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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SANTOS ERNESTO CRUZ MEMBRENO, Defendant and Appellant.	B284026 (Los Angeles County Super. Ct. No. TA140223)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Jr., Judge. Modified and, as so modified, affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Santos Ernesto Cruz Membreno of two counts of sexual intercourse with a child 10 years old or younger, continuous sexual abuse of a child under the age of 14, and three counts of forcible rape of a child under the age of 14. Cruz Membreno appeals, contending (1) the trial court erred by denying his motion to suppress statements he made to a detective and a letter he wrote to the victim, both allegedly obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and (2) he is entitled to presentence custody credits. The latter contention has merit, but the former does not. Accordingly, we modify the judgment to award Cruz Membreno presentence custody credits and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Appellant, his wife, and their daughter (hereinafter "Daughter") lived together in a residence in Los Angeles. Beginning when Daughter was approximately six years old, appellant repeatedly engaged in sexual intercourse with her in the bathroom, while her mother was at work. Appellant would tell Daughter to come into the bathroom; if she did not comply, he pulled her inside. When Daughter told him to stop, he either told her to be quiet, or ignored her. Appellant continued to have intercourse with Daughter more than five times per year, until she was 11 years old, either in the bathroom, her bedroom, or appellant's bedroom. When Daughter was nine or 10, she began to physically resist her father's molestation; however, he was stronger than she was. Daughter did not tell anyone about the abuse because she did not want to make her mother angry and feared that no one would believe her.

In December 2015, Daughter told two friends about the abuse. Soon thereafter, she told them this had been a prank, because she did not trust one of them. In March 2016, she told two of her best friends, including one of the girls she had spoken to in December, about the abuse. They encouraged her to inform her mother. In May 2016, when Daughter was 11, she told her mother about appellant's actions. Her mother immediately reported the abuse to police. On May 23, 2016, Patricia Goclowski, a registered nurse, conducted a pediatric sexual assault examination. Goclowski observed two potential abnormalities on Daughter's genitalia: a possible abrasion, and an area of redness, on her perihymenal tissue. These conditions could have been the result of sexual abuse, or could have had other causes. It was not possible, based on the examination, to determine whether sexual penetration had occurred. The examination results were consistent with Daughter's account of the abuse. Child sexual assault victims often have no visible injuries.

On May 24, 2016, Los Angeles County Sheriff's Department Detective Mayra Zuniga interviewed appellant. The interview, which was audio-recorded, was conducted in Spanish. After being given *Miranda* advisements, appellant admitted sexually fondling Daughter on two or three occasions when she was 11. After Zuniga told appellant that Daughter claimed he had had intercourse with her beginning when she was five years old, appellant admitted having intercourse with her on three occasions and kissing her vagina four times, when his wife was at work and despite Daughter's protests. The last instance had occurred during the week prior to the interview. Appellant did not recall having intercourse with Daughter when she was six,

but stated he began abusing her when she was nine or ten years old. He stated he did not understand why he molested his daughter, and would go to his room and cry after doing so.

At Detective Zuniga's suggestion, appellant wrote a letter to Daughter in Spanish, apologizing to her. Translated, the letter read: "Hello, my child. I hope you are well after all of this that's going on. I love you, my child. I have always told you that. And I'm writing you this letter to ask you to forgive me. I'm begging you from the heart forgive me, my child. I pray to God to be able to hug you all again some day. I love both you and my precious boy. Sincerely, your Dad."

The defense presented no evidence.

2. *Procedure*

A jury convicted appellant of two counts of sexual intercourse with a child 10 years of age or younger (Pen. Code, § 288.7, subd. (a)),[1] continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a)), and three counts of forcible rape of a child under the age of 14 (§ 261, subd. (a)(2)). The trial court imposed a sentence of 105 years to life, configured as follows: consecutive terms of 25 years to life on counts 1 and 3 (sexual intercourse with a child 10 years old or younger); a consecutive term of 16 years, the upper term, on count 2 (continuous sexual abuse of a child under the age of 14); and consecutive terms of 13 years, the upper term, on counts 4, 5 and 6 (forcible rape of a child under the age of 14). It imposed a restitution fine, a suspended parole revocation restitution fine, a sex offender program fee, a criminal conviction assessment, and a court operations assessment. Cruz Membreno timely appeals.

