No. 18

The People &c.,
Respondent,
v.
Adrian P. Thomas,
Appellant.

Jerome K. Frost and Ingrid Effman, for appellant.
Kelly L. Egan, for respondent.
Legal Aid Society; New York Law School Post Conviction Innocence Project; American Psychological Association; Innocence Network; District Attorneys Associaton of the State of New York; New York City Bar Association, amici curiae.

LIPPMAN, Chief Judge:

Defendant was convicted by a jury of murdering his four-month-old son, Matthew Thomas. The evidence considered by the jury included a statement in which he admitted that on three occasions during the week preceding the infant's death he "slammed" Matthew down on a mattress just 17 inches above the

floor and a videotape of defendant's interrogation, near the end of which defendant, a particularly large individual,[1] demonstrated how he raised the infant above his head and threw him down with great force on the low lying mattress. The jury also heard testimony from the child's treating doctors from Albany Medical Center, the medical examiner who performed the autopsy on Matthew, and an expert on child abuse from Brown Medical School. These witnesses, citing radiologic and post-mortem findings of subdural fluid collections, brain swelling and retinal hemorrhaging, as well as defendant's account of what he had done, said that Matthew died from intracranial injuries caused by abusively inflicted head trauma. Although defendant argued at trial and on appeal that the proof before the jury was insufficient to support a verdict finding him guilty of depraved indifference murder (Penal Law § 125.25 [4])-- the theory charged -- the argument was correctly rejected. Defendant's written and videotaped confession together with the evidence presented by the prosecution's medical experts sufficed to demonstrate that defendant, with depraved indifference to human life, recklessly engaged in conduct which created a grave risk of serious physical injury to the four-month-old infant and thereby caused the child's death. Although there may have been uncertainty at the time of defendant's trial and prior appeal as to whether a one-

[1]At the time of the events in question, defendant weighed well over 300 pounds.

on-one killing of a helpless infant by an adult through the infliction of physical abuse could qualify as depraved indifference murder, it is now settled that it can (see People v Barboni, 21 NY3d 393, 403 [2013]), rendering defendant's argument to the contrary unavailing. That the evidence was sufficient to support the conviction, however, does not end the inquiry we are assigned on this appeal before us by leave of a Judge of this Court (19 NY3d 1105 [2012]), since there is a persisting issue of law as to whether the jury should have had before it all the evidence it did. Inasmuch as we conclude that defendant's inculpating statements were not demonstrably voluntary, we reverse the order of the Appellate Division affirming defendant's conviction (93 AD3d 1019 [3d Dept 2012]), grant defendant's previously denied motion to suppress those statements, and direct a new trial.

I.

On the morning of September 21, 2008, defendant's wife, Wilhelmina Hicks awoke to discover that the couple's four-month-old prematurely born infant, Matthew, was limp and unresponsive. Emergency assistance was immediately summoned and the child was rushed to Samaritan Hospital in Troy, New York. There, he presented with a range of symptoms, including a low white blood count, irregular heartbeat, low blood pressure, severe dehydration and respiratory failure. The most likely differential diagnosis was noted by the treating emergency room

doctor as septic shock, although intracranial injuries were also listed to be ruled out. Blood tests to confirm sepsis were performed, but their results were not immediately available. Meanwhile, the child was placed on massive doses of antibiotics.

In the early afternoon, Matthew was transferred to the Pediatric Intensive Care Unit at Albany Medical Center, where he continued to be treated for sepsis. The child's treating physician concluded that his patient had been a victim of blunt force trauma -- indeed, that the by-then moribund child had been "murdered." (At the trial of the case, this doctor and other prosecution experts testified that blunt force trauma was indeed the cause of death; defense experts disputed this, attributing the death to sepsis, and the defense suggested that the treating doctor was misled by his initial impression, later proved wrong, that the child's skull was fractured). He so informed local child protective and law enforcement authorities on the evening of September 21st.

