to speak, . . . there is no basis to exclude the subsequent statement. [¶] That is exactly what I see happening here. The officer was certainly entitled to clarify. Where you have somebody who says both 'yes' and both 'no,' and 'I will do whatever you want,' that's not clear enough, and, therefore, a clarifying question is posed. The answer is given. The officer has a right to rely on that and go forward. [¶]

I don't find that [defendant's] position of ineffective waiver is the case here. I am going to allow the People to introduce the . . . statements of the defendant."

On appeal, defendant renews the argument regarding equivocal waiver and raises additional claims, which we discuss below. None of defendant's arguments has merit.

"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." (*Miranda*, *supra*, 384 U.S. at pp. 473–474.) A waiver of *Miranda* rights "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135].) Whether a waiver is knowing and intelligent "is 'a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034.)

"[N]o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation] . . . ." (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.) "If a suspect's request for counsel or invocation of the right to remain silent is ambiguous, the police may 'continue talking with him for the limited purpose of clarifying whether he is waiving or invoking those rights.' [Citations.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1194.) "[T]he case law draws a sensible distinction between clarification and interrogation. On the one hand, it *permits clarifying questions* with regard to the individual's comprehension of his constitutional rights or the waiver of them; on the other hand, it *prohibits substantive questions* which portend to develop the facts under investigation [citations]." (*People v. Turnage* (1975) 45 Cal.App.3d 201, 211.)

Here, immediately after defendant gave his ambiguous responses of "Um" and "I don't know. Whatever you guys want," Detective Soto asked an additional question, the

sole purpose of which was to clarify that ambiguity. Defendant's response was an unequivocal, affirmative statement that he wanted to waive his *Miranda* rights. Exercising independent judgment under federal standards (*People v. Box*, *supra*, 23 Cal.4th at p. 1194), we conclude that the trial court was correct in ruling that defendant's *Miranda* rights had been waived.

Defendant claims additional *Miranda* error because he was admonished that his statements "may," rather than "can and will," be used against him. The "may" formulation was used in *Miranda* itself (384 U.S. at pp. 474, 479) and "has been consistently approved by the lower courts." (*People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.) Thus, to the extent that defendant's argument has not been waived based on his failure to raise it in the trial court, it must be rejected.

Finally, defendant argues that "[t]he error in this case is compounded by the fact that [he] had made an earlier admission immediately after his arrest that was not apparently preceded by any *Miranda* warnings" — a practice which was questioned in *Missouri v. Seibert* (2004) 542 U.S. 600 [124 S.Ct. 2610]. Again, defendant did not raise this issue in the trial court, nor does the record clearly establish the lack of *Miranda* warnings at the time of defendant's arrest. Thus, the argument is unavailing here because there was no *Miranda* violation that could be "compounded."

2. Sentencing

The count 1 and 2 lewd conduct convictions arose from the incident that occurred in January or February 2004. The count 3 conviction of forcible lewd conduct arose from the incident in September of that year. Defendant was sentenced as follows:

"The defendant is ineligible statutorily for probation, and more importantly, the circumstances of the case demonstrate that he is not a suitable candidate for probation and probation as to all counts is denied.

"As to count 1, the court considered the defendant's background and circumstances and I am aware that he may not have a lengthy and extensive record, but he was on probation in a domestic violence case at the time of this offense. I have that file in front of me. While I intend on terminating without benefit of dismissal today, I am

allowed to consider that he was on probation in such a case at the time he committed this offense.

"Additionally, this is a situation where we had a child barely 12. The statute refers to a victim under 14. This child was substantially younger, and the defendant had maneuvered himself into a position of trust in the family, taking full advantage of that trust to violate this barely 12 year old child.

"As to count 1 the court deems the high term to be the appropriate sentence. That would be eight years pursuant to 288 subdivision (a) of the Penal Code.

"I do agree with counsel that counts 1 and 2 occurred during a solitary incident. While the defendant was convicted of touching separate body parts, I do believe it was part of a [sole] transaction and I am going to impose a concurrent term of eight years for count 2, also a violation of 288 subdivision (a) of the Penal Code.

"Count 3 is a separate incident in which the defendant used force. He ultimately impregnated this 12 year old, and under case law, that can constitute great bodily injury and could have been a separate enhancement in this case. The child was faced with the option of either bearing a child that was the result of rape, or undergoing abortion at the age of 12 years. Not very nice options. I consider those to be circumstances in aggravation which, once again, outweigh the fact that he didn't have an extensive prior criminal history, and I am imposing a consecutive eight year term on count 3 for the violation of 288 [subdivision (b)(1)], making his total term 16 years."

Defendant, who filed his opening brief before the California Supreme Court decided *People v. Black* (2007) 41 Cal.4th 799, contends that imposition of the upper term violated *Cunningham v. California* (2007) ___ U.S.___ [127 S.Ct. 856]. He further contends that his full-term consecutive sentence was improper because the trial court erroneously believed it was mandatory. Defendant's contentions are without merit.

"[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*People v. Black, supra*, 41

Cal.4th at p. 816.) The prior convictions exception includes "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Id*. at p. 819.) "The [trial] court's factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the upper term sentence, but these findings do not themselves further raise the authorized sentence beyond the upper term. No matter how many additional aggravating facts are found by the court, the upper term remains the maximum that may be imposed. Accordingly, judicial factfinding on those additional aggravating circumstances is not unconstitutional." (*Id.* at p. 815.)

Here, defendant's being on probation when the crimes in this case occurred is a legally sufficient aggravating circumstance permitting imposition of the upper term without infringing on his constitutional right to a jury trial. (*People v. Black, supra,* 41 Cal.4th at p. 819.) Defendant argues in his reply brief that this result violates protections granted under the United States Constitution. We need not address this argument because we are bound to follow the rulings promulgated by the high court of this state. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

With respect to the full-term nature of the consecutive sentence, defendant accurately notes that because lewd conduct without force is not an offense enumerated in Penal Code section 667.6, subdivision (e), the consecutive term was discretionary under section 667.6, subdivision (c), rather than mandatory under section 667.6, subdivision (d). But there is nothing in the record to support the notion that the trial court erroneously believed that a full-term consecutive sentence was mandatory. The trial court is presumed to know the law. (See Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) And it is the defendant's burden to affirmatively demonstrate error on the appellate record. (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.) Accordingly, defendant's contention must be rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

JACKSON, J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.