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[1] All further undesignated statutory references are to the Penal Code.

DISCUSSION

1. *The trial court properly denied appellant's suppression motion*

a. *Additional facts and contentions*

The translated transcript[2] reflects that Detective Zuniga began the May 24, 2016 interview with appellant by obtaining some biographical information from him[3] and encouraging him to tell the truth. She then advised Cruz Membreno of his *Miranda* rights, as follows:

"[Zuniga]: Well, then . . . I'm going to read you your rights. You have rights. Okay? You have to say 'yes' or 'no' to the questions I ask you, okay? I don't understand the nodding up and down or to the sides from your head. I don't know what that is. I want a definite 'yes' – [¶] . . . [¶] or a definite 'no', okay? . . . You have the right no[t] to talk, do you understand?

"[Cruz Membreno]: Yes.

"[Zuniga]: Okay. . . . [W]hatever you say may be used against you in court, do you understand?

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[2] The jury was provided a transcript of the audio-recording with an English translation.

[3] General questions such as those Zuniga asked prior to giving *Miranda* warnings did not constitute interrogation, and appellant does not contend otherwise. (See *People v. Valdivia* (1986) 180 Cal.App.3d 657, 662; see generally *People v. Scott* (2011) 52 Cal.4th 452, 477–478; *People v. Gurule* (2002) 28 Cal.4th 557, 602 [small talk and pre-interview banter did not constitute improper "softening-up" of defendant].) To the extent any of the detective's pre-advisement questions could be construed as interrogation, they did not elicit incriminating answers and are not challenged on appeal.

"[Cruz Membreno]: Yes.

"[Zuniga]: Okay. You have the right to have an attorney here, present while we speak, do you understand?

"[Cruz Membreno]: Yes.

"[Zuniga]: [I]f you want an attorney but you don't have money, the court will give you one while we talk, do you understand?

"[Cruz Membreno]: Yes." (Some capitalization omitted.)

Zuniga then began questioning appellant. He admitted sexually fondling Daughter, kissing her vagina, and engaging in sexual intercourse with her three times; he said he did not know why he did these things. At Zuniga's suggestion, he also wrote the apology letter discussed *ante*. Appellant never asked for an attorney, did not attempt to stop the interview, and never refused or appeared reluctant to answer any questions.

On March 27, 2017, after the jury was selected but before the presentation of evidence, the trial court considered and denied appellant's motion to suppress his statements to Detective Zuniga. Defense counsel argued that, because Zuniga immediately began talking after advising appellant of his rights, appellant had no opportunity to assert them; he was unfamiliar with his rights; and nothing — other than the fact he answered questions — indicated waiver. Rejecting these arguments, the trial court concluded that the record demonstrated appellant impliedly waived his *Miranda* rights. The parties did not address any contention that the advisements given were inadequate. Defense counsel renewed her objection, without stating any additional grounds, shortly before the recording of the interview was played, and the trial court reiterated its prior ruling.

Cruz Membreno now asserts that the trial court should have suppressed his statements to Detective Zuniga, as well as the apology letter, for two reasons: (1) the *Miranda* warnings provided by Detective Zuniga were constitutionally inadequate because they failed to inform him he had the right to consult with an attorney *prior* to questioning; and (2) he did not make a valid waiver of his *Miranda* rights.

b. *Applicable legal principles*

To "give force to the Constitution's protection against compelled self-incrimination," a custodial interrogation must be preceded by *Miranda* warnings and by the suspect's knowing and intelligent waiver of them. (*Florida v. Powell* (2010) 559 U.S. 50, 59; *People v. Elizalde* (2015) 61 Cal.4th 523, 530; *People v. Dykes* (2009) 46 Cal.4th 731, 751.) "*Miranda* prescribed the following four now-familiar warnings: [¶] '[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' " (*Florida v. Powell*, at pp. 59–60; *Miranda*, *supra*, 384 U.S. at p. 479.) A defendant's right to counsel includes the right to consult with a lawyer prior to questioning and to have the lawyer present during questioning, and the suspect must be so informed. (*Miranda*, at pp. 470-471, 474; *Duckworth v. Eagan* (1989) 492 U.S. 195, 204 (*Duckworth*) [*Miranda* requires "that the suspect be informed . . . that he has the right to an attorney before and during questioning"]; *People v. Kelly* (1990) 51 Cal.3d 931, 948.)

