

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS HERNANDEZ-SOLARES,

Defendant and Appellant.

A136444

(Sonoma County  
Super. Ct. No. SCR597257)

Luis Hernandez-Solares appeals from a judgment upon a jury verdict finding him guilty of substantial sexual conduct within the meaning of Penal Code<sup>1</sup> section 1203.066 subdivision (b) of three or more lewd and lascivious acts as defined in section 288 with a victim under the age of 14 while defendant resided with or had access to the victim. The jury also found true the allegation that the victim was under the age of 14 (§ 1203.066, subd. (a)(8)) and that the prosecution was commenced prior to her 28th birthday (§ 801.1, subd. (a)). Defendant contends that his pretrial statements to the police were admitted into evidence in violation of his *Miranda*<sup>2</sup> rights. We affirm.

**I. FACTS**

J. L. met defendant when he was about 15 years old. He was the adopted son of her father-in-law. Her children did not refer to him as an uncle but considered him a part of the family. He was about six or seven years older than her daughter, P.

<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

In 2003, defendant lived with L.'s sister-in-law's family in Petaluma. L. worked weekends in Petaluma for about eight months in 2003 and would drop off P., who was then 10 years old, and her two siblings at her sister-in-law's (P.'s aunt's) house, where defendant's mother would care for the children. Defendant and his two siblings along with his parents lived in the home.

On the second or third weekend that P. stayed at her aunt's home, P. was in the bathroom when she heard a knock on the bathroom door. P. said, "hold on," but defendant entered the bathroom. P. told him to get out, but defendant refused, proceeded to pull her pants down, and told her to "Be quiet. Don't say anything." He took his pants off, sat on the toilet and pulled her toward him. He told her to sit on his lap and he started to kiss her. He then stood up and put his penis in her vagina. Defendant put his hand on her mouth and told her not to say anything. P. was scared. Someone knocked on the bathroom door during the incident, and defendant told P. to be quiet and answered, "Oh wait. I'll be out." He turned off the bathroom light, told P. to hide behind the door, and distracted the other person, before he gave her "the clear" to get out.

The sexual assaults continued whenever defendant was home on the weekends that P. was at her aunt's home. Defendant also forced her to orally copulate him. He gave her instructions on how to do it, grabbed her hair, and pushed her head towards his penis. He made her orally copulate him five or six times. He would also touch her breasts and had sexual intercourse with her numerous times a month. P. told him that it hurt, but defendant would say, "Trust me. It doesn't hurt." He would not stop when she told him it hurt. Defendant told her not to tell anyone and that it was their "little secret." P. did not tell anyone because she thought that her parents would not believe her and that defendant would harm her family. The sexual assaults continued until P's mother stopped working in Petaluma.

During the time that L. worked in Petaluma, she found blood on a pair of P's underwear. She asked P. about it and was led to believe that she had started her menstrual period. L. later learned that P. had not yet begun to menstruate.

In 2010, when P. was 16, she had trouble in school and went to therapy. She reported the sexual abuse she had suffered with defendant to the therapist. The therapist reported the abuse to the police. P. was subsequently interviewed by the police and she revealed that defendant had sexually assaulted her.

At the request of the police, L. placed a pretext phone call to defendant on November 9, 2010. L. told defendant that she had spoken with P. and wanted to talk to him about P.'s accusations without involving the family. Defendant initially denied raping P. but then thanked L. for not telling the family because he was sure that the family would take the news badly. L. asked him why he had raped P. Defendant said that he was influenced by pornography and his friends. He, however, continued to deny that he actually penetrated P., but then said that if P. said he had, then it was true. He did not deny that he forced P. to orally copulate him.

