In re Elias V.

(2015) 237 Cal.App.4th 568

Issue

While questioning a teenager about a sex crime, did a detective utilize coercive interrogation tactics?

Facts

A 13-year old boy named Elias was playing a video game with his friend Hector in Hector's bedroom in Santa Rosa. At some point, Hector's 3-year old sister, identified as A.T., entered the room and sat near Elias on the bed. Hector could not see Elias or A.T. because he was playing the game from the floor. A short time later, Hector's and A.T.'s mother, identified here as Aurora, walked into the room and saw that A.T.'s pants were down. When she asked "what happened," Elias said that A.T. had asked him to help take her pants off because she needed to go to the bathroom. That was the end of the incident. But over the next few days, A.T. repeatedly told Aurora that Elias had "touched" her, which Aurora was told or interpreted as meaning Elias had touched A.T.'s vagina. At first, Aurora did not report the incident because she said, "I did not know what to do." But when a friend told her to report it, she did so.

A Sonoma County sheriff's detective went to Elias's school and met with him in a "small office used by a school counselor." He was *Mirandized.* At first, Elias "adamantly" denied the allegation but later admitted it, saying his motive was "curiosity," not sexual gratification. The juvenile court ruled the statement had been given voluntarily and was admissible. It then sustained the petition and placed Elias on probation. He appealed.

Discussion

In addition to satisfying the Miranda requirements, officers who are questioning a suspect must not say or do anything that would have generated such pressure that the suspect felt coerced. "[T]he ultimate test," said the Supreme Court, is whether the confession was "the product of an essentially free and unconstrained choice by its maker."[1] An interview is not, however, coercive merely because it was stressful. As the Eighth Circuit observed, "[A]n interrogation of a suspect will always involve some pressure because its purpose is to elicit a confession."[2]

Because the court did not append a transcript of the interview to its opinion, we do not know everything that was said. We know that it was short (it lasted only about 20 minutes), that it was recorded and that the recording was reviewed by Juvenile Court Judge Raima Ballinger. We also know that, after listening to the recording, the judge ruled the interview was not coercive, that the detective's manner was "gentle" and "calm," her questions were "short" and not "convoluted," and her "language usage for someone of Elias's age was appropriate." The judge concluded, "Just the totality of where the interview took place was, in the court's view, not intimidating. It was very short. It

[1] *Culombe v. Connecticut* (1961) 367 U.S. 568, 601-2. Also see *People v. Cunningham* (2015) __ Cal.4th __ [2015 WL 4031004].

[2] *U.S. v. Dehghani* (8th Cir. 2008) 550 F.3d 716, 720. Also see *Oregon v. Elstad* (1985) 470 U.S. 298, 305 [officers may apply "moral and psychological pressures to confess"].

was only a 20-minute interview. And it complied with the current case law. I don't have a problem with the way the interview was conducted."

But, in one of the most slanted and undignified opinions we have seen from a court in California or anywhere else, a panel of the Court of Appeal (First District, Division 2) said the ruling by the juvenile court was erroneous because, in its view, the detective had used interviewing techniques that were coercive, harsh, and contemptible. It also alleged that this was not an isolated incident—that law enforcement officers throughout the country are taught and encouraged to do the same thing. It also attacked the character of the detective and Aurora.

Attacking the detective

The thrust of the panel's opinion was that the detective's questioning of Elias was "aggressive," "persistent," and "relentless." It sought to prove this by, among other things, condensing all of the detective's probing questions into a single paragraph and stringing them together, thus leaving the impression that the detective had bombarded Elias with a series of hostile and accusatory questions. That didn't happen, but here is how the panel presented it:

> **Detective**: [W]hen [A.T.'s] mom walked in, how come [A.T.'s] pants were down?; how come you ended up on the bed with her?; But her mom walked in and you were on the bed with her; how many fingers did you put inside her?; you touched the outside of her but you did not put fingers inside her?; you touched the outside of her; You were on the bed and you had her pants down. So the question again is how many fingers did you put inside of her? … So, I know that you touched her bare vagina and you know that you touched her bare vagina; You're okay with what you did? … Why do you think you touched her?; so you felt like you needed to touch her vagina when you were unzipping her pants?

The panel also disregarded Judge Ballinger's observation that Elias "was able to indicate in the flow of conversation if he needed clarification of anything, and he did that a couple of times, and there was give and take in the conversation. In other words, sometimes he asked questions too, and that's what really made me feel that this interview was appropriate."