The prosecution has the burden to prove, by a preponderance of the evidence, that the accused's rights under

Miranda were not violated. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 751; *People v. Villasenor* (2015) 242 Cal.App.4th 42, 59.) When reviewing a trial court's ruling on a claimed *Miranda* violation, we accept the court's resolution of disputed facts and inferences and its credibility evaluations if supported by substantial evidence. We independently determine from those facts whether the challenged statements were illegally obtained, applying federal constitutional standards. (*People v. Jackson* (2016) 1 Cal.5th 269, 339; *People v. Elizalde*, *supra*, 61 Cal.4th at p. 530; *People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in the prosecution's case-in-chief. (*People v. Jackson*, at p. 339; *People v. Peevy* (1998) 17 Cal.4th 1184, 1193–1196.)

c. *Forfeiture*

The People assert that Cruz Membreno has forfeited his argument that the *Miranda* advisements were inadequate, because he failed to raise this contention below. We agree. Based on the record before us, it does not appear that appellant sought to suppress his statements on the ground the advisements were inadequate; his only contention was that he did not waive his rights. The record before us does not contain a written suppression motion, and it is unclear whether defense counsel filed one or simply made an oral request. The parties and the trial court may have discussed the suppression issue off the record on March 24, 2017, but nothing suggests that the adequacy of the advisements was raised at that time. The authorities the parties referenced at the March 27 proceeding addressed the validity of implied waivers. (See *North Carolina v. Butler* (1979) 441 U.S. 369, 372–376; *People v. Sully* (1991) 53

Cal.3d 1195, 1233; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 402–403, 406.) The trial court's analysis of the issue was limited to the question of whether appellant impliedly waived his rights. The court did not consider, or rule on, the adequacy of the advisements. Contrary to appellant's contention, defense counsel never argued, at the March 27, 2017 proceeding, that the *Miranda* warnings themselves were inadequate. Instead, she urged that there was no valid waiver, and acknowledged that "Mr. Cruz was advised of his rights . . . ." Based on this record, there is little doubt the adequacy of the *Miranda* advisements was not challenged below.

Under these circumstances, appellant has forfeited his challenge to the adequacy of the *Miranda* advisements. A judgment may be reversed due to the erroneous admission of evidence only if an objection was made on the specific ground asserted on appeal. (Evid. Code, § 353, subd. (a); *People v. Demetrulias* (2006) 39 Cal.4th 1, 20–21; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.) "The rule requiring specificity applies to *Miranda*-based objections and motions to exclude." (*People v. Holt* (1997) 15 Cal.4th 619, 666; *People v. Rundle* (2008) 43 Cal.4th 76, 115–116 [defendant's "generic" suppression motion did not preserve claim that he invoked his right to silence], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Polk*, at p. 1194 [because defendant did "not raise the issue of the substantive adequacy of the *Miranda* warnings in the trial court, defendant has forfeited that issue on appeal"].) Nothing in the record suggests the trial court would have failed to seriously consider such a challenge,

nor does the requirement of a specific objection amount to "an absurdity," as appellant suggests.[4]

d. *The* Miranda *advisements were adequate*

Appellant's contention that the *Miranda* warnings were inadequate fails on the merits in any event. *Miranda* warnings "need not be presented in any particular formulation or 'talismanic incantation.' [Citation.]" (*People v. Wash* (1993) 6 Cal.4th 215, 236; *California v. Prysock* (1981) 453 U.S. 355, 359

