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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MERIJILDO GARZA,

Defendant and Appellant.

G047307

(Super. Ct. No. 11WF0025)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Steven D. Bromberg, Judge. Affirmed.

Christine Vento, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and  
Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

A jury found defendant Merijildo Garza guilty of two counts of committing a lewd and lascivious act upon a child under 14 years old, and one count of sexually penetrating a child 10 years of age or younger. The jury also found true several enhancement allegations.

We affirm. The trial court did not err by admitting evidence, under Evidence Code section 1108, showing that Garza previously committed other uncharged sexual offenses. The court properly exercised its discretion under Evidence Code section 352 before admitting that evidence. The court did not abuse its discretion by admitting expert testimony on child sexual abuse accommodation syndrome. In his opening brief, Garza argues that we must direct the trial court to correct the abstract of judgment to reflect the correct statutory violation for which he was convicted in count 2 of the information. During the pendency of this appeal, an amended abstract of judgment, citing the correct statute for count 2, was filed.

## FACTS

### I.

#### OFFENSES COMMITTED AGAINST A.

On January 20, 2010, four-year-old A. lived in an apartment with her brother and parents, G. and V. That evening, V.'s then 76-year-old grandfather, Garza, offered the use of his car to G. so that she could drive to a Subway restaurant to purchase sandwiches for G., Garza, and the children. G. accepted Garza's offer and left the children in Garza's care. This was not an unusual turn of events. Garza frequently came to the apartment, sometimes weekly, and would watch the children when G. and V. were out; Garza provided G. money for the purpose of going out and buying things for the children or for the purpose of G. and V. going out to eat or to see a movie.

In the late evening of January 20, G. saw A. lying on her bed and rubbing her vaginal area with both hands. G. asked A. what she was doing. A. said she was

touching herself. G. asked A. why she was doing that and where she learned to do this. A. told G. that Garza, whom A. referred to as “Grandpa Joe,” had “put his fingers there” and that “Grandpa Joe did it to me.” She also told G. that Garza had moved her underwear and put two fingers in her “pee-pee” area. A. said that “it” happened every time G. left the apartment and that, on one other occasion, Garza took A. to the laundry room and put his fingers into her vagina. A. said that she told Garza to stop and that it hurt her.

G. called the police. Sergeant Craig McIver of the Garden Grove Police Department was dispatched to the apartment where he spoke with G. and A. He asked A. what had happened; A. pointed to her vaginal area and said, “Grandpa Joe put his finger there.” McIver asked A. if Garza’s finger went inside of her; she said it did and it felt bad.

A. testified at trial. After initially denying that Garza had touched her vaginal area, A. testified that he had touched her on the “pee-pee” once; when she told him to stop, he did. She had told G. the day it happened.

Garza’s daughter, A.J., testified that after she heard about what happened to A., she confronted Garza. Garza told her that he did not remember doing anything to A. He told A.J. that on the night in question, he noticed A. had a hole in her underwear and told her about it. In response to A.J.’s question whether Garza touched A.’s vaginal area, Garza said he did not remember. A.J. asked Garza what he meant by not remembering whether he had touched A.’s vaginal area; Garza similarly responded, “I don’t remember.”

## II.

### OFFENSES COMMITTED AGAINST B.

B., who is one of Garza’s grandchildren, was 19 years old at the time of trial. She testified that when she was a seven- or eight-year-old third grader, she went to Garza’s house on the weekends and spent the night. When B. took a shower at Garza’s

house, he would come into the bathroom and watch her shower. B. testified Garza also rubbed her thighs, and put his hand down her pants or pajamas and touched her vaginal area outside of her underwear. She said that would happen when she was sleeping or when he had her sit on his lap while she played a game on the computer. B. testified Garza's conduct happened "[I]lots of times," more than 15 and less than 100. Garza's conduct stopped when B. was in either the fifth or the sixth grade and no longer went to his house. B. testified she had not told anyone, explaining that she was confused and knew Garza financially helped her family. B. came forward after she heard about A.; B. explained that after learning what Garza did to A., she thought "it could have been my daughter, and I couldn't have that happen."