The panel also suggested that the detective was unprofessional or incompetent because she had focused her investigation on Elias too quickly. Said the panel, "Neither [the detective], nor, so far as she knew, any other officer, asked residents of the apartment complex about Elias's behavior or whether other children had been disturbed by Elias or anyone else." But it would have foolish for the deputies to begin their investigation by questioning the other tenants since no one even suggested that Elias had molested any other children in the building or that any neighbors had witnessed the incident with A.T.

So why did the panel stoop to such a tawdry and obviously senseless line of attack? We cannot know all the reasons, but it apparently wanted to portray the sheriff's detective and other investigators as people whose goal was to railroad this youngster. It also conformed to the panel's storyline (discussed below) that such railroading is not an uncommon practice in the U.S.

Next, the panel accused the detective of being "deceptive" and "overbearing." To help justify this characterization, it said that many academics who study the subject believe that "the purpose of interrogation is to induce confessions" and that was probably why

the detective repeatedly referred to Elias's guilt "as an established fact." (The panel relies heavily on the opinions of academics, as discussed below. This may be because an advocacy group from Northwestern University, the Center on Wrongful Confessions of Youth, filed an amicus brief in the case.) Continuing on, the panel castigated the detective for providing Elias with two plausible motives for his behavior: he touched A.T.'s vagina because it was "exciting" or because he was "curious." The panel said this was a trick question because both answers constituted an admission. But even if it was a "trick question" there was nothing coercive about it.[3]

It was especially revealing that, in its discussion of this issue, the panel insinuated that it was aware of Elias's thought processes just before he answered the question. Said the panel, Elias was "offended" by the suggestion that he was "excited" by the touching, and that is why he agreed to "the more acceptable alternative" that he was merely "curious." How did the panel become aware of Elias's thought processes? Nobody knows because there is nothing in the opinion to suggest that he discussed the subject with the detective, the juvenile court judge, or anyone else.

Attacking Aurora

In addition to attacking the detective, the panel portrayed Aurora as a notorious troublemaker who had lied about the "touching" incident because of her hostility toward Elias's family. For example, the panel thought it was significant that the landlord of her apartment building "frequently spoke with Aurora and her husband Carlos about complaints from tenants on both floors of the building and from neighbors that people living in or visiting Aurora's apartment (including Aurora's husband and children, her brothers, and others) were playing loud music, playing volleyball, and 'drinking alcohol a lot' in the backyard" and "peeing in the yard," and that the landlord had learned from Elias's father that Aurora's brother "wanted to take a swing" at him, that Elias's father "was scared and you could hear it in his voice," and that the landlord eventually evicted Aurora's family because she was "sick and tired of the problems."

Why was this sordid melodrama relevant to whether the detective utilized coercive interrogation techniques in the school counselor's office? The panel didn't say.

Attacking law enforcement

Although the panel was contemptuous of the detective and Aurora, its most virulent attack was leveled at the nation's law enforcement agencies who, according to the panel, are routinely instructing officers to utilize nefarious interviewing tactics to obtain

[3] See *Illinois v. Perkins* (1990) 496 U.S. 292, 297 ["mere strategic deception" is not coercive]; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1088 ["The use of deceptive statements during an investigation does not invalidate a confession as involuntary unless the deception is the type likely to procure an untrue statement."]; *People v. Hensley* (2014) 59 Cal.4th 788, 813 ["Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is of a type reasonably likely to procure an untrue statement."]; *People v. Scott* (2011) 52 Cal.4th 452, 481 ["The use of deceptive statements during an interrogation does not invalidate a confession as involuntary unless the deception is of a type reasonably likely to produce an untrue statement."]; *People v. Thompson* (1990) 50 Cal.3d 134, 167 ["Numerous California decisions confirm that deception does not necessarily invalidate a confession."]; *People v. Maury* (2003) 30 Cal.4th 342, 411 ["Deception does not necessarily invalidate an incriminating statement."]; *People v. Lee* (2002) 95 Cal.App.4th 772, 785 ["it is sometimes necessary to use deception to get at the truth."].

confessions from suspects. For example it explained that "all contemporary police manuals" instruct officers to "display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details." It also quoted a psychologist as saying that officers are taught to "isolate the suspect in a small private room" in order to increase his "anxiety and incentive to escape," and then confront him "with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured."

As for the anxiety-producing "small private room" in which Elias was supposedly questioned, we can only point out that it was his school counselor's office which most students would undoubtedly view as a "safe" and "friendly" place.