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[4] Appellant argues that even if forfeited, his contention is "cognizable on appeal under the 'plain error' standard of review" as articulated in *United States v. Olano* (1993) 507 U.S. 725, and *Johnson v. United States* (1997) 520 U.S. 461. But *Olano* and *Johnson* addressed application of Rule 52(b) of the Federal Rules of Criminal Procedure, which allows consideration of errors affecting a defendant's substantial rights on appeal absent an objection below, rather than the relevant California statute, Evidence Code section 353, subdivision (a), which implements the rule of forfeiture. California courts have repeatedly rejected the federal practice of conducting "plain error" review in the absence of an adequate objection. (See, e.g., *People v. Bryant*, *Smith and Wheeler* (2014) 60 Cal.4th 335, 426–427; *People v. Fuiava* (2012) 53 Cal.4th 622, 727; *People v. McKinnon* (2011) 52 Cal.4th 610, 641–642, fn. 20; *People v. Redd* (2010) 48 Cal.4th 691, 730–731, fn. 19; *People v. Dykes*, *supra*, 46 Cal.4th at p. 757; *People v. Benavides* (2005) 35 Cal.4th 69, 115.) To the extent *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2, applied a "plain error" analysis, that case is distinguishable: the error in *Cleveland* pertained to application of section 654 — an issue cognizable on appeal even absent an objection — and involved a change in the law occurring after trial. (*Ibid.*) In any event, even when the federal plain error doctrine applies, an appellate court has discretion whether or not to correct the forfeited error. (*United States v. Olano*, *supra*, 507 U.S. at pp. 732, 735.) We decline to exercise such discretion here.

(*Prysock*).) *Miranda* warnings "are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' [Citation.] Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' " (*Duckworth*, *supra*, 492 U.S. at p. 203; *Florida v. Powell*, *supra*, 559 U.S. at p. 60; *People v. Wash*, at pp. 236–237.)

For example, courts have concluded *Miranda* warnings were adequate even where the suspect was not expressly told he or she had the right to consult with *appointed* counsel prior to questioning. (See *Prysock*, *supra*, 453 U.S. at pp. 356–361 [advisements adequate although defendant was not expressly told of right to appointed counsel before questioning; advisements did not link the right to appointed counsel to a future point in time]; *Duckworth*, *supra*, 492 U.S. at pp. 197–198 [statement that attorney would be appointed when suspect went to court did not render *Miranda* advisements inadequate]; *People v. Kelly*, *supra*, 51 Cal.3d at p. 948 [advisement that suspect had the right to talk to a lawyer and have him present while being questioned was adequate when coupled with statement that attorney could be appointed before questioning]; *United States v. Loucious* (9th Cir. 2017) 847 F.3d 1146, 1147–1148, 1151 [defendant "need not have been informed explicitly of his right to consult with counsel prior to questioning" where advisements as a whole were adequate]; *People of Territory of Guam v. Snaer* (9th Cir. 1985) 758 F.2d 1341, 1342–1343 [defendant was advised he had " 'a right to consult with a lawyer and to have a lawyer

present' " during questioning, but was not expressly told of the right to consult before questioning; the "right to consult" language was adequate].)

Most analogously to the instant matter, in *State v. Brown* (1997) 132 Wash.2d 529, 940 P.2d 546, the defendant was advised that he had the "right to an attorney and have him present while you're being questioned, and if you can't afford one, one will be appointed for you by the court." (*Id.* at p. 573–574, italics omitted.) The Washington Supreme Court rejected defendant's contention that the advisements were inadequate because they did not explicitly inform him of his right to speak with an attorney before questioning. (*Id.* at pp. 573–575.) The warnings that defendant had the right to an attorney and had the right to have that attorney present during questioning, read together, adequately advised defendant that he had the right to consult with counsel before questioning. (*Id.* at p. 575.) "Although the actual words 'before questioning' were not included in the first part of the statement, the second part which read 'and to have him present when you're being questioned' made that point sufficiently clear." (*Ibid.*)

