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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.

JAVIER HERNANDEZ ARAGON,

Defendant and Appellant.

G047813

(Super. Ct. No. 10HF1429)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\* \* \*

Defendant Javier Hernandez Aragon filed a notice of appeal after a jury convicted him of numerous sexual offenses against his two daughters, M. and J., occurring between January 2000 and December 2009. (Pen. Code, § 288.7, subd. (a) counts 1-2 (victim J. [sexual intercourse or sodomy with a child 10 years or younger]<sup>1</sup>; § 288, subd. (a) counts 3-6 (victim J.), counts 7-10 (victim M.) [lewd act on a child under age 14].) The jury also found true the allegations Aragon engaged in substantial sexual conduct (§ 1203.066, subd. (a)(8) [masturbation]), and committed the offenses against more than one victim (§ 667.61). His appointed counsel filed a brief summarizing the case, but advised this court he found no issues to support an appeal. We gave Aragon 30 days to file a written brief on his own behalf, but he has not responded. After conducting an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

#### FACTS

At trial in August 2012, A. M. testified she began a relationship with Aragon in 1991 when she was 14 years old. She gave birth to their daughter M. in Mexico in March 1993. The family moved to Santa Ana in 1995, and subsequently moved to Lake Forest. A. gave birth to a second daughter J. in January 1999. They had a son in August 2000.

A. worked in housekeeping at a hotel from 8:00 a.m. to 4:30 p.m., and, for about six months, at a restaurant from 6:00 p.m. to 10 p.m. Aragon worked during the day as a mechanic. He usually came home for lunch, and was also home alone with the children on Sundays. A. and defendant fought verbally and physically “[a]ll the time,” often in front of the children.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

Around October 2007, when J. was eight years old, she complained of pain in her stomach and “cola” or “butt.” J. was “afraid, nervous” and “crying.” A. found a “little bit” of blood in J.’s underwear and took her to the doctor.

A pediatric nurse practitioner who examined and treated J. testified A. reported J. resisted going to the bathroom because she suffered from abdominal pain and painful stools. Anal or rectal pain often causes children to voluntarily withhold bowel movements, resulting in constipation. A. stated she had seen bright red blood in J.’s stool, but did not mention blood in J.’s underwear.

In early 2010, M. disclosed Aragon had been touching her inappropriately since she was six years old, and stopped the abuse only after he left the family home in 2008. A. contacted the authorities. In July 2010, J. disclosed to A. that Aragon had touched her inappropriately beginning when she was around seven years old.

M. testified that when she was seven years old, Aragon came to her bed, told her to remove her clothing and touched her breasts, vagina, and bottom. Her mother was in another part of the apartment with J. Aragon told M. not to move if A. came into the room. M. complied because she feared Aragon would hurt her mother. The touching occurred more than once a week. When she was nine years old, Aragon entered the shower with her. He directed her to bend down and to put his penis in her mouth. Something white came out of his penis. This occurred at least once a week. He also rubbed his penis on her bottom, but did not insert it. He touched her breasts and bottom with his hands and made her touch his penis while they watched television. She recalled one incident when he put his fingers into her vagina. She did not disclose the abuse to her mother because she “felt really embarrassed” and Aragon told her A. would not believe her. Some of the incidents occurred during Aragon’s lunch breaks. He stopped molesting M. when she was 13, after her mother decided to separate from him and he moved out.

J. testified she witnessed Aragon hit her mother “a lot” when they lived in Lake Forest. Aragon first touched her sexually when she was five or six years old. Each time A. left for work, Aragon took J. into his room, put her hand in his pants and made her touch his penis. Sometimes her hand got wet and sticky. He removed her pants and underwear, as well as his own clothing. He touched her stomach and rubbed her vagina with his hands and fingers. When she was seven, he crawled into bed with her at night, touched her with his penis, and “put [his penis] in [her] butt,” which sometimes would be “wet” after these incidents. Because of the pain, she cried and asked him to stop. Aragon warned her he would hit her mother if she disclosed the abuse. These incidents happened “every time he would touch” her and only stopped when she was nine and he moved out of the house. She saw Aragon in bed with M., who was naked. J. told her mother about the abuse after she learned M. had disclosed that Aragon also had abused her. J. told a deputy sheriff the abuse began when she was eight years old and stopped when she was nine.

