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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.

LUIS A. HERRERA,

Defendant and Appellant.

G049686

(Super. Ct. No. 11CF1339)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

David McNiel Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Luis A. Herrera of four counts of lewd and lascivious acts upon the body of a child under 14 years of age (Pen. Code, § 288, subd. (a)) and found that, in the commission of the charged offenses, defendant committed an offense against more than one victim. The court sentenced defendant to a total aggregate term of 30 years to life and imposed a restitution fine of \$200.

Before trial started, defendant moved to exclude his statement to the police on the ground it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]. The court denied the motion, and the sole issue in this appeal is whether this was error. It is undisputed no *Miranda* warning was given before the police interviewed defendant. Thus, the issue here would be whether the police questioned defendant while he was in custody.

But, as the Attorney General points out, we need not determine whether the interrogation violated the restrictions of *Miranda* because defendant here elected to testify, making any error in denial of the motion harmless. A statement taken in violation of *Miranda* “is admissible to impeach the defendant’s credibility as a witness, so long as the statement otherwise is voluntary.” (*People v. Peevy* (1998) 17 Cal.4th 1184, 1188.) Neither in the trial court nor here does defendant assert any contention he would not have testified but for the denial of his pretrial motion. In fact, defendant has failed to respond to the Attorney General’s argument based upon his decision to testify and thus we conclude he concedes this point.

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.