At the hearing upon defendant's motion to suppress his inculpating statements, the course of the ensuing investigation was described through the testimony of Troy Police Sergeant Adam Mason and the video recording of defendant's entire interrogation was placed in evidence. Mason stated that, based on the report that Matthew had been physically abused, he accompanied child protective workers to defendant's home and assisted in the

removal of defendant's six other children.[2] Defendant, who had been caring for the children while his wife was at the hospital with Matthew, remained at his residence subsequent to the removal. Hours later, the police returned and escorted defendant to an interrogation room at the Troy Central Police Station. There, they read the evidently distraught father his rights and commenced a course of videotaped interrogation. The interrogation lasted about 9 and 1/2 hours, broken into an initial two-hour, and a subsequent 7 and 1/2-hour session. In between, defendant, having expressed suicidal thoughts during the initial interview, was involuntarily hospitalized pursuant to Mental Hygiene Law § 9.39 for some 15 hours on a secure psychiatric unit. By prearrangement, he was released back to his interrogators who immediately escorted him back to the police station where the interrogation resumed.

The premise of the interrogation was that an adult within the Thomas-Hicks household must have inflicted traumatic head injuries on the infant. Indeed one of the interrogating officers told defendant that he had been informed by Matthew's doctor that Matthew had been "slammed into something very hard. It's like a high speed impact in a vehicle. This baby was murdered . . . This baby is going to die and he was murdered." The interrogators, however, repeatedly reassured defendant that

[2]There was no evidence that any of these other children were themselves abused or neglected.

they understood Matthew's injuries to have been accidental. They said they were not investigating what they thought to be a crime and that once defendant had told them what had happened he could go home. He would not, they reassured over and again, be arrested. When, however, defendant continued to deny having hurt Matthew, even accidentally, the officers falsely represented that his wife had blamed him for Matthew's injuries and then threatened that, if he did not take responsibility, they would "scoop" Ms. Hicks out from the hospital and bring her in, since one of them must have injured the child. By the end of the initial two-hour interrogation, defendant agreed to "take the fall" for his wife. He said that he had not harmed the child and did not believe that his wife had either because "she is a good wife," but that he would take responsibility to keep her out of trouble.

Before the interrogation recommenced on the evening of September 22nd, Matthew was pronounced brain dead. Nonetheless, the interrogating officers, told defendant that he was alive and that his survival could depend on defendant's disclosure of how he had caused the child's injuries:

> "SERGEANT MASON: The doctors need to know this. Do you want to save your baby's life, alright? Do you want to save your baby's life or do you want your baby to die tonight?
>
> "DEFENDANT: No, I want to save his life.
>
> "SERGEANT MASON: Are you sure about that? Because you don't seem like you want to save

> your baby’s life right now. You seem like you’re beating around the bush with me.
>
> "DEFENDANT: I’m not lying.
>
> "SERGEANT MASON: You better find that memory right now, Adrian. You’ve got to find that memory. This is important for your son’s life man. You know what happens when you find that memory? Maybe if we get this information, okay, maybe he’s able to save your son’s life. Maybe your wife forgives you for what happened. Maybe your family lives happier ever after. But you know what, if you can’t find that memory and those doctors can’t save your son’s life, then what kind of future are you going to have? Where’s it going to go? What’s going to happen if Matthew dies in that hospital tonight, man?"

About four hours into the second interrogation session defendant gave a statement. He said that, about 10 or 15 days before, he accidentally dropped Matthew five or six inches into his crib and Matthew hit his head "pretty hard." He supposed that that impact caused Matthew's brain injury. He also recalled accidentally bumping Matthew's head with his head on the evening of September 20th. He noticed that Matthew's breathing became labored, but was afraid to tell his wife what happened. Defendant would expand upon this statement, but before he did so a second officer, Sergeant Colinari, entered the interrogation room. He claimed to have had experience with head injuries during his military service in Operation Desert Storm, and angrily accused defendant of lying -- he said that Matthew's injuries could only have resulted from a far greater application of force than defendant had described. Matthew's doctors, he

