Filed 4/14/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

---

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAYMOND HAROLD BUTTE,<br><br>Defendant and Appellant. | C041978<br><br>(Super. Ct. No. 99F8160) |

APPEAL from a judgment of the Superior Court of Shasta County, Monica Marlow, J. Reversed in part and affirmed in part.

Law Office of Mark L. Christiansen and Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson and Jo Graves, Assistant Attorneys General, Rachelle Newcomb and James Ching, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of DEFENDANT'S CONTENTIONS, FACTS, and parts I through III and parts V through VII of the DISCUSSION.

A criminal information was filed charging defendant Raymond Harold Butte with 35 counts of sexual offenses perpetrated against his daughter R.W., beginning in 1979 and ending in 1998. A jury convicted him on 31 counts and deadlocked on the remaining four. The trial court sentenced him to a total prison term of 188 years and eight months.

In the unpublished portion of the opinion, we reverse 18 counts because, in light of *Stogner v. California* (2003) 539 U.S. ___ [156 L.Ed.2d 544] (*Stogner*), they are barred by the statute of limitations. In the published portion, we shall reject defendant's contention that the information provided defendant with inadequate due process notice of the charges. We shall conclude that, because defendant waived a preliminary hearing, he has forfeited his claim of inadequate due process notice.

DEFENDANT'S CONTENTIONS

Defendant states in his supplemental opening brief that several arguments in his original opening brief, filed before the United States Supreme Court's decision in *Stogner, supra,* 539 U.S. ___ [156 L.Ed.2d 544]), are moot in light of *Stogner*. In *Stogner*, the high court found Penal Code section 803, subdivision (g), under which all counts in this case alleging offenses prior to 1993 were pleaded, to be unconstitutional as applied retroactively before the statute's effective date. As we shall explain, the People generally concede that those counts must be dismissed.

With this in mind, defendant contends: (1) Counts 1 through 18 must be dismissed with prejudice because they are beyond the statute of limitations. (2) Counts 21 and 22, and one count of counts 33 through 35, are not supported by substantial evidence. (3) Defendant's statements to Deputy Sheriff Potts should have been suppressed because they were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). (4) Defendant was denied due process by the vagueness in the charging periods on numerous counts and by the admission of prejudicial evidence which was offered to corroborate R.W.'s testimony as to the pre-1993 offenses. (5) The trial court erred in sentencing defendant on the non-violent subordinate offenses; under section 1170.1, those terms cannot exceed five years. (6) The trial court erred by sentencing on counts 21 through 22 and 30 through 32 under Penal Code section 667.6; they must be sentenced under Penal Code section 1170.1. (7) The trial court erred in calculating presentence custody credits. (8) The trial court erred by failing to instruct the jury on the range of dates in which it could find the offenses were committed.

The People concede that defendant's convictions on counts predating the running of the statute of limitations must be reversed, but assert that count 12 does not fit within that category. The People also concede defendant's sentencing claims of error.

We shall accept the People's concessions; however, disagreeing with the People that count 12 lies outside the statute of limitations bar, we shall reverse as to all of the first 18 counts. We shall reject the rest of defendant's contentions and affirm his convictions on the remaining counts, but shall remand for resentencing on those counts and for recalculating defendant's presentence custody credits.[1]

---

[1] The offenses alleged are as follows:

1. Section 288, subdivision (a) (counts 1-2): Lewd and lascivious act upon a child under the age of 14.

2. Section 288, subdivision (b) (counts 3-4): Lewd and lascivious act upon a child under the age of 14, committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

3. Section 288a, subdivision (c) (counts 5-6, 11-14, 19-22): Oral copulation with another person under the age of 14 and more than 10 years younger, or against the victim's will and by means of force, violence, duress, menace, fear of immediate and unlawful bodily injury upon the victim or another person, or threatening to retaliate in the future against the victim or any other person.

4. Section 288a, subdivision (b)(2) (counts 7-8): Oral copulation by a person over the age of 21 with another person under the age of 16.

5. Section 288a, subdivision (b)(1) (counts 9-10): Oral copulation with a person under the age of 18.

6. Section 289, subdivision (a) (counts 15-18, 23-26): Sexual penetration against the victim's will by means of force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person.

7. Section 286, subdivision (c) (counts 27-32): Forcible sodomy.

8. Section 285 (counts 33-35): Incest.

FACTS

The following chart sets out the counts, offenses, and dates alleged in the information, the verdicts, and the sentences (undesignated statutory references are to the Penal Code).