### III.

#### SUMMARY OF EVIDENCE REGARDING GARZA'S PRIOR SEXUAL OFFENSES

Other female members of Garza's family and female friends of his daughters testified about prior instances of sexual abuse by Garza, which had occurred over several decades. Garza's daughter, M.G., who was 56 years old at the time of trial, testified that when she was eight years old, Garza played the "snake game" with her, during which he would have her sit on top of his groin area while he lay on his back on the floor and moved his body. M.G. said they played the snake game "several times." Sometimes, Garza would not be wearing a shirt. M.G. remembered that she felt Garza's penis was hard when they played the snake game. She had not told anyone about the snake game because it was hard to talk about, being so young, and she felt embarrassed and uncomfortable talking about it.

M.G. also testified that one day when she was 15 or 16 years old, she came home from school and found Garza in the garage with one of her childhood friends who was "[a]round 12 to 14" years old. She saw Garza's left hand down the front of the girl's pants and his right hand fondling her breasts; he was also kissing the back of her neck. M.G. screamed at Garza, ran to the bathroom, and got sick to her stomach. Garza offered

M.G. money and threatened that she had better not say anything about what she had seen. That same day, M.G. told her mother what had happened. M.G. had not told anyone else because she was scared of Garza.

Another of M.G.'s friends, C.S., who was 56 years old at the time of trial, testified that when she was eight years old, she had spent the night at Garza's house. On both of those occasions, Garza entered the room where she was sleeping, put his hands inside her underwear, and "felt all in" her vaginal area.

Yet another of M.G.'s friends, C.E., who was 48 years old at the time of trial, testified that when she was five years old, she was walking home from school one day when Garza called her over to him. He fondled her vaginal area inside her underwear. C.E. testified that one time when she was in kindergarten or the first grade, she spent the night at Garza's house. Garza entered the room where she was sleeping, pulled her down to the bottom of the bed, and orally copulated her. She did not say anything to anyone about what had happened.

A.B., who was 27 years old at the time of trial, grew up believing that Garza was her father. Starting when A.B. was six or seven years old, A.B. and her sister went to Garza's house every weekend. They would spend the night. On more than 20 occasions, while the sisters slept, Garza would pull down their pajamas or underwear, and touch them. He licked A.B.'s vaginal area. On one or two occasions, but not more than four times, Garza inserted his penis into A.B. A.B. saw him do the same thing to her sister once or twice. Garza called it "the secret game." When A.B. would tell Garza she did not want to play the game, he would not respond. Instead, he would stop giving the sisters the toys and other items they wanted. He told them to "keep it quiet."

A.J. testified that in 1987, she confronted Garza about molesting other family members and neighbor friends. At first, Garza told A.J. that "they were all lying," then stated, "if I did, I don't remember."

#### IV.

##### EVIDENCE REGARDING THE THEORY OF CHILD SEXUAL ABUSE ACCOMMODATION

Clinical and forensic psychologist Jody Ward testified about the theory known as child sexual abuse accommodation. She testified about the following five circumstances commonly present in child sexual abuse cases, based on studies:

(1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed and unconvincing disclosure, and (5) recantation or retraction.

Ward explained that child sexual abuse occurs in secret and the victims often keep the abusive conduct secret because they are told to, and, sometimes, because they are threatened to keep it secret. She stated that children who are victims of sexual abuse feel a sense of helplessness in light of the power differential between themselves and adults, their following instructions to obey adults, their dependence on the adults around them to provide for their physical and emotional needs, and their physical inability to fight off the abuse and lack of resources to get out of the situation. She further explained that child sexual abuse victims become entrapped in the situation and accommodate the abuse as a result of their tendency not to report the abuse right away. By acquiescing to the abuse, the child victims often make it easy for the abuser to continue the abusive conduct. Ward testified that children who are victims of sexual abuse tend to develop a blind spot and might fail to recognize that they are putting themselves in a bad situation. The child victims commonly feel they must tolerate the abuse to receive the positive financial or emotional aspects of their relationship with their abuser. Disclosure of sexual abuse is often made after a delay, and such disclosures tend to be tentative or hesitant. Child victims also have shown a tendency to recant or retract reports of sexual abuse because they love their abusers and do not want to see them go to jail.

## V.

### DEFENSE

Garza testified that “the allegations or charges” are not true. He admitted that A.J. confronted him and asked him whether he put his fingers inside A.’s vagina. He responded that he had not, but if he had, he did not remember.