As for displaying an air of confidence in the suspect's guilt, this isn't surprising because detectives seldom begin their interviews by informing suspects that they have absolutely no evidence of their guilt and that they desperately need a confession because, otherwise, the suspect will walk out the door. Instead, most courts understand that "almost all interrogation involves some degree of pressure,"[4] which is why they have consistently rejected arguments that coercion necessarily resulted from persistent questioning, or because the suspect was subjected to "intellectual persuasion," "searching questions," or "confrontation with contradictory facts."[5] As the Fourth Circuit observed in *U.S. v. Holmes*, "Numerous cases reiterate that statements by law enforcement officers that are merely 'uncomfortable' or create a 'predicament' for a defendant are not ipso facto coercive."[6]

Of course, in utilizing such tactics, officers must take into account the manner in which they are employed and the suspect's age and mental state.[7] And here, the juvenile court judge ruled that the detective who interviewed Elias had done just that. Yet the panel thought the detective had taken unfair advantage of his age because "[r]ecent research has shown that more than one-third (35 percent) of proven false confessions were obtained from suspects under the age of 18." (These statistics have been frequently questioned on grounds that they were based on dubious methodology; e.g., in some studies, if a criminal charge against a teenager was dismissed for any reason after he confessed, the confession was listed as "false" even if it was unquestionably true.)

Finally, the panel suggested that an epidemic of false confessions (especially by minors) was sweeping the country and that it was caused by widespread police misconduct. It attempted to accomplish this by citing over 25 articles written by psychologists, sociologists, and behavioral scientists. We mention this because, by skimming the titles of just a few, it may be possible to detect a certain predisposition:

- *Convicting the Innocent*
- *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*
- *The Problem of False Confessions in the Post–DNA World*
- *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*
- *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*

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[4] *People v. Anderson* (1980) 101 Cal.App.3d 563, 575.

[5] See *People v. Carrington* (2009) 47 Cal.4th 145, 175; *People v. Ditson* (1962) 57 Cal.2d 415, 433 ["intellectual persuasion" and "searching questions"]; *People v. Boyde* (1988) 46 Cal.3d 212, 242 ["harsh questioning"]; *People v. Anderson* (1980) 101 Cal.App.3d 563, 576 ["confrontation with contradictory facts"]; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 213 ["tough talk"]; *In re Joe R.* (1980) 27 Cal.3d 496, 515 ["loud, aggressive accusations of lying"].

[6] (4th Cir. 2012) 670 F.3d 586, 592-93.

[7] See *In re Joseph H.* (2015) __ Cal.App.4th __ [2015 WL 3561526].

- *The Social Psychology of False Confessions*
- *Contaminated Confessions Revisited*
- *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*
- *Suggestibility of The Child Witness: A Historical Review and Synthesis*
- *Questioning the Reliability of Children's Testimony: An Examination of the Problematic Element*
- *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*
- *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*
- *No Match for the Police: An analysis of Miranda's Problematic Application to Juvenile Defendants*
- *Police–Induced Confessions: Risk Factors and Recommendations*
- *Police Interrogation and False Confession*
- *Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions*

Rewriting the law

Perhaps the most blatant of the errors and omissions in the panel's opinion was its suggestion that, even if a statement was given freely, it will be deemed involuntary unless there was some corroboration of the suspect's guilt, or at least some "internal indicia" of the statement's reliability. This is contrary to the holdings of the U.S. Supreme Court. As noted earlier, it said that "the ultimate test" is whether the confession was "the product of an essentially free and unconstrained choice by its maker." Consequently, a statement that was given freely is, by definition, voluntary—and no additional indicia of reliability is required.[8] This does not mean that a defendant is not protected against unreliable statements. In California, he can file a motion in the trial court to suppress the statement on grounds that its probative value is outweighed by its unreliability,[9] or he can argue to the jury that the statement was unreliable. But there is absolutely no precedent that permits a court to suppress an uncoerced statement on grounds that its lack of reliability demonstrated that it was involuntary.

To be clear, we do not contend that false confessions do not happen. On the contrary, it is a subject (like false identifications) that is being openly discussed and has become an integral part of police training. Nor do we think the panel's dismissal of the petition against Elias resulted in a miscarriage of justice. We do believe, however, that it is harmful to the administration of justice when an appellate court publishes an opinion that fails to demonstrate objectivity, restraint, and professionalism.

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***Update**: Despite the court's dubious analysis of the law and the evidence in this case, and despite its insinuation that law enforcement officers throughout the country are routinely coercing confessions and admissions from suspects, the California Attorney General's Office decided not to seek depublication of this case. To date, the Attorney General's Office has not provided an explanation for its incomprehensible decision.*

[8] See *Michigan v. Tucker* (1974) 417 U.S. 433, 448 [the voluntariness requirement protects "the courts from reliance on untrustworthy evidence"]; *Spano v. New York* (1959) 360 U.S. 315, 320; *Dickerson v. United States* (2000) 530 U.S. 428, 433.
[9] See Evidence Code Section 352.