| Count | Violation of section | Time of Offense | Verdict | Term of Imprisonment |
|---|---|---|---|---|
| 1 | 288, subdivision (a) | 1/1/79-2/1/84 | guilty | eight years (upper term) |
| 2 | 288, subdivision (a) | 1/1/79-2/1/84 | guilty | two years (middle term) |
| 3 | 288, subdivision (b) | 1/1/79-2/1/84 | guilty | eight years (upper term) |
| 4 | 288, subdivision (b) | 1/1/79-2/1/84 | guilty | eight years (upper term) |
| 5 | 288a, subdivision (c) | 1/1/79-2/1/84 | deadlocked | |
| 6 | 288a, subdivision (c) | 1/1/79-2/1/84 | deadlocked | |
| 7 | 288a, subdivision (b)(2) | 2/2/84-2/1/85 | guilty | eight months (middle term) |
| 8 | 288a, subdivision (b)(2) | 2/2/85-2/2/86 | guilty | eight months (middle term) |
| 9 | 288a, subdivision (b)(1) | 2/2/86-2/1/87 | guilty | eight months (middle term) |
| 10 | 288a, subdivision (b)(1) | 2/2/87-2/1/88 | guilty | eight months (middle term) |
| 11 | 288a, subdivision (c) | 2/2/84-2/1/88 | guilty | eight years (upper term) |
| 12 | 288a, subdivision (c) | 2/2/84-2/1/98 [*sic*] | guilty | eight years (upper term) |
| 13 | 288a, subdivision (c) | 1/1/86-2/1/88 | guilty | eight years (upper term) |
| 14 | 288a, subdivision (c) | 1/1/86-2/1/88 | guilty | eight years (upper term) |
| 15 | 289, subdivision (a) | 2/2/84-2/1/88 | guilty | eight years (upper term) |

| | | | | |
|---|---|---|---|---|
| 16 | 289, subdivision (a) | 2/2/84-2/1/88 | guilty | eight years (upper term) |
| 17 | 289, subdivision (a) | 1/1/87-2/1/88 | guilty | eight years (upper term) |
| 18 | 289, subdivision (a) | 1/1/87-2/1/88 | guilty | eight years (upper term) |
| 19 | 288a, subdivision (c) | 5/1/93-1/31/98 | deadlocked | |
| 20 | 288a, subdivision (c) | 5/1/93-1/31/98 | deadlocked | |
| 21 | 288a, subdivision (c) | 5/1/93-1/31/98 | guilty | eight years (upper term) |
| 22 | 288a, subdivision (c) | 5/1/93-1/31/98 | guilty | eight years (upper term) |
| 23 | 289, subdivision (a) | 5/1/93-1/31/98 | guilty | eight years (upper term) |
| 24 | 289, subdivision (a) | 5/1/93-1/31/98 | guilty | eight years (upper term) |
| 25 | 289, subdivision (a) | 5/1/93-1/31/98 | guilty | eight years (upper term) |
| 26 | 289, subdivision (a) | 5/1/93-1/31/98 | guilty | eight years (upper term) |
| 27 | 286, subdivision (c) | 5/1/93-12/31/97 | guilty | eight years (upper term) |
| 28 | 286, subdivision (c) | 5/1/93-12/31/97 | guilty | eight years (upper term) |
| 29 | 286, subdivision (c) | 5/1/93-12/31/97 | guilty | eight years (upper term) |
| 30 | 286, subdivision (c) | 5/1/93-12/31/97 | guilty | eight years (upper term) |
| 31 | 286, subdivision (c) | 5/1/93-12/31/97 | guilty | eight years (upper term) |
| 32 | 286, subdivision (c) | 5/1/93-12/31/97 | guilty | eight years (upper term) |
| 33 | 285 | 4/27/96-1/1/98 | guilty | stayed (§ 654) |
| 34 | 285 | 4/27/96-1/1/98 | guilty | stayed (§ 654) |
| 35 | 285 | 4/27/96-1/1/98 | guilty | stayed (§ 654) |

*Counts 1 through 18*

The victim, R.W., was born on February 2, 1970. Counts 1 through 18 allege offenses committed against R.W. when she was a

minor, ranging from 1979 to 1988. (The information alleges a terminal date of 1998 as to count 12; however, as we explain below, on the whole record this date appears to be a mere typographical error overlooked by the parties and the trial court.) Because we must reverse defendant's convictions on these counts under compulsion of *Stogner, supra*, 539 U.S. ___ [156 L.Ed.2d 544] we discuss these allegations only to establish the context for the remaining counts and the relationships among the key persons in the case.

R.W. testified that defendant's molestations began when she was around 10 years old and the family was living in Bakersfield, where they continued to live until she was around 13.[2] (R.W. was born on February 2, 1970; thus this period includes the years from 1979 to 1984, covering the charges alleged in counts 1 through 6.[3]) One evening in the living room, where she slept, defendant played with her private parts and fondled her. On at least one occasion during the afternoon when R.W.'s stepmother was at work, defendant forced R.W. to suck his penis. Over a period of a couple of years, defendant fondled R.W. at least 10 times, touching her "tits" and vagina and sometimes putting his finger inside her. R.W. was frightened of

---

[2] In addition to defendant and R.W., the family included defendant's second wife M.B., his son, and four cousins of R.W. (J., K., L., and M.) who moved in after their parents were killed. K. and L. testified under Evidence Code section 1108 that defendant sexually abused them and their sister M.

[3] As noted, the jury deadlocked on counts 5 and 6.

defendant because he beat her and the other children in the home, and because when she was eight or nine years old he told her he had killed someone who had "messed with my mom." He often brought up this alleged killing when he molested R.W.

When R.W. was 12 or 13 years old, the family moved to Northern California. Throughout the remainder of R.W.'s minority (up to the beginning of 1989) they relocated frequently. R.W. had trouble recalling all their residences or the exact order in which they lived in each. However, she remembered that defendant continued to molest her throughout the period 1984 through 1988, and that during these years he increasingly engaged in forcible acts, including oral copulation and penetration by means of force or threat. (This period takes in counts 7 through 18, with the caveat that count 12 was alleged in the information to run through 1998.)