Courts have similarly held *Miranda* advisements were adequate in the converse situation to that presented here, that is, where a suspect was told he had the right to counsel before, but not during, interrogation. In *Florida v. Powell*, officers told the suspect (1) he had the right to talk to a lawyer before answering questions, (2) a lawyer would be appointed before questioning, and (3) he had the right to " 'use any of these rights' " at any time during the interview. (*Florida v. Powell*, *supra*, 559 U.S. at p. 54.) The high court rejected the contention that the advisements were defective because they failed to convey

defendant's right to the presence of an attorney *during* questioning. (*Id.* at pp. 60, 62.) The advisements did not entirely omit any information *Miranda* required; and taken together, the first and third warnings communicated defendant's right to have an attorney present at all times. (*Id.* at p. 62.) Moreover, to reach the opposite conclusion, a suspect would have to "imagine an unlikely scenario," i.e. that "he would be obliged to exit and reenter the interrogation room between each query," a counterintuitive conclusion a reasonable suspect would not adopt. (*Ibid.*) Given a commonsense meaning, the warnings were sufficiently comprehensive and comprehensible. (*Id.* at p. 63.)

In *People v. Wash*, the suspect was advised he had the right to have an attorney present before questioning and one would be provided at no cost before questioning began. (*People v. Wash*, *supra*, 6 Cal.4th at p. 236.) Our Supreme Court reasoned: "Although the warning . . . deviated from the standard form in failing to expressly state that defendant had the right to counsel both before and *during* questioning, we are not persuaded . . . that the language was so ambiguous or confusing as to lead defendant to believe that counsel would be provided before questioning, and then summarily removed once questioning began." (*Id.* at p. 236.)

Similarly, in *People v. Valdivia*, police advised the suspect he had the right to "speak with an attorney and to have him present before any question," but did not state he had the right to counsel during interrogation. (*People v. Valdivia*, *supra*, 180 Cal.App.3d at p. 661.) *Valdivia* reasoned, "While the warning given to Valdivia deviated somewhat from the accepted form, we are unpersuaded that the words were facially ambiguous or would have caused most people to believe counsel would only be

provided before questioning and then whisked away once it began. A far more reasonable interpretation of the disputed language is that Valdivia had the unfettered right to consult with and have counsel physically present before and at the interrogation . . . ." (*Id.* at pp. 663–664.)

Applying these principles here, we are satisfied the *Miranda* advisements were adequate. None of the four crucial *Miranda* warnings was omitted; appellant was informed of his right to silence, that anything he said could be used against him in court, that he had the right to an attorney, and that an attorney would be appointed for him if he could not afford one. Although the warnings given did not expressly state that appellant had the right to consult with an attorney prior to questioning, in our view the language was not so ambiguous or confusing as to lead a reasonable defendant to assume he had the right to have counsel present during interrogation, but not to consult with that attorney before questioning. Appellant was clearly told he had the right to an attorney then and there, while questioning transpired, and that an attorney would be appointed for him if he could not afford one. In contrast to the authorities appellant cites, the advisements did not link the appointment of counsel to a future point in time.[5] Given that Detective Zuniga

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[5] See *People v. White* (1969) 275 Cal.App.2d 877, 878–879, 882 [defendant asserted right to counsel, but agreed to questioning after being informed attorney would not be available until the next morning]; *Lujan v. Garcia* (9th Cir. 2013) 734 F.3d 917, 921–922, 931–933 [defendant was told he had the right to an appointed attorney, but was not informed he was entitled to counsel before and during questioning; when he invoked his right to counsel, he was told an attorney was not available but would be appointed when he went to court]; *Pope v. Zenon* (9th Cir.

advised appellant he was entitled to an attorney during interrogation, the most natural, commonsense interpretation was that appellant was entitled to consult with counsel before and during questioning. The advisement of the right to remain silent, combined with the advisement that he had a right to counsel "while we speak," reasonably conveyed that he had the right to counsel before and during questioning.

e. *The trial court properly concluded Cruz Membreno impliedly waived his* Miranda *rights*

Cruz Membreno's contention that his statements must be suppressed because he did not make a valid, knowing, and intelligent waiver of his rights likewise fails.

" 'To establish a valid *Miranda* waiver, the prosecution bears the burden of establishing by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary under the totality of the circumstances of the interrogation.' [Citations.]" (*People v. Duff* (2014) 58 Cal.4th 527, 551; *People v. Parker* (2017) 2 Cal.5th 1184, 1216 [the " 'question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused" ' "].)