reported, had stated that the child's head injuries were comparable to those that would have been sustained by a passenger in a high speed car collision. After Colinari left, Sergeant Mason, said that he felt betrayed by defendant's untruthfulness and that he was doing all he could to stop his superior from having defendant arrested. Although he would acknowledge in his hearing testimony that he did not then have probable cause for defendant's arrest, he represented to defendant that he was defendant's last hope in forestalling criminal charges. He said that he could not help defendant unless defendant told him how he had caused Matthew's injuries. He proposed that defendant had been depressed and emotionally overwhelmed after having been berated by his wife over his chronic unemployment and that, out of frustration, he had, without intending to harm the infant, responded to his crying by throwing him from above his head onto a low-lying mattress.[3] He emphasized several times that, according to the doctor at the hospital, the child would have had to hit the mattress at a speed of 60 miles-per-hour to sustain the injuries from which he was suffering. He had defendant demonstrate with a clipboard how he threw the child down on the mattress, instructing:

> "Move that chair out of the way. Here hold that like you hold the baby. Turn around, look at me. Now here's the bed right here,

[3]The officer suggested that defendant had thrown the child down on his mattress after defendant adamantly denied throwing the child against a hard surface, i.e., the wall or the floor.

> all right. Now like I said, the doctor said that this injury is consistent with a 60 mile per hour vehicle crash, all right, all right. That means it was a very severe acceleration. It means he was going fast and stopped suddenly, all right, so think about that. Don't try to downplay this and make like its not as severe as it is. Because [we] both know now you are finally starting to be honest, okay, all right. Maybe this other stuff you said is the truth.
>
> "MR. THOMAS: That is.
>
> "SERGEANT MASON: For what the information that I need to know we both know now you are starting to finally be honest with that, all right. Hold that like you hold that baby, okay and start thinking about them negative things that your wife said to you, all right, start thinking about them kids crying all day and all night in your ear, your mother-in-law nagging you and your wife calling you a loser, all right, and let that aggression build up and show me how you threw Matthew on you bed, all right. Don't try to sugar coat it and make it like it wasn't that bad. Show me how hard you threw him on that bed."

The ensuing enactment conforming to the Sergeant's directions was captured on the interrogation video. Defendant then enlarged upon his prior statement, now admitting that, under circumstances precisely resembling those specified by Mason, he threw Matthew down on his mattress on the Wednesday, Thursday and Saturday preceding the child's hospitalization.

Defendant's motion to suppress his written and videotaped statements on the ground that they were not voluntary, but had been extracted by means of threats and misrepresentations to which he was specially vulnerable by reason of physical and emotional exhaustion, and upon the ground that the police tactics

used during the interrogation created a substantial risk of false incrimination, was denied. In the decision and order we now review, the Appellate Division upheld the denial of suppression reasoning that the People met their burden at the Huntley hearing to prove defendant's confession voluntary beyond a reasonable doubt (93 AD3d at 1026) and, relatedly, that the ploys and misrepresentations of defendant's interrogators were not so serious as to offend due process (id.). The court found that the threat to arrest Ms. Hicks was "reasonable" (id. at 1028), and that the misrepresentation that Matthew's life depended upon defendant's disclosure of the manner in which he had caused the child's injuries, did not offend due process because it would not have elicited unreliable information. In the latter connection the court observed, that "common sense dictates the . . . conclusion . . . that parents, aware of their child's life threatening predicament, would accurately disclose any information that might enable doctors to save their child" (id. at 1027). As to the officers' many reassurances that what was involved was an accident and that defendant would not be arrested -- indeed, that he would be returning home -- the court was of the view that they reflected the officers' beliefs at the time they were given (id. at 1027-1028).

II.

It is the People's burden to prove beyond a reasonable doubt that statements of a defendant they intend to rely upon at

trial are voluntary (People v Guilford, 21 NY3d 205, 208 [2013]). To do that, they must show that the statements were not products of coercion, either physical or psychological (see Miranda v Arizona, 384 US 436, 448 [1966]), or, in other words that they were given as a result of a "free and unconstrained choice by [their] maker" (Culombe v Connecticut, 367 US 568, 602 [1961]). The task is the same where deception is employed in the service of psychologically oriented interrogation; the statements must be proved, under the totality of the circumstances (see Guilford, 21 NY3d at 206) -- necessarily including any potentially actuating deception -- the product of the maker's own choice. The choice to speak where speech may incriminate is constitutionally that of the individual, not the government, and the government may not effectively eliminate it by any coercive device. It is well established that not all deception of a suspect is coercive, but in extreme forms it may be. Whether deception or other psychologically directed stratagems actually eclipse individual will, will of course depend upon the facts of each case, both as they bear upon the means employed and the vulnerability of the declarant. There are cases, however, in which voluntariness may be determined as a matter of law -- in which the facts of record permit but one legal conclusion as to whether the declarant's will was overborne (see e.g. Guilford, supra). This, we believe, is such a case. What transpired during defendant's interrogation was not consonant with and, indeed, completely undermined,