The family moved to Redding before R.W. turned 14, and stayed for six to eight months at the home of defendant's brother. While there, defendant continued his prior activities and added new ones, including 10 to 12 instances of forced oral copulation and the insertion of his penis into her vagina. Once he threatened her with a pistol.

The family next moved to Oregon, where they stayed only two or three months; R.W. may or may not have reached the age of 14 by then. During that period defendant molested her "quite a few" times. Once he dragged her upstairs by the hair while threatening to kill her.

Over the next four years, after the family moved back to Northern California, they relocated often; R.W. could not be sure exactly where they lived at any particular time or exactly which events occurred at which places. She recalled that they returned briefly to defendant's brother's home, then moved on to Red Bluff or Cottonwood, then to Johnson Park, then to Burney. Defendant's molestations continued as before at each new residence. When the family lived at Cottonwood, R.W. became pregnant, but miscarried.

Around the time R.W. turned 18, she became pregnant again. On June 10, 1989, after she had turned 18, she married E.S., a man of 65; according to R.W., defendant forced her to do so in order to conceal his paternity. On September 12, 1989, she gave birth to a son, A.J.[4] R.W. never lived with or had sexual relations with E.S.

*Counts 19 through 35*

These offenses were alleged to have occurred during the period 1993 through 1998.[5] During most of this time, R.W. was living at the family's residence outside Burney, an isolated "shack" without utilities on approximately 30 acres of land.

---

[4] R.W. named E.S. as the father on the birth certificate. However, after signing up for welfare and food stamps she informed family support people, at defendant's instigation, that the father was "Bob" in Kentucky; defendant got his brother to attest falsely that R.W. had been living in Kentucky at the time. R.W. was eventually convicted of perjury over this story. Later, defendant told her to name one Richard Brinkman as the father.

[5] As noted, the jury deadlocked on counts 19 and 20.

While living there, R.W. started raising and selling hunting dogs. She bought a trailer and put it on the property when she was 22 or 23, but she testified that it was merely "for show"; defendant forced her and A.J. to live in the shack.

The family moved to the Burney "shack" in 1991. While they lived there, defendant continued his former practices; he also began to engage in sodomy and penetration by force or threat. He would insert flashlights and bottles into R.W.'s anus and vagina, routinely threatening to kill her or others she cared about if she tried to leave. He also began using hollowed-out cucumbers, which he would place over his penis before inserting it into her. He would also put his finger into her vagina whenever he thought she had been with someone else. He would beat her in the middle of the woods after stripping her, and once hit her in the head with a rock. Because of the threats to kill others, she did not try to leave permanently even after she had acquired a gun. (This testimony correlates with counts 21 through 22, alleging two counts of oral copulation by force, duress, or threats to retaliate (§ 288a, subd. (c)) during the period May 1, 1993, to January 31, 1998; counts 23 through 26, alleging four acts of sexual penetration by means of force, duress, or threats to retaliate (§ 289, subd. (a)) during the period from May 1, 1993, to January 31, 1998; counts 27 through 32, alleging six acts of forcible sodomy (§ 286, subd. (c)) during the period from May 1, 1993, to December 31, 1997; and

counts 33 through 35, alleging three acts of incest (§ 285) occurring between April 27, 1996, and January 1, 1998.)

At some time during this period, R.W. moved into Redding and stayed in the home of an elderly friend, A.S., whom she had met through hunting; she was trying to get her high school diploma. She lived there about six months, along with defendant's wife and son, while defendant remained at the shack. During these six months, defendant did not engage in sexual activity with R.W.

During this same period, R.W. met B.W. and began seeing him.[6] She hid this fact from everyone except her brother, but defendant eventually found out.

At some point, she ran away to Oregon with B.W. and her son A.J. She did not see defendant for a long while after that.

Sometime around Christmas 1997, defendant persuaded R.W. and B.W. to come down to Redding so that he and his wife could see A.J.[7] They met at a restaurant. As defendant and R.W. spoke outside the restaurant, defendant threatened to shoot B.W. (who was inside) if she did not come back with defendant. R.W. went with defendant to A.S.'s house, where defendant took A.J. and drove them all back to his shack. Defendant asked her if she preferred B.W. because he "had a bigger penis than" defendant.

---

[6] R.W. and B.W. married in February 2001.

[7] R.W. remembered these events as occurring in December 1998, but that could not have been correct because she told her story to Shasta County Deputy Sheriff Sherman Potts in July 1998. R.W. admitted to not being good with dates.

After they drove back to A.S.'s house, R.W. got defendant to take a shower and then escaped while he was in the shower. She grabbed A.J. and drove to the sheriff's station in Redding, where B.W. met her.

At some time after these events, R.W. told B.W. and a friend about what defendant had done to her. In July 1998, she contacted Deputy Sheriff Potts at the Burney substation; he interviewed her, and she wrote out a statement. At Potts's request, she made two phone calls to defendant, which were recorded.