As a result of the pretext call, Detectives Gilman, Stemmer, and Vallejo went to defendant's apartment in Chino to interview him on February 2, 2011. Defendant allowed the officers into his apartment and they interviewed defendant in his living room. Gilman asked defendant if he knew why the officers were there. Defendant responded that he had an idea based on a telephone conversation he had with L. in November. He told them that he was P.'s step-uncle and that he used to live in Petaluma during 2002. Defendant said that P. was either 10 or 12 years old at the time. Gilman asked defendant if his sexual relationship with P. was consensual. Defendant denied sexually assaulting P.

Early on in the interview, Gilman asked if defendant wished to continue the interview in Spanish. A local police officer subsequently arrived to continue the interview in Spanish. Defendant initially denied that he kissed P. When Gilman confronted him with statements he made during the pretext call, he admitted that he kissed P. during an incident in the bathroom. He ultimately admitted that he asked P. to orally copulate him on one occasion. He also admitted that he made P. touch his penis over his clothing and that he touched her breasts over her clothing and that P. showed him "her parts."

Defendant said that he apologized to L. during the pretext call because he had kissed P. on one occasion and disrespected the family. He said that he had told L. that he denied the allegations P. had made. He told Gilman he could not remember whether he penetrated P. The interview lasted about an hour and 45 minutes.

## **II. DISCUSSION**

Defendant contends that he was in custody when he was interrogated at his apartment in Chino and thus his pretrial statements were obtained in violation of his *Miranda* rights.

The trial court held an Evidence Code section 402 hearing on the *Miranda* issue. Detective Gilman testified that after L. made the pretext call to defendant, he along with Detectives Stemmer and Vallejo went to defendant's apartment in Chino. He knocked on the door of the apartment and defendant answered. Gilman identified himself as a Petaluma detective and asked to enter the apartment and speak with him. Defendant allowed the detectives into his apartment and Gilman asked if they could sit down. Defendant initially directed them to the kitchen area but then opted to sit in the living room. Stemmer and Vallejo remained standing and leaned against the kitchen counter which was across from the living room. Another adult male and some children were in another part of the apartment.

Gilman told defendant that he wanted to talk about an incident that occurred in Petaluma. Defendant indicated that he knew why the police were there because he assumed it was about his telephone conversation with L. Gilman did not read defendant his *Miranda* rights and did not tell him he was free to terminate the conversation. He proceeded to ask defendant about P.'s accusations. Defendant said that P. was not his girlfriend and denied raping her.

Defendant then asked for a Spanish interpreter. Gilman told him that he thought he was doing just fine but suggested that either an officer come to the apartment or that they go to the police department. Defendant asked about the time because he had to pick up his daughter at school at noon. He asked if he could call his wife so that she could pick up his daughter. Defendant got up from the couch and proceeded to move out of the

room. Defendant said that he was going to get his cell phone. Gilman said the detectives would get it for him and directed him to remain in the living room because they had not searched the house. Detective Stemmer located defendant's phone so that arrangements could be made to pick up his daughter from school.

Defendant made several telephone calls including to his boss at work. Gilman asked defendant again if he wanted to conduct the interview in Spanish and arrangements were made for an interpreting officer to come to the apartment. Up to this point, defendant had not made any admissions. After Officer Briones, the interpreter arrived, Gilman told defendant that there was a difference between kids experimenting about sex and being forced to have sex. Defendant again repeated that he had not had sex with P. Gilman told him that he thought he was lying and that he believed P.'s accusations. Defendant ultimately admitted that he had kissed P., she touched his penis over his clothing, he touched her breasts, and she orally copulated him. When asked if he had ever had sexual intercourse with P., defendant claimed he could not remember. At the conclusion of the interview, Gilman arrested defendant.

The trial court ruled that it would permit introduction of defendant's pretrial statements, finding that the questioning of defendant occurred during a noncustodial investigation.

It is well settled that the requirements of *Miranda* apply only to custodial interrogation. (*Miranda v. Arizona, supra*, 384 U.S. 436.) Whether a person is in custody is determined by an objective test — whether there was a formal arrest or if the restraint on the suspect's freedom of movement is of the degree associated with a formal arrest. (*People v. Linton* (2013) 56 Cal.4th 1146, 1167.) “[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances.” (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662.)