defendant's right not to incriminate himself -- to remain silent.

III.

Most prominent among the totality of the circumstances in this case, is the set of highly coercive deceptions. They were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed against defendant, an unsophisticated individual without experience in the criminal justice system.

It is established that interrogators may not threaten that the assertion of Fifth Amendment rights will result in harm to the interogee's vital interests. In Garrity v New Jersey (385 US 493 [1967]), police officers were convicted of conspiracy to obstruct justice on the basis of confessions made after the officers were threatened with the loss of their jobs if they asserted their Fifth Amendment rights. The Court held that the confessions were "infected by the coercion inherent in the scheme of questioning" and thus impossible to sustain as voluntary (id. at 496-498). In People v Avant (33 NY2d 265 [1973]) this Court, following Garrity, held that municipal contractors could not be pressured to make incriminating disclosures by threatening forfeiture of the right to bid on municipal contracts if they did not. Recognizing the breadth of the principle informing Garrity, the Court stated

> "While there was once a different view, it is now . . . undisputed that one may not be

> 'coerced' into waiving his constitutional privilege by the withholding of a substantial right to engage in one's occupation or of any other substantial or fundamental exercise of life, liberty, and the pursuit of happiness (Gardner v Broderick, 392 US 273, 279 [1968]; Garrity v New Jersey, 385 US 493, 497)" (id. at 273 [emphasis supplied]).

It was not consistent with the rule of Garrity and Avant to threaten that if defendant continued to deny responsibility for his child's injury, his wife would be arrested and removed from his ailing child's bedside. While the People and the Appellate Division viewed this threat as "reasonable," the issue is not whether it reflected a reasonable investigative option, but whether it was permissibly marshaled to pressure defendant to speak against his penal interest. It was not. And, although the Appellate Division treated the threat as benign because defendant did not finally provide a complete confession until many hours had passed, it is clear that defendant's agreement to "take the fall" -- an immediate response to the threat against his wife -- was pivotal to the course of the ensuing interrogation and instrumental to his final self-inculpation.

Another patently coercive representation made to defendant -- one repeated some 21 times in the course of the interrogation -- was that his disclosure of the circumstances under which he injured his child was essential to assist the doctors attempting to save the child's life. We agree with the Appellate Division, and it is in any case self-evident, that

these were representations of a sort that would prompt any ordinarily caring parent to provide whatever information they thought might be helpful, even if it was incriminating. Perhaps speaking in such a circumstance would amount to a valid waiver of the Fifth Amendment privilege if the underlying representations were true, but here they were false. These falsehoods were coercive by making defendant's constitutionally protected option to remain silent seem valueless and respondent does not plausibly argue otherwise. Instead, it is contended that they did not render defendant's ensuing statements involuntary because there was no substantial risk that appealing to defendant's fatherly concern would elicit a false confession. It has long been established that what the due process clause of the Fourteenth Amendment forbids is a coerced confession, regardless of whether it is likely to be true. In Rogers v Richmond (365 US 534 [1961] [Frankfurter, J.]) the Court explained:

> "Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system -- a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be

> untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees"

id. at 540-541 [internal citations omitted]).

It is true that our State statute (CPL 60.45 [2] [b] [i]) treats as "involuntarily made" a statement elicited "by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself," but this provision does not, and indeed cannot displace the categorical constitutional prohibition on the receipt of coerced confessions, even those that are probably true (see Rogers, 365 US at 545 n 3 ["whether the question of admissibility is left to the jury or is determinable by the trial judge, it must be determined according to constitutional standards satisfying the Due Process Clause of the Fourteenth Amendment"]). As CPL 60.45's enumeration of the various grounds upon which a statement may be deemed involuntary

itself demonstrates, subsection (2) (b) (i) constitutes an additional ground for excluding statements as "involuntarily made," not a license for the admission of coerced statements a court might find reliable.