In July 1998, Deputy Sheriff Potts conducted a videotaped interview of defendant at the Burney substation, which was played at trial; a transcript was provided to the jury. (We explain the circumstances of this interview in part III of the Discussion, where we address defendant's *Miranda, supra,* 384 U.S. 436, claim.) Defendant denied having sex with R.W. when she was a minor, but later admitted it had happened when she was 15 or 16, though not before. He admitted they had had a sexual relationship after she became an adult, but insisted it was consensual and he had tried to end it; he portrayed her as the dominant partner in the relationship, claiming "she owned me." He admitted using a flashlight and a cucumber during sexual acts, but claimed she asked him to do so. (In addition, he admitted having had sex "one time" with R.W.'s cousin M. and "a few times" with R.W.'s cousin L., but blamed the girls for their sexual aggressiveness: "[A]ll they do is just grab you and play

with ya [*sic*] all the time."[8]) Defendant denied that he was A.J.'s father, though R.W. had told him he was and he had been "probably a little worried" about it; however, he insisted R.W. married E.S. because she wanted to. Defendant claimed R.W. was telling her story now only because he was threatening to have B.W. jailed for beating A.J.

Defendant's trial testimony was generally consistent with this story. He admitted having had sex with R.W. but only by mutual consent, and (except once when she was 15 or 16) only after she became an adult. He never used force or threats of any kind. Nor did he order her to marry E.S. or to name anyone in particular as A.J.'s father. R.W. could have left any time after they moved to the Burney residence and she acquired dogs and guns, but she never said she wanted to leave. Defendant did not know until recently that R.W. was his biological daughter, because his first wife had said someone else was the father.

DISCUSSION

I

Defendant contends his convictions on the first 18 counts must be reversed and the charges dismissed with prejudice because these counts were filed beyond the statute of limitations and the United States Supreme Court has declared section 803, subdivision (g) (§ 803(g)), under which they were brought, unconstitutional as to acts which terminated before the

[8] However, defendant denied having sex with R.W.'s female cousin K.

statute took effect. The People concede the point except as to count 12, which was filed with a terminal date of February 1, 1998 (unlike counts 1 through 11 and 13 through 18, all alleged to terminate no later than February 1, 1988).[9] We conclude that defendant is correct as to all 18 counts.

Section 803(g), which took effect on January 1, 1994 (Stats. 1993, ch. 390, § 1, pp. 2224-2226; (§ 803(g)(3)(A)), currently provides in part:

"(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

"(2) This subdivision applies only if both of the following occur:

"(A) The limitation period specified in Section 800 or 801 has expired.

"(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's

---

[9] The statute of limitations for the offense charged in count 12 (§ 288a, subd. (c), punishable by up to eight years in prison) is six years. (§ 800.) Defendant does not dispute that if count 12 truly covered acts up to 1998 it would have been filed timely.

allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals."

In *Stogner, supra*, 539 U.S. ___ [156 L.Ed.2d 544], the United States Supreme Court held that the Ex Post Facto Clause of the United States Constitution (U.S. Const., art. I, § 10, cl. 1) bars the use of section 803(g) to prosecute a defendant for offenses as to which the statute of limitations had expired before section 803(g) took effect. (*Stogner, supra,* 539 U.S. ___, ___ [156 L.Ed.2d at pp. 551-558].) The parties agree that *Stogner* controls here and that, with respect to counts 1 through 18, defendant's convictions must be reversed, except for defendant's conviction on count 12. The People contend count 12 survives *Stogner*; however, our review of the record fails to support the People's contention.

The "Amended Consolidated Information" on which the case went to trial states immediately after count 18: "The District Attorney alleges that prosecution of offenses alleged in this complaint are commenced pursuant to [] Section 803[](g)(3)(A)(iii)." Notwithstanding the apparent 1998 terminal date for count 12, the information does not differentiate in this respect between count 12 and the others in the group 1 through 18. Nor did the trial court, the parties, or the jury.

Reading the information to the jury at the start of trial, the trial court stated: "Count 12 charges a violation of Section 288A(c) [*sic*] of the Penal Code, a felony, it being charged the defendant on and between the second day of February 1984 and the first day of February *1988,* did willfully and unlawfully participate in an act of oral copulation with R[.W]." (Italics added.) Neither counsel objected to this statement.

The prosecutor's opening statement laid out the chronology of the information. As relevant here, the prosecutor stated: "Counts 11 through 18, this is a time period the People allege in [R.W.]'s life between the age of fourteen and seventeen years old." The prosecutor made no exception for count 12. R.W. turned 18 on February 2, 1988.

The trial court instructed the jury that counts 1 through 18 were filed pursuant to section 803(g) and the jury would have to make the findings required under that provision if it found defendant guilty on those counts. In closing argument, the prosecutor said the same. The prosecutor added that she and defense counsel had stipulated the statute of limitations had expired on all of these counts. Finally, the prosecutor stated: "Counts 1 through 18 allege only when [R.W.] was under 18."

The jury received verdict forms which required a true finding on the section 803(g) allegation as to all counts from 1 through 18, including count 12. The jury made that finding as to all those counts, including count 12.

The People acknowledge the "temptation" to infer that the 1998 terminal date on count 12 in the information is a typographical error. However, the People assert we would have to "speculate" to draw that inference. The People are mistaken. Given all of the above, and lacking specific evidence (which the People do not cite) showing that count 12 covered an additional 10 years beyond the other counts pleaded in the same part of the information, we see no other inference to draw.

Moreover, having consistently taken the position in the trial court that count 12 applied to offenses committed before R.W. was 18, and that count 12 was being prosecuted pursuant to section 803(g), the People may not now change their theory of the case on appeal. "It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant. [Citations.]" (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.)