A "waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.' " (*Berghuis v.*

1995) 69 F.3d 1018, 1022, 1024–1025 [defendant was told he would get an attorney the next day, at arraignment]; *United States v. Garcia* (9th Cir. 1970) 431 F.2d 134 [defendant was given several inconsistent versions of *Miranda*; none was complete; and one included the statement that an attorney could be appointed when she appeared in court].)

Thompkins (2010) 560 U.S. 370, 384.) "It is well settled that law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview and that a valid waiver of such rights may be implied from the defendant's words and actions." (*People v. Parker*, *supra*, 2 Cal.5th at p. 1216; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1269 ["a defendant's decision to answer questions after indicating that he or she understands the *Miranda* rights may support a finding of implied waiver, under the totality of the circumstances"]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169.) " 'In general, if a custodial suspect, having heard and understood a full explanation of his or her *Miranda* rights, then makes an uncompelled and uncoerced decision to talk, he or she has thereby knowingly, voluntarily, and intelligently waived them.' [Citations.]" (*People v. Parker*, at p. 1216; *People v. Cunningham* (2015) 61 Cal.4th 609, 642.) The "prosecution . . . does not need to show that a waiver of *Miranda* rights was express." (*Berghuis v. Thompkins*, at p. 384.) An implicit waiver is sufficient to allow admission of a suspect's statement into evidence. (*Ibid.*)

Here, Detective Zuniga informed appellant of his rights to silence and to appointed counsel, and advised that his statements could be used against him in court. Appellant confirmed that he understood each right. Immediately thereafter, he began answering the detective's questions without hesitation, demonstrating an implied waiver of his *Miranda* rights. Further, nothing in the record suggests coercion. The interrogation was not lengthy. Detective Zuniga did not employ improper interrogation tactics. She questioned appellant in a gentle and nonthreatening manner. He was not induced to confess by means of improper promises. Detective Zuniga did inaccurately inform

appellant that Daughter's sexual assault examination had revealed a vaginal tear, but by that point appellant had already admitted putting his penis in the victim's vagina and, in fact, the examination did reveal minor abnormalities that were consistent with abuse. The detective's single statement was therefore not coercive. (See *People v. Williams* (2010) 49 Cal.4th 405, 443 [deception does not undermine voluntariness unless it is of a type reasonably likely to procure an untrue statement]; *People v. Jones* (1998) 17 Cal.4th 279, 299.) Appellant did not hesitate to answer the detective's questions and never gave any hint that he felt intimidated, wanted a lawyer, wished to terminate the interview, or wished to invoke his right to silence. Under these circumstances, the trial court's finding of implied waiver is supported by substantial evidence.

Appellant argues that no waiver can be implied because (1) he was not expressly advised of his right to consult an attorney before questioning; (2) he speaks little or no English; (3) he had no prior record and was unfamiliar with the criminal justice system; and (4) he has a "limited educational background." We have already addressed his first point, and determined the *Miranda* advisements were adequate. The interview was conducted in Spanish, so the fact he was not a native English speaker does not suggest involuntariness. Appellant cites no persuasive authority for the proposition that his limited education and unfamiliarity with the criminal justice system, by themselves, preclude a finding of an implied waiver. Indeed, despite his limited experience, he told Detective Zuniga he knew his conduct was a crime and knew he would go to jail, indicating he had at least some understanding of the criminal justice system.

f. *Prejudice*

Finally, even assuming arguendo that appellant's challenge to the adequacy of the *Miranda* advisements was not forfeited, and that his confession and apology letter were admitted in violation of *Miranda*, reversal is not required. " 'The erroneous admission of a defendant's statements obtained in violation of the Fifth Amendment is reviewed for prejudice under the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18 . . . . That test requires the People . . . "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " (*People v. Case* (2018) 5 Cal.5th 1, 22; *People v. Elizalde*, *supra*, 61 Cal.4th at p. 542.)