Generally, “absent an arrest, interrogation in the familiar surroundings of one's own home is generally not deemed custodial.” (*U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 675.) Here, defendant allowed the officers into his home and acquiesced to answering questions. He decided upon the living room for the interview. Neither Gilman

nor any of the other officers informed defendant that he was not under arrest, that he did not have to answer questions and that he could leave at any time. (Cf. *U.S. v. Sutera* (8th Cir. 1991) 933 F.2d 641, 646–647 [officer’s comments on freedom to decline to answer questions indicates noncustodial interrogation].) Nonetheless, the police presence in his home was not “a police-dominated atmosphere.” (*U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1089.) Defendant was not handcuffed, the officers did not draw any weapons, and they were dressed in plain clothes. (*Id.* at p. 1085 [presence of visibly armed police officers suggests a police-dominated environment].)

Defendant argues that he was in custody during the interrogation because Gilman asked that he get someone else to pick up his daughter from school rather than allowing him to do so. Although this circumstance suggests defendant might reasonably have believed he was not free to terminate the interrogation, we conclude, as did the trial court, that the totality of the circumstances did not support a finding that defendant was in custody. Defendant was not restrained, the officers permitted him to make several calls on his cell phone, and the interview, in defendant’s home, lasted less than two hours. (See *U.S. v. Sutera, supra*, 933 F.2d at p. 647 [defendant was not in custody where interview lasting approximately one hour was conducted in his home, he was told he was not under arrest, but was not permitted to answer the telephone and there were six armed officers present].)

Defendant’s reliance on *U.S. v. Craighead, supra*, 539 F.3d 1073 is misplaced. The *Craighead* court held that based on the totality of the circumstances, the defendant was in custody when eight law enforcement officers, who were visibly armed, entered the defendant’s home to execute a search warrant and interviewed him in a back storage room with the door closed and guarded by an armed officer. (*Id.* at pp. 1078, 1085–1086, 1089.) The court considered the fact that the defendant was isolated from others in the storage room as a factor weighing in favor of a finding of a custodial interrogation. (*Id.* at pp. 1086–1087.) Although the defendant was told the questioning was voluntary and that he was free to leave, given the police-dominated atmosphere, the court determined that these factors did not render the interrogation non-custodial. (*Id.* at pp. 1086–1087.)

The court, however, recognized that “[a]n interview conducted in a suspect’s kitchen, living room, or bedroom might allow the suspect to take comfort in the familiar surroundings of the home and decrease the sensation of being isolated in a police-dominated atmosphere.” (*Id.* at p. 1088.)

Here, defendant was interviewed in the living room of his home, the duration of the interview was less than two hours, and he was permitted to make several telephone calls during the interview. While the fact that the police suggested he make arrangements to have someone else pick up his daughter at school is a factor that might indicate that defendant was not free to leave, defendant was not restrained, the officers were not visibly armed, and the number of officers present would not by itself have led defendant to believe that he was in custody. (Cf. *U.S. v. Newton*, *supra*, 369 F.3d at pp. 675–677 [defendant was in custody where, although he was advised he was not under arrest, he was handcuffed in his home and interrogated in the presence of six officers].) Based on the totality of the circumstances, defendant was not in custody at the time of the interrogation.

Even if the court erred in finding that defendant was not in custody for purposes of *Miranda*, any error in admitting his pretrial statements was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Apart from defendant’s statements, the evidence that defendant committed the offenses was overwhelming. The evidence included not only defendant’s admissions to L. in the pretext call but also P.’s testimony of the sexual assaults committed by defendant. On this record, any error in admitting the statements was harmless.

### III. DISPOSITION

The judgment is affirmed.

---

Rivera, J.

We concur:

---

Reardon, Acting P.J.

---

Humes, J.