Defendant's convictions and sentences on count 1 through 18, including count 12, must be reversed.[10]

---

[10] This conclusion makes it unnecessary to address defendant's contention that there was insufficient evidence of corroboration with respect to counts 1 through 18 as required by section 803(g).

II

Defendant contends that his convictions on counts 21 and 22 (oral copulation by force or threat between May 1, 1993, and January 31, 1998) and on at least one of the three counts 33 through 35 (incest between April 27, 1996, and January 1, 1998) must be reversed due to insufficient evidence.[11] We disagree.

We review a claim of insufficient evidence by determining whether substantial evidence supports the defendant's conviction, viewing the evidence in the light most favorable to the judgment. Substantial evidence is "evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In a case alleging multiple counts of sexual assault where the victim testifies credibly to at least as many separate offenses as are charged, the evidence is sufficient to support convictions on those charges even if the victim is inconsistent as to the exact number of acts committed. (See *People v. Jones* (1990) 51 Cal.3d 294, 316; *People v. Newlun* (1991) 227 Cal.App.3d 1590, 1602.)

As to counts 21 and 22, R.W. testified that after she turned 18 and gave birth to A.J., defendant continued to do the assaultive acts he had begun when she was a minor, as well as

---

[11] As mentioned above, the trial court stayed sentence on counts 33 through 35 under section 654.

adding new ones; the former included oral copulation by force or threat. She testified that he abused her more or less continuously when they lived on the Burney property beginning in 1991, frequently beating her and threatening to kill her, until she finally left for good shortly before making her statement to Deputy Sheriff Potts (i.e., sometime in 1998, though she misremembered the year as 1999). This was substantial evidence of at least two acts of oral copulation by force or threat during the period 1993 through 1998. (See *People v. Jones, supra*, 51 Cal.3d 294, 316; *People v. Newlun, supra,* 227 Cal.App.3d 1590, 1602.)

Defendant admits he told Deputy Sheriff Potts that he and R.W. would have sex "every once in a while," including oral sex, after she was 22. He concludes from this admission: "Thus, there was evidence of at least one act of oral copulation, but not of more than one." First, "every once in a while" in ordinary usage means more than once, and defendant never said oral sex happened only once. Second, the jury did not have to take defendant's story as the last word on anything in this case; thus, the jury was not bound by the number of acts defendant admitted to. Finally, defendant's admission was not inconsistent with R.W.'s testimony that every form of sexual assault he committed occurred far more than once after she turned 22.

As to counts 33 through 35, defendant asserts in his opening brief only that there is no specific evidence to support

more than two such counts between the dates alleged (April 27, 1996, to January 1, 1998). So far as this bare assertion may be deemed an argument, we disagree for the reasons already stated.[12]

Defendant has not shown grounds for reversal as to counts 21 and 22 or counts 33 through 35.

III

Defendant contends the trial court erred by denying his pretrial motion to suppress his statements to Deputy Sheriff Potts. According to defendant, he was in custody during the interview but received no *Miranda, supra,* 384 U.S. 436, warnings. The trial court found, on the contrary, that he was not in custody and made his statements voluntarily. We agree with the trial court.

**Background**

Defendant moved to suppress his statements (which he called a "Confession"), alleging they were obtained in violation of his federal and state constitutional rights to silence and due process.

Having reviewed the videotape and transcript of the interview, the trial court held a hearing on the motion. Defendant and Deputy Sheriff Potts testified, as did two other deputies whom defendant claimed were involved in his detention.

---

[12] Defendant makes more detailed factual arguments about these counts in his reply brief. We disregard these arguments because they were not raised in his opening brief. (See *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

*Potts's testimony*

On the day of the interview, Potts was on a rural highway in an unmarked car when he saw defendant driving up the road toward town. Potts knew from the pretext phone calls he had had R.W. make to defendant that defendant would be en route at that time. He wanted to talk to defendant about R.W.'s accusations immediately, so he directed a uniformed deputy in a marked car to flash his lights and pull defendant over. Potts was not in uniform, but had his gun on his belt in a holster.

After defendant pulled over, Potts said that he wanted to talk to defendant now. Defendant said he was on his way to an appointment with R.W. Potts asked defendant to meet him at Potts's office, where they could talk in a quiet comfortable setting; defendant agreed to do so. Potts made clear that he wanted defendant to come in now rather than after seeing R.W., but did not tell him either that he had to come in now or that he did not have to. The conversation was "polite" on both sides. Defendant did not say he would go in only if he were under arrest. Potts did not pull his gun out of his holster, search defendant, or handcuff him. Defendant never got out of his truck during the conversation.

Defendant drove to the Burney substation of the Shasta County Sheriff's Office; Potts followed in his own car. Defendant parked in front and walked into the building with Potts. The substation is not a locked facility. There were two

or more deputies on duty, but Potts did not remember whether defendant had any contact with them.

Potts did not display his gun, handcuff defendant, or search him at the substation. Potts asked if defendant wanted water or to use the restroom; defendant used the restroom.[13] Defendant then sat on a couch in Potts's office, while Potts sat behind his desk. Defendant was nearer than Potts to the office door, which was unlocked.

Defendant asked several times if he was under arrest, but never tried to leave. Potts did not tell him either that he was or was not free to leave. However, Potts twice thanked defendant for agreeing to come for the interview. Potts also did not tell defendant he was under arrest and did not read him his *Miranda, supra,* 384 U.S. 436, rights. Nor did he tell defendant he was videotaping the interview.