### BACKGROUND

Garza was charged in an information with (1) committing a lewd and lascivious act upon a child under 14 years of age (A.), in violation of Penal Code section 288, subdivision (a) (count 1); (2) sexual penetration of a child 10 years of age or younger (A.), in violation of Penal Code section 288.7, subdivision (b) (count 2); and (3) committing a lewd and lascivious act upon a child under the age of 14 years (B.), in violation of section 288, subdivision (a) (count 3). As to counts 1 and 3, the information alleged, pursuant to Penal Code section 667.61, subdivisions (b) and (e)(5), that, in the commission of those offenses, Garza committed an offense specified in section 667.61, subdivision (c), against more than one victim. The information further alleged, as to counts 1 and 3, that pursuant to Penal Code section 1203.066, subdivision (a)(7), Garza committed those offenses on more than one victim.

The jury found Garza guilty of all counts as charged in the information, and found true the enhancement allegations as to counts 1 and 3. The trial court sentenced Garza to a total prison term of 30 years to life. Garza appealed.

### DISCUSSION

#### I.

#### THE TRIAL COURT DID NOT ERR BY ADMITTING EVIDENCE OF GARZA’S PRIOR UNCHARGED SEXUAL OFFENSES UNDER EVIDENCE CODE SECTION 1108.

In his opening brief, Garza argues the evidence that he committed prior uncharged sexual offenses should not have been admitted under Evidence Code

sections 1108 and 352 because it lacked probative value and any such value was substantially outweighed by its undue prejudicial effect. For the reasons we will explain, the trial court's admission of the evidence of Garza's prior uncharged sexual offenses was not error.

A.

*Applicable Legal Principles*

“Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person’s conduct on a specified occasion. [Citations.] . . . The Legislature has . . . created specific exceptions to the rule against admitting character evidence in cases involving *sexual offenses* [citation], and domestic violence, elder or dependent abuse, or child abuse [citation]. [Citation.]” (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159, italics added.) Evidence Code section 1108, subdivision (a) provides: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” (See *People v. Falsetta* (1999) 21 Cal.4th 903, 911.)<sup>1</sup>

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” The

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<sup>1</sup> In *People v. Falsetta, supra*, 21 Cal.4th at page 915, the Supreme Court stated: “As the legislative history indicates, the Legislature’s principal justification for adopting [Evidence Code] section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant’s possible disposition to commit sex crimes.”

California Supreme Court, in *People v. Falsetta*, *supra*, 21 Cal.4th at pages 916-917, stated the trial court’s “careful weighing process under section 352,” before admitting evidence of a prior sex offense under Evidence Code section 1108, involves consideration of “its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [trial court’s decision to admit evidence under section 352 is reviewed for abuse of discretion]; *People v. Williams* (1997) 16 Cal.4th 153, 213 [same].)

B.

*The Trial Court’s Ruling*

Here, the trial court analyzed, under Evidence Code section 352, whether to admit the prior uncharged sexual offenses, stating:

“Is it inflammatory? Well, okay, I have yet to see an issue that comes to this court or this tower from floors 8 to 11 that’s not inflammatory. It’s all inflammatory. That comes back to the position where is it any more inflammatory than the charges themselves, is it so inflammatory that it’s going to confuse the jury. And there is actually a crossover as to that entire issue.

“And I haven’t actually seen that happen yet where it’s been confusing because it’s usually laid out very carefully because prosecutors, quite frankly, are as concerned as the court or anyone else about being reversed if it’s not done properly. So I take these as they come. It’s been laid out very succinctly in the [prosecutor’s] brief as to what the evidence would be, you’ve now indicated who you’re not going to call, so I

don't see that as being a reason to not allow it because of the inflammatory nature or being confusing.

“Remote? That’s basically the whole issue with [Evidence Code section ]1108 in more than half the cases that come up, as pointed out in the brief. And that case has been around for awhile also. 30 years might not be remote. 50 years might not be remote. Three years could be remote. Depends on the circumstances.

“Again, based on taking it for how it was set forth in the brief as to what the evidence is intended to show, I don’t see remoteness as being an issue. It goes back to propensity, and that’s where this all fits together almost like a puzzle.

“Consumption of time. We’re here to do justice, and that’s—I don’t see it as being a consumption of time. The big issue is also, of course, raising the probative value versus the prejudicial nature. That’s the whole basis for 1108 in the first place.

“As for a[n Evidence Code section] 352 analysis, I fully appreciate, [Garza’s counsel], your position on that. I think in this case, as it’s been laid out, and, quite frankly, the 23 pages of the People’s brief w[ere] very thorough as to that issue, so I’m going to allow that.”