The evidence demonstrating appellant's guilt of the charged crimes was strong and undisputed. The victim credibly testified to the acts of molestation. The defense presented no evidence casting doubt upon the victim's account. The sexual assault examination revealed two abnormalities which were consistent with the victim's account. While there was an absence of significant trauma to the victim's genitalia, according to the nurse the absence of physical trauma is commonplace in child sexual molestation victims. There was a dearth of evidence demonstrating that the victim had any motive to fabricate, or that her testimony was inaccurate, and there was no plausible reason for jurors to disbelieve her. For example, there was no evidence of marital discord or family conflict, nor was there any indication the victim had manifested behavioral issues. Daughter's statement to two friends that her initial revelation of the abuse was a prank was readily explained by her lack of trust of one of the friends. Thereafter, her allegations of abuse to her friends, her mother, and authorities never wavered. Contrary to

appellant's argument, we see no significant uncertainty in the victim's account of events; her memory was not vague as to the key facts that appellant, her father, repeatedly sexually abused her. She was unable to pinpoint dates and could only estimate the number of offenses occurring each year. But the jury was likely to attribute this to her young age and the ongoing nature of the abuse. In any event, to the extent the jury might have questioned the accuracy of her testimony on these points, appellant's confession was not helpful to the prosecution; he claimed to recall far fewer instances of molestation than the victim remembered. In short, even setting aside the confession and letter, there was overwhelming evidence of guilt. The jury convicted appellant of all charges approximately 20 minutes after retiring for deliberations. We are cognizant that a confession is uniquely powerful evidence. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296; *People v. Bradford* (2008) 169 Cal.App.4th 843, 855.) But in the instant matter, it is nonetheless clear beyond a reasonable doubt that, even had the confession and apology letter been excluded, the jury would not have rendered a more favorable result for appellant.[6]

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[6] Of course, had the confession been excluded, there is a possibility appellant might have opted to testify on his own behalf. But, had he denied committing the offenses, his confession would have been admissible to impeach his testimony. Statements obtained in violation of *Miranda* may not be admitted in the prosecution's case-in-chief, but are admissible to impeach a defendant's trial testimony. (*Harris v. New York* (1971) 401 U.S. 222, 225–226; *Oregon v. Hass* (1975) 420 U.S. 714, 722; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1075; *People v. DePriest* (2007) 42 Cal.4th 1, 32.)

2. *Custody credits*

At sentencing, the trial court declined to award appellant any actual or conduct credit. Appellant argues he is entitled to credit for actual time served and to fifteen percent presentence conduct credit. The People agree.

The parties are correct. A defendant is entitled to actual custody credit for "all days of custody" spent in county jail. (§ 2900.5, subd. (a); *People v. Denman* (2013) 218 Cal.App.4th 800, 814; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) Calculation of custody credits begins on the day of arrest and continues through the day of sentencing. (*People v. Denman*, at p. 814; *People v. Rajanayagam*, at p. 48.) According to the probation report, appellant was arrested on May 23, 2016. He was sentenced on June 21, 2017. There is no indication he was released from custody at any point. Thus, he should have been credited for 395 days of actual custody.

A defendant is also entitled to presentence conduct credit pursuant to section 4019. (*People v. Dieck* (2009) 46 Cal.4th 934, 939; *People v. Rajanayagam*, *supra*, 211 Cal.App.4th at p. 48; *People v. Philpot* (2004) 122 Cal.App.4th 893, 909.) Presentence conduct credits for a defendant convicted of appellant's offenses of rape, of a felony punishable by life imprisonment, and of continuous sexual abuse of a child, are limited to 15 percent. (§§ 2933.1, subd. (a); 667.5, subds. (c)(3), (7), (16); *People v. Brewer* (2011) 192 Cal.App.4th 457, 462.) Thus, appellant is entitled to 59 days of presentence conduct credit.

The failure to properly calculate custody and conduct credit is a jurisdictional error that can be corrected at any time. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 591; *People v. Goldman* (2014) 225 Cal.App.4th 950, 961; *People v. Taylor* (2004) 119

Cal.App.4th 628, 647.) Accordingly, we order the judgment modified and the abstract of judgment amended to award defendant 395 days of actual custody credit and 59 days of presentence conduct credit, for a total of 454 days.

DISPOSITION

The judgment is modified to reflect 395 days of actual custody credit and 59 days of presentence conduct credit for a total of 454 days. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J. DHANIDINA, J.