Additional support for the conclusion that defendant's statements were not demonstrably voluntary, under the totality of the circumstances, can be found in the ubiquitous assurances offered by defendant's interrogators, that whatever had happened was an accident, that he could be helped if he disclosed all, and that, once he had done so, he would not be arrested, but would be permitted to return home. In assessing all of the attendant circumstances, these assurances cannot be minimized on the basis that the eventual confession admitted behavior that could not be characterized as accidental. It is plain that defendant was cajoled into his inculpatory demonstration by these assurances -- that they were essential to neutralizing his often expressed fear that what he was being asked to acknowledge and demonstrate was conduct bespeaking a wrongful intent. Defendant unquestionably relied upon these assurances, repeating with each admission that what he had done was an accident. These assurances, however, were false. From its inception, defendant's interrogation had as its object obtaining a statement that would confirm the hypothesis that the infant had been murdered through physical abuse. That objective was incompatible with any true intermediate representation that what defendant did was just an

accident. Had there been only a few such deceptive assurances, perhaps they might be deemed insufficient to raise a question as to whether defendant's confession had been obtained in violation of due process. This record, however, is replete with false assurances. Defendant was told 67 times that what had been done to his son was an accident, 14 times that he would not be arrested, and 8 times that he would be going home. These representations were, moreover, undeniably instrumental in the extraction of defendant's most damaging admissions. When Sergeant Mason suggested that defendant had thrown Matthew down on the bed, defendant protested repeatedly that he was being asked to admit that he had intentionally harmed his son. To each such protest, Mason responded that what defendant had done was not intentional, often adding an elaborate explanation of why that was so. In this way, and after a final appeal from Mason to provide the "proper information to relate to the hospital and talk to the doctors to keep your son alive," defendant at last agreed that he argued with Ms. Hicks and then threw Matthew down on the bed. Based on that admission, he would be prosecuted for murder. We do not decide whether these police techniques would themselves require suppression of defendant's statements, but that they, taken in combination with the threat to arrest his wife and the deception about the child, reinforce our conclusion that, as a matter of law, defendant's statements were involuntary.

IV.

Defendant's inculpating statements were also inadmissible as "involuntarily made" within the meaning of CPL 60.45 (2) (i). The various misrepresentations and false assurances used to elicit and shape defendant's admissions manifestly raised a substantial risk of false incrimination. Defendant initially agreed to take responsibility for his son's injuries to save his wife from arrest. His subsequent confession provided no independent confirmation that he had in fact caused the child's fatal injuries. Every scenario of trauma induced head injury equal to explaining the infant's symptoms was suggested to defendant by his interrogators. Indeed, there is not a single inculpatory fact in defendant's confession that was not suggested to him. He did not know what to say to save his wife and child from the harm he was led to believe his silence would cause. It was at Mason's request and pursuant to his instructions, that defendant finally purported to demonstrate how he threw the child. And after Mason said that he must have thrown the child still harder and after being exhorted not to "sugar-coat" it, he did as he was bid. Shortly after this closely directed enactment, defendant was arrested.

Defendant's admissions were not necessarily rendered more probably true by the medical findings of Matthew's treating physicians. The agreement of his inculpatory account with the theory of injury advanced by those doctors can be readily

understood as a congruence forged by the interrogation. The attainment of the interrogation's goal therefore, cannot instill confidence in the reliability of its result.

Inasmuch as we conclude that defendant's confession should not have been placed before the jury, there is no need to address whether defendant's expert should have been permitted to testify about the phenomenon of false confession and the interrogation techniques employed to elicit defendant's admissions.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress statements granted and a new trial ordered.

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Order reversed, defendant's motion to suppress statements granted and a new trial ordered. Opinion by Chief Judge Lippman. Judges Graffeo, Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Decided February 20, 2014