The interview was conversational in tone. After about 40 minutes, Potts thought the interview was over and said he was going to make a phone call to the district attorney. In Potts's opinion, defendant was free to leave then, but Potts did not say so. Potts did not remember whether deputies were in the hallway outside. As he and defendant were talking in the hallway, defendant said he had remembered more things Potts should know, so they went back inside and resumed the interview.

---

[13] The videotape of the interview, which we have viewed at defendant's request, shows that he had a bottle of water throughout the interview.

At this point in the proceedings, Potts and defendant talked about a "dirk or dagger" which Potts had confiscated from defendant.[14] Potts recalled that the weapon was in plain view, either in defendant's belt or in his truck as he and Potts walked into the substation. Potts did not recall searching defendant's truck or asking any other officer to do so. In Potts's recollection, he advised defendant that possessing and concealing such a weapon could get him arrested, but never told defendant he would arrest him for it.

When Potts resumed the interview, he again did not tell defendant it was being videotaped. The entire interview lasted about one hour and 40 minutes. Potts never threatened defendant or promised him anything during the interview.

When the interview ended, defendant was allowed to leave. He was arrested several months later.

---

[14] The second part of the interview begins as follows, according to the transcript:

"[Potts]: Okay. Just help yourself there and go ahead and, uh, have a seat there when you're . . . (inaudible). (Inaudible) this step right now (inaudible) that's our job. Can get you arrested right now, see, I can book ya [*sic*] right . . .

"[Defendant]: Why?

"[Potts]: 'Cause you can't just, it's and [*sic*] illegal, it's an illegal weapon. It's a two-sided dirk and dagger. That's a prohibited weapon.

"[Defendant]: Really?

"[Potts]: Yeah. See, that's why you gotta be careful, you gotta."

After this exchange, Potts dropped the subject and did not return to it.

*The officers' testimony*

Deputy Durflinger stopped defendant on the road at Potts's request. He had no independent recollection of anything else about the incident, however. He did not recall going to the substation after the traffic stop; he believed he had gone his separate way after assisting Potts.

Detective Larson, the other officer named by defendant as a participant in these events, did not recall anything about them. As far as he could remember, he was not present at the traffic stop or the substation.

*Defendant's testimony*

When stopped on the road, defendant got out of his truck. He explained to Potts that he had a very important appointment to see R.W. about B.W.'s beating of A.J. Defendant told Potts at least four times that he would not go in to the substation then unless he was under arrest. Potts said, referring to deputies Durflinger and Larson, "That's what they're here for," and called them over. Everyone was standing on the road between defendant's truck and Potts's car. The conversation lasted "quite a while." No one said defendant was under arrest, cuffed him, searched him, or pointed a gun at him; however, Deputy Durflinger touched his handcuffs as if preparing to use them, and Potts motioned to Durflinger and Larson to come over to defendant and trap him.

The officers were about to take defendant to the substation in their car. However, after he protested that his truck was

his family's sole transportation and his wife would be stranded at work if the officers left it by the roadside, they allowed him to drive it so his wife could pick it up at the substation.[15] Before he started, Potts told defendant that if he went anywhere but the substation he would be charged with resisting arrest.

Defendant proceeded to the substation, followed by Potts in his car and the other officers in theirs. After parking in front, he left the truck unlocked with his keys inside.

The officers escorted him in, one on each side. They took him through booking, then to a cell in the back of the building. However, Potts told them to wait because he wanted to talk to defendant. They took him back to Potts's office, then waited outside in the hallway. They did not search or handcuff him at the cell, but they had guns. Potts displayed his own gun when he took his coat off.

Potts never told defendant that he could leave or make a phone call; he also did not mention that the interview was being taped. Defendant did not recall Potts asking about water or a restroom.

After the interview apparently ended, Potts said they needed to go out to defendant's truck. The officers in the hallway went along with them. Potts looked inside the truck, found the knife under the edge of the seat, and removed it; meanwhile, one officer took defendant's temporary registration

---

[15] Defendant did not explain how his wife was supposed to come in and pick up the truck if she had no other transportation.

sticker out of the rear window. Defendant told the officers they had no right to search his truck.

After removing the knife, Potts told defendant it was illegal. Defendant could spend a year in county jail if he did not say what Potts wanted. In the alternative, Potts would call in the FBI because it was a federal offense to possess such a weapon, and defendant would spend a long time in federal prison.[16]

The officers took defendant back into the substation, saying he had to go in. They stayed with him and would not let him leave.

During the second part of the interview, there was more discussion of the weapon. Defendant thought he asked whether he was "still under arrest." Again, he was not told he was free to leave.

At the end of the interview, Potts allowed him to drive away, but with strict instructions that he could go only to A.S.'s house and stay there; he could not go to his sister's house (where he was living at the time) because there were children there. Potts told him to remember that he was still under arrest.[17]

---

[16] Defendant admitted that according to his story Potts had arrested him, then allowed him to drive the truck to the substation, even though Potts knew the truck contained a weapon.

[17] Defendant did not explain why the officers, having let him drive the truck to the substation only so that his wife could come and get it there, then let him drive it away.