Sheriff’s Investigator Myrna Caballero could not locate Aragon after M.’s disclosures in March 2010. After J.’s disclosures in August 2010, Caballero arranged a child abuse (CAST) interview. During the CAST interview, J. told the social worker Aragon touched her on the vagina and the butt and the incidents began when she was eight years old and stopped when they moved away from him. The incidents usually occurred while her mom worked. The first time, she was watching television in her mother’s room. Aragon came in, put her on the bed, unzipped her pants, and began touching her and moving his hands back and forth on her vagina, which sometimes hurt. He also put his fingers inside her vagina more than five times. He would touch her this way once or twice a week when he came home from work. She tried to scoot away from him but he put his arm around her. The abuse sometimes happened in her bed, and often he would forcefully place her hand in his shorts and make her touch and rub his penis. Sometimes she would feel something wet in his shorts. This occurred more than five

times. He occasionally put his penis “on her butt.” “[I]t was going in . . . where the poop comes from.” This happened five to 10 times. She sometimes felt “wet stuff” on her butt afterwards. He also touched her breasts. She occasionally saw Aragon in bed with M. early in the morning. Aragon threatened to hurt her mother if she disclosed the abuse.

Caballero arranged for M. to make a covert phone call to Aragon. Aragon would say little over the phone, but when M. asked if he had sex with J., he stated, “I don’t know, I mean.”

Caballero interviewed Aragon at work. Aragon knew Caballero wanted to speak with him because he “apparently . . . abused [his] daughter” M. Aragon complained “everybody is blaming me . . . because I don’t want to give her mom any more money.” Caballero told him there was evidence J. had suffered “sexual abuse marks” on “her butt inside.” Aragon said J. would sometimes lay down with him and hug or grab him and that “as a man we already feel more or less what they’re looking for or not that they’re looking for but what is it that the little girls feel . . . .” J. touched his penis “just one time and I was drunk.” He used to “drink a lot before.” J. also put his penis in her butt cheeks “maybe . . . just . . . one time.” She would sometimes hug him when he came from bathing or when he was changing. He admitted he “made a mistake,” but denied any rectal penetration. He was laying down and she sat down and grabbed him. He explained J. was scared and had “seen many things,” including “violence, like, that happened with me and her mom.”

Aragon testified and denied touching the girls sexually. There was only the one incident with J., as he described to Caballero. When J. was seven or eight, Aragon was drunk and watching television and J. jumped on his bed and kissed him on his neck. Aragon was “thinking like a man” about A. “[I]t just occurred to [him] to grab [J.] around the waist and push her down, I had my clothing on [silk-like shorts]. She had a little pair of shorts on . . . . [¶] And at that moment, I don’t know what I was thinking. My penis was erect. And when that happened, I just picked her up and I put her down

and I told her to go to her room.” J. put her “hand to the back” and asked “what is this,” apparently referring to his erect penis. The incident lasted five seconds. He denied striking A. except “one time when both of us were hitting each other.”

As noted above, the jury convicted Aragon of the charged offenses and found the special allegations true. At the sentencing hearing in December 2012, the court imposed life with a minimum term of 25 years for each of the sodomy convictions (§ 288.7, subd. (a) [counts 1 and 2]), life with minimum terms of 15 years for each of the lewd act convictions (§ 288, subd. (a); § 667.61 [counts 3-10]). The combined minimum term was 170 years.

#### POTENTIAL ISSUES

Aragon’s appellate lawyer identifies two potential issues for our consideration: (1) Whether substantial evidence supported Aragon’s convictions; and (2) Whether the trial court should have suppressed Aragon’s statements to Officer Caballero.