Garza’s counsel argued that A.B.’s testimony should not be admitted under Evidence Code section 352 as being too remote in time in light of the different and more serious nature of Garza’s sexual offenses against her and her sister. The trial court responded, “[b]ut what’s also significant, which I think overcomes the remoteness, is the age. The alleged victims, whether they were the family members or whether they were the sleepover friends, were all within the same age. And I think that sort of—I hate to use the word ‘trumps,’ but that does take out the remoteness concern because, again, it’s that puzzle. And that’s why we have to look at each one of these [Evidence Code section ]1108 motions so individually.”

C.

*The Trial Court Did Not Err by Admitting Evidence  
of the Prior Uncharged Sexual Offenses.*

The trial court understood its discretion under Evidence Code section 352 and exercised that discretion on the record in admitting the evidence of Garza’s prior uncharged sexual offenses under Evidence Code section 1108. Garza contends that evidence should have been excluded because it lacked probative value, and any probative value it had was substantially outweighed by its prejudicial effect. For the reasons we explain, the trial court did not err.

1.

*The Evidence Admitted Under Evidence Code Section 1108 Was Probative.*

Garza argues the evidence of his prior uncharged sexual offenses, admitted under Evidence Code section 1108, lacked probative value because it showed he engaged in conduct that was remote in time and insufficiently similar to the charged offenses, and also because “the sources of the evidence of these acts were insufficiently independent of the charged offenses.”

“‘No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible.’ [Citation.] “[S]ubstantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses. [Citation.]” [Citation.]” (*People v. Robertson* (2012) 208 Cal.App.4th 965, 992.) “Numerous cases have upheld admission pursuant to Evidence Code section 1108 of prior sexual crimes that occurred decades before the current offenses.” (*Ibid.*)

Here, the evidence admitted under Evidence Code section 1108 showed Garza committed sexual offenses dating back several decades, but also included evidence of ongoing sexual offenses over the course of those decades. The remoteness of those

offenses is more than balanced out by their substantial similarity to the charged offenses, as we have discussed in detail.

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 404, the California Supreme Court stated, “[t]he probative value of evidence of uncharged misconduct also is affected by the extent to which its source is independent of the evidence of the charged offense.” Some, if not all, of the prior sexual offenses came to light *after* the charged offenses occurred, and what had happened to A. was discussed among Garza’s family members. In *People v. Ewoldt*, however, the Supreme Court stated that this factor was of “limited significance” in that case because it was only after learning the victim of the charged offense made a similar accusation, that the victim of a prior sexual offense accused the defendant of molesting her. (*Id.* at p. 405.) The Supreme Court held that the trial court did not abuse its discretion in admitting the prior uncharged sexual offense evidence. (*Ibid.*)

2.

*The Trial Court Properly Exercised Its Discretion in Concluding the Prejudicial Impact of the Evidence of Garza’s Prior Uncharged Sexual Offenses Did Not Substantially Outweigh Its Probative Value.*

Garza argues the evidence of his prior uncharged sexual offenses “had an extensive prejudicial effect” (underscoring omitted) as he was never convicted in connection with any of the prior sexual offenses and the jury might have thus been inclined to punish Garza for the uncharged sexual offenses. He also argues that the prior uncharged sexual offenses involved conduct that was “more inflammatory than the evidence of the charged offenses.”

As discussed *ante*, the prior uncharged sexual offenses bore similarities to the charged offenses. Nothing in the record suggests that the jury was inclined to punish Garza for committing the prior uncharged sexual offenses instead of, or in addition to, the charged offenses, or that the jury was otherwise confused by that evidence. We

recognize a few of the prior sexual offenses involved forms of sexual conduct other than that charged in this case, such as oral copulation and sexual intercourse. The trial court acknowledged the nature of the evidence of Garza's prior uncharged sexual offenses, but concluded, after carefully conducting its Evidence Code section 352 analysis, that the prejudicial impact of that evidence did not substantially outweigh its probative value. We cannot say the trial court abused its discretion in reaching that conclusion.

## II.

### THE TRIAL COURT DID NOT ERR BY ADMITTING WARD'S EXPERT TESTIMONY ON THE THEORY OF CHILD SEXUAL ABUSE ACCOMMODATION.

Garza contends the trial court abused its discretion by admitting Ward's expert testimony regarding the theory of child sexual abuse accommodation and thereby violated his constitutional rights to due process, to present a defense, and to have a fair trial. For the reasons we explain, Garza's argument has no merit.