*The trial court's ruling*

The trial court denied defendant's suppression motion, reasoning as follows:

"In terms of whether or not the defendant was in custody, the court uses the following standards. The court determines whether he was deprived of freedom of action in any significant way. Whether there was a restraint on his freedom of movement to the degree associated with a formal arrest. The court is mindful that it is the reasonable person's standard that applies. The court feels the subjective state of mind of the defendant in this case is pertinent, and I'll state the reasons for that now, and that is because his testimony was clear that foremost in his mind at the time of the stop was getting information to officers about a meeting with [R.W.] about abuse by [R.W.]'s husband of A.J. and that he wanted law enforcement to know about that. And also it is clear from the defendant's testimony that he voluntarily was complying with a request to go to the substation, not because he was in custody, but because he was subjectively trying to determine what was in his best interest. And he thought he would get in further trouble than he already may have been in if he took any action other than going to the substation. That doesn't mean he's in custody. It means that he's deciding in his own mind what is the best course of action for him, what is in his best interests.

"He weighed the advantages and disadvantages in his mind and decided to go to the substation and cooperate and to report

what B[.W.] was[,] he thought[,] doing to A.J. in terms of abuse.

"So as the court considers the totality of the circumstances, certainly there was not a formal arrest. In terms of detention, even if this could be considered a detention, it was not so long that it would indicate that it turned into a custody situation. The location was a substation in a small town where it was clear that doors were unlocked, that he did not need assistance to leave the substation if he chose to do so. The ratio of officers to the [defendant] . . . [¶] . . . [¶] was not such that this would turn this into a custody situation, and the demeanor of the officer including the nature of the questioning was such that it would not turn this into an in custody situation.

"So the court finds that he was not in custody at the time, so the Miranda warnings were not required.

"Going to the next step, there was an interrogation, and then going to the third step, this involves whether the statements given during the interrogation were voluntary[;] the court finds that they were voluntary.

"The court is mindful of the burden of proof that the confessions are presumed involuntary. It is the duty of the state to prove that the statements are voluntary. The court feels that burden has been met. I'm considering the totality of the circumstances. I have reviewed the videotape twice, I've reviewed the transcript twice, and I have heard the testimony at

this 402 hearing and am persuaded that . . . the statements were voluntary, that there was no coercive police activity, and the voluntariness appears from the record with unmistakable clarity in my mind."

**Analysis**

In reviewing a claim of *Miranda, supra,* 384 U.S. 436, violation, we must determine if the defendant was in custody--"that is, whether examining all the circumstances regarding the interrogation, there was a '"formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' (*California v. Beheler* (1983) 463 U.S. 1121, 1125.) As the United States Supreme Court has instructed, 'the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.' (*Berkemer v. McCarthy* (1984) 468 U.S. 420, 422, fn. omitted.)" (*People v. Stansbury* (1995) 9 Cal.4th 824, 830.) In reviewing the trial court's ruling, we accept the court's resolution of conflicting evidence if supported by the record, but independently review its conclusions of law. (*Id.* at p. 831.)

The trial court expressly found that defendant was not in custody at any point. This finding necessarily included the implied finding that so far as defendant's account differed from those of the officers it was not credible. We must accept the trial court's resolution of the evidentiary conflicts. (*People v. Stansbury, supra,* 9 Cal.4th 824, 831.)

Furthermore, our own review of the record, including our viewing of the videotape, supports the trial court's implied finding. We have already mentioned defendant's admissions that no officer formally arrested, handcuffed, or searched him, and that the officers allowed him not only to drive to the substation in his own truck but to drive away after the interview. We have also noted some gross implausibilities in defendant's story. In addition, we observe the following:

The interview took place in an office, not an interrogation room. It began with Deputy Sheriff Potts thanking defendant for coming in; it ended with similar remarks. These remarks would not have been made if defendant had been ordered to come to the police station. The interview was conversational in tone; indeed, at times it resembled a therapist-patient session, with Potts offering psychological explanations for defendant's alleged conduct as a device to get him to open up. Potts's reminiscences about previous encounters with defendant--often in response to defendant's complaints to the police--show that the two had a preexisting relationship going back many years. Finally, Potts not only did not say at any time that defendant was under arrest or going to jail, but said at first that he did not know yet whether that would happen and ultimately said he would not arrest or jail defendant at that time.

The only problematic portion of the interview as to *Miranda, supra,* 384 U.S. 436, is that in which Potts and defendant discuss the "dirk or dagger," set out above in

footnote 14. Under all the circumstances, however, this does not show defendant was in custody. First, as noted, Potts told him several times, both before and after this interchange, that he was not now under arrest. Second, the words Potts spoke are consistent with his recollection that he was merely advising defendant hypothetically about the potential legal danger of carrying such a weapon. Finally, we see no causal connection between this brief discussion and anything defendant said about R.W.'s accusations.

Defendant eloquently describes the coercion employed to stop him on the road and get him to the substation, then concludes that this coercion shows "[t]he indicia of arrest were present." He notes that Potts immediately brought up the grave accusations made by R.W. He observes that the interview did not take place in "a coffee shop or some other comfortable private place" which would have provided "neutrality" and "mutuality," but rather in a "closed, if not locked, office in the station house with the defendant seated on a low sofa and his interrogator behind a normal desk," a setting which made Potts's authority over defendant clear. He points out that the investigation was clearly focused on him. He asserts that Potts's "attitude was one of a lecturer and inquisitor." He complains that he was not offered "some alternative arrangement . . . for a meeting or phone call at a more convenient time." He even protests that his "appointment [with R.W.] was not honored."

