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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ABDUL GHAFAR SELHARI,

Defendant and Appellant.

D059081

(Super. Ct. No. SCD220434)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

INTRODUCTION

In this child molestation case, an amended information charged Abdul Ghaffar Selhari with two counts of committing a lewd and lascivious act upon his daughter (hereafter the victim), a child under the age of 14 years (counts 1 & 2: Pen. Code, § 288, subd. (a) (undesigned statutory references will be to the Penal Code unless otherwise specified)), and, as to count 1, alleged that Selhari had substantial sexual contact with her

within the meaning of section 1203.066, subdivision (a)(8) (hereafter section 1203.066(a)(8)).

On the day the amended information was filed in mid-August 2010, the court heard Selhari's motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to replace Ray Aragon as his court-appointed counsel. After hearing from Selhari (who was assisted by an Urdu-speaking interpreter) and Aragon outside the presence of the prosecutor, the court denied Selhari's *Marsden* motion.

At the first trial in late August 2010, a jury found Selhari not guilty of count 2, but could not reach a verdict as to count 1. The court declared a mistrial as to count 1.

In early December 2010, at the retrial at which both the then-nine-years-of-age victim and Selhari testified, the jury found Selhari guilty of count 1 and found true the allegation that Selhari had substantial sexual contact with the victim (§ 1203.066(a)(8)).

The court sentenced Selhari to the middle prison term of six years. This appeal followed.

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the proceedings below. Counsel presents no argument for reversal, but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U. S. 738, counsel refers to the following as possible, but not arguable, issues: (1) Whether the minor victim's pretrial statements were properly admitted under Evidence Code section 1360; (2) whether there is sufficient evidence to support the jury's true finding on the substantial sexual conduct allegation

(§ 1203.066(a)(8)); and (3) whether the court erroneously denied Selhari's *Marsden* motion for appointment of new counsel.

We granted Selhari permission to file a brief in English on his own behalf. He responded by filing a supplemental appellant's opening brief that consists of a nine-page narrative of claimed events that was translated from Urdu into English and contains no legal arguments, no citations to any legal authority, and no citations to the record.

A review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, and *Anders v. California, supra*, 386 U.S. 738, including the possible issues raised by appellate counsel, has disclosed no reasonably arguable appellate issue.

A. *Evidence Code section 1360*

Regarding the first possible issue raised by Selhari's appellate counsel concerning the victim's pretrial statements, Evidence Code section 1360 provides, as an exception to the hearsay rule, for the admission of out-of-court statements by a victim under age 12

describing acts of child abuse.¹ "A trial court's findings concerning indicia of reliability are subject to independent review on appeal." (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445-446.)

Here, the record shows the court conducted a hearing outside the presence of the jury on the prosecution's motion in limine to introduce under Evidence Code section 1360 evidence of pretrial statements the victim made about Selhari to Sheri Rouse, a forensic child abuse interviewer at Rady's Children's Hospital, and to L.M., the victim's foster mother. Defense counsel opposed the People's motion, claiming the victim's statements were unreliable and thus inadmissible under the hearsay rule. The court ruled that the victim's statements to both Rouse and L.M. were admissible under Evidence Code section 1360.

We conclude there is no arguable issue as to whether the court abused its discretion. It is undisputed the defense had notice of the prosecution's intent to seek

¹ Evidence Code section 1360 provides in pertinent part: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child. [¶] (b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

admission of evidence of the statements. The record shows L.M. testified regarding the statements at an Evidence Code section 402 hearing held in the first trial in this matter, as well as during that trial itself. The prosecutor's lengthy offer of proof regarding the victim's statements to Rouse demonstrated their reliability, and the record shows the victim testified at the retrial and was cross-examined by defense counsel. We conclude the court did not err by admitting under Evidence Code section 1360 evidence of the victim's statements to third parties.

B. Sufficiency of the Evidence of Substantial Sexual Conduct (§ 1203.066(a)(8))

We also conclude there is no arguable issue as to whether the evidence is insufficient to support the jury's true finding on the section 1203.066(a)(8) substantial sexual conduct allegation. Here, the victim testified that she slept in Selhari's bed with him one night when she was scared. No one else was in the house. She felt both her pajama pants and underwear being pulled down to her knees. She then felt something bigger than a finger in her "private part," which she acknowledged was her vagina. The prosecution presented evidence showing that Selhari's semen and DNA were found on the victim's underwear.

C. Marsden Motion

Last, we conclude there is no arguable issue as to whether the court erroneously denied Selhari's *Marsden* motion for appointment of new counsel. A defendant who brings such a motion has the burden of "mak[ing] a sufficient showing that denial of substitution would substantially impair his constitutional right to the assistance of counsel [citation], whether because of his attorney's incompetence or lack of diligence [citations],

or because of an irreconcilable conflict [citations]." (*People v. Ortiz* (1990) 51 Cal.3d 975, 980, fn. 1.) A trial court's denial of a *Marsden* motion does not constitute an abuse of discretion unless it is shown the failure to replace counsel substantially impaired the defendant's right to effective assistance of counsel. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

We have reviewed the sealed transcript of the *Marsden* hearing in this case. We conclude there is no arguable issue as to whether the court's decision not to replace counsel substantially impaired Selhari's right to effective assistance of counsel. The court did not abuse its discretion by denying Selhari's *Marsden* motion.

We conclude Selhari has been adequately represented by counsel on this appeal. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.