##### *Sufficiency of the Evidence*

On appeal, we must view the record in the light most favorable to the judgment below. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) The test is whether substantial evidence supports the verdict (*Johnson*, at p. 577). (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) It is the jury’s exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) An appellant “bears an enormous burden” in challenging the sufficiency of the evidence. (*Sanchez* at p. 330.)

The information charged Aragon with committing two acts of sodomy (§ 288.7) against J. between October 1, 2006 and December 31, 2009. The charged acts included the “first time” and the “last time” he committed sodomy. The information also charged Aragon with four lewd act offenses (§ 288, subd. (a)) against J. The information identified the offenses as the first and last time Aragon touched J.’s vagina (counts 3-4),

and the first and last time he caused her to masturbate him (counts 5-6). Finally, the information charged Aragon with four lewd act offenses (§ 288, subd. (a)) against M. The information identified one offense occurring in each year from 2000 to 2003 (counts 7-10).

Section 288.7 provides, “(a) Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life.” Section 286 provides, “(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.” Section 288 provides, “(a) . . . any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . .” Where a person commits lewd acts against more than one child under age 14, the punishment is 15 years to life in prison. (Former § 667.61 subds. (b), (c)(8), (e)(5).)

The evidence, including J.’s and M.’s testimony related in detail above, amply supports the charged sodomy and lewd act convictions.

#### *Aragon’s Pretrial Statements*

The trial court denied Aragon’s pretrial motion to exclude his pre- and postarrest statements to Investigator Caballero, finding the statements were not obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436.

The prosecution may not use statements elicited by the police during custodial interrogations unless preceded by a valid waiver of the defendant’s *Miranda* rights. (*People v. Mickey* (1991) 54 Cal.3d 612, 647-648.) *Miranda* warnings are required only when a suspect “has been taken into custody or otherwise deprived of his

freedom of action in any significant way.” (*Miranda, supra*, 348 U.S. at p. 444.) The Supreme Court later explained that “*Miranda* become[s] applicable as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440, quoting *California v. Beheler* (1983) 463 U.S. 1121, 1125 (*Beheler*)). Whether an individual is in custody is a mixed question of law and fact. (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403 (*Pilster*)). The appellate court defers to the trial court’s findings of fact to the extent that they are supported by substantial evidence, but independently evaluates whether the defendant was in custody. (*Ibid.*)

“Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] [Fn. omitted.] The totality of the circumstances surrounding an incident must be considered as a whole. [Citations.] Although no one factor is controlling, the following circumstances should be considered: (1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of [the] questioning. [Citation.]” (*Pilster, supra*, 138 Cal.App.4th at 1403, internal quotation marks omitted.) “Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect’s freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were ‘aggressive, confrontational, and/or accusatory,’ whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation.]” (*Id.* at pp. 1403–1404.) Informing a suspect he is not under arrest can be a significant factor. (See, e.g., *United States v. Salvo* (6th Cir. 1998) 133 F.3d 943, 951 [informing suspect he was not under arrest, was free to leave and would not be arrested after the interview was

an “important factor in finding the suspect was not in custody”].) The location and length of the interview are also significant factors. Police may employ ruses to encourage a confession. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 493 [falsely told the defendant his fingerprints had been found at the crime scene and the defendant then confessed].)

We have read the testimony of Investigators Caballero and Park at the pretrial hearing, as well as the transcript of Caballero’s recorded pre- and postarrest questioning of Aragon. The evidence supports the trial court’s conclusion Aragon was not in custody at the time of Caballero’s initial questioning, and that he impliedly waived his *Miranda* rights before Caballero’s postarrest interrogation. (*People v. Whitson* (1998) 17 Cal.4th 229, 246 [collecting federal and California cases upholding implied waiver of *Miranda* rights].)

We discern no arguable issues from counsel’s brief or in our independent review of the record.

#### DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O’LEARY, P. J.

THOMPSON, J.