“[U]nder subdivision (a) of [Evidence Code ]section 801, expert testimony is admissible on any subject ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’” (*People v. Brown* (2004) 33 Cal.4th 892, 905.) “It is beyond dispute that CSAAS [(child sexual abuse accommodation syndrome)] testimony is inadmissible to prove that a molestation actually occurred. . . . [¶] [But] . . . CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. [Citations.] [¶] Identifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim’s credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]” (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.)

In *People v. Brown*, *supra*, 33 Cal.4th at pages 905-906, the Supreme Court explained: “The Legislature, courts, and legal commentators have noted the close analogy between use of expert testimony to explain the behavior of domestic violence victims, and expert testimony concerning victims of rape or child abuse. [Citations.] In *People v. Bledsoe* (1984) 36 Cal.3d 236 . . . , we held expert testimony concerning rape victims—the rape trauma syndrome—to be admissible under [Evidence Code] section 801 to dispel common misconceptions about how such victims behave [citation], but not to prove that the victim had actually been raped [citation]. And in *People v. Bowker* (1988) 203 Cal.App.3d 385 . . . , the Court of Appeal said that when an allegedly abused child ‘recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child. . . .’ [Citation.] Although the expert in *Bowker* had referred to the ‘child abuse accommodation syndrome,’ the Court of Appeal observed: ‘[A]n expert has little need to refer to the syndrome in order to testify that a particular type of behavior is not inconsistent with a child having been abused.’ [Citation.] [¶] Thereafter, in [*People v. McAlpin* [(1991)] 53 Cal.3d 1289, we made it clear that admissibility of expert testimony does not depend on a showing based on a recognized ‘syndrome.’ That case concerned expert testimony about the behavior of parents of abused children. We first explained the admissibility of evidence about the behavior of the children themselves: ‘[E]xpert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness’s credibility when the defendant suggests that the child’s conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.] “Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior.”’”

The trial court did not abuse its discretion in admitting Ward's testimony. Garza testified that he did not commit any sexual offenses against anyone, ever. Garza's victims' testimony raised questions about why they delayed in reporting the alleged sexual abuse. The trial court stated that Ward was not to refer to child sexual abuse accommodation as a syndrome but must refer to it as a theory. Ward followed the court's direction. In addition, Ward testified that she was unfamiliar with the facts of this case and that her testimony was based on studies.

The court also instructed the jury with CALCRIM No. 1193, stating: "You have heard testimony from Dr. Jody Ward regarding child sexual abuse theory. [¶] Dr. Jody Ward's testimony about child sexual abuse theory is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not A[.]'s, B[.]'s, M[.]G.'s, [C.]S.'s, C[.]E.'s, and A[.]B.'s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

In short, the court "handled the matter carefully and correctly" by admonishing the jury on the limited purpose of the child sexual abuse accommodation theory. (*People v. Patino, supra*, 26 Cal.App.4th at p. 1745) The jury is presumed to have followed this instruction. (*People v. Avila* (2006) 38 Cal.4th 491, 574.)

We find no error.

### III.

THE ABSTRACT OF JUDGMENT HAS BEEN AMENDED TO REFLECT THE PROPER PENAL CODE SECTION GARZA WAS CONVICTED OF VIOLATING IN COUNT 2.

Garza argues that the abstract of judgment should be corrected to reflect the correct Penal Code section that he was convicted of violating in count 2. He was convicted in count 2 of violating Penal Code section 288.7, subdivision (b). The abstract of judgment, filed August 15, 2012, however, states Garza was convicted in count 2 of violating Penal Code section 287, subdivision (b). In the respondent's brief, the Attorney

General states the abstract of judgment should be corrected to accurately reflect that Garza was convicted of violating section 288.7, subdivision (b) in count 2, not section 287, subdivision (b).

During the pendency of this appeal, an amended abstract of judgment, filed August 6, 2013, correctly reflects count 2 as a violation of Penal Code section 288.7, subdivision (b). The trial court's minute order, dated August 9, 2013, states that a conformed copy of the amended abstract of judgment was mailed to the California Department of Corrections and Rehabilitation. In light of these developments, combined with Garza's silence on this subject in his reply brief filed August 23, 2013, no remand is warranted.

#### DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.