What defendant does not do in laying out this bill of particulars is to cite any authority holding that these circumstances, individually or collectively (even taking his version of them at face value), give rise to custody. It is well settled that the police may detain a person for investigation, interview him at a police station, and even ask him pointed questions implying that he might be guilty of a crime, all without creating custody for purposes of *Miranda, supra,* 384 U.S. 436. (See, e.g., *California v. Beheler, supra*, 463 U.S. 1121, 1125; *Oregon v. Mathiason* (1977) 429 U.S. 492, 495; *People v. Stansbury, supra*, 9 Cal.4th 824, 833-834.) Furthermore, *Miranda* does not come into play merely because the police fail to suit their actions to a suspect's convenience or to accommodate his preexisting schedule.

Defendant also criticizes the trial court's reliance on his subjective state of mind. We need not decide whether the trial court should have done so. We review the court's ruling, not its reasoning. (*California Aviation, Inc. v. Leeds* (1991) 233 Cal.App.3d 724, 731.)

For all the above reasons, defendant's *Miranda, supra,* 384 U.S. 436, claim fails.

IV

Defendant contends his demurrer to the information should have been sustained because the charges were too vague to address as they were alleged; according to defendant, this vagueness violated his rights to notice and due process. We

agree with the People that defendant has forfeited this claim of error by waiving preliminary hearing.

This case had a complicated pretrial procedural history which we need not recount in full. For present purposes, what matters is the following:

On March 8, 2000, after a complaint was filed which alleged all of the counts contained in the ultimate "Amended Consolidated Information" (as well as others dismissed before trial), defendant waived preliminary examination. On the same date the complaint was deemed an information and the prosecution was given leave to file a consolidated information (incorporating into one charging document counts previously filed under separate case numbers). Defendant thereafter demurred to the consolidated information, arguing in part that the charging of offenses over a period of years denied defendant a fair opportunity to defend. The trial court overruled the demurrer.

As our Supreme Court explained in *People v. Jones* (1990) 51 Cal.3d 294 at pages 317 through 318 (*Jones*), criminal procedure today provides a defendant with numerous means to obtain notice of the charges against him, including the information and the preliminary examination. These procedural devices, when properly used, are sufficient to preserve the defendant's due process right to notice. (*Ibid.*)

In the above-cited passage of *Jones, supra*, 51 Cal.3d 294, the Supreme Court quoted with approval the concurring opinion of

Justice Sims in *People v. Gordon* (1985) 165 Cal.App.3d 839 at pages 868 through 869 (*Gordon*): "It is clear that in modern criminal prosecutions initiated by informations, *the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which he must defend*." (Italics added.) "[A]n information plays a limited but important role: It tells a defendant what *kinds* of offenses he is charged with (usually by reference to a statute violated), and it states the *number* of offenses (convictions) that can result from the prosecution. But the time, place and circumstances of charged offenses are left to the preliminary hearing transcript; it is the touchstone of due process notice to a defendant." (*Id.* at p. 870.)

It follows from *Jones, supra,* 51 Cal.3d 294, and *Gordon, supra,* 165 Cal.App.3d 839, that a defendant who waives preliminary hearing is poorly situated to complain about vagueness in the pleading. We conclude that, having foregone the use of a preliminary hearing--"the touchstone of due process notice to a defendant" (*Gordon, supra*, 165 Cal.App.3d at p. 870)--defendant has forfeited his right to complain on appeal that he was provided with insufficient notice of the charges against him.

V

Defendant contends that the sentences for counts 21, 22, and 30 through 32 were improper in that the trial court applied section 667.6 to sentence him to eight years on each count, but

that provision did not apply to the crimes charged in those counts. Instead, the court should have sentenced on those counts pursuant to section 1170.1, subdivision (a), under which the sentence on each count could not exceed five years. The People properly concede this point.

Under section 667.6, a variety of specific crimes are enumerated. As the parties agree, these do not include oral copulation or sodomy committed by threat of future retaliation as charged in counts 21, 22, and 30 through 32, though they do include these offenses when committed by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (*Ibid.*)

On remand, the trial court is directed to resentence defendant on these counts in accordance with section 1170.1, subdivision (a).

VI

Defendant contends that he is entitled to additional presentence custody credits because the trial court improperly limited his credits under section 2933.1. That section limits custody credits to 15 percent of the actual period of confinement for a person convicted of any "violent felon[ies]" listed in section 667.5, subdivision (c). In this case, that includes the crimes charged in counts 23 through 26. (§§ 289, subd. (a), 667.5, subd. (c)(11).) Defendant asserts, as he did at the time of sentencing, that section 2933.1 cannot properly be applied here even to those offenses which fall under section

667.5, subdivision (c), because of an ex post facto problem: Section 2933.1, subdivision (d), specifies that the provision applies only to violent offenses committed on or after its effective date, which was September 21, 1994. (Stats. 1994, ch. 713, § 1, p. 3448; *People v. Camba* (1996) 50 Cal.App.4th 857, 867.) However, the information, as amended to conform to proof at trial, charges that the latest of defendant's offenses which fall within section 667.5, subdivision (c), began on May 1, 1993.

The People reply that this argument should be presented to the trial court in the first instance. As the matter must be remanded for resentencing in any event, we agree.

The trial court is directed on remand to reconsider the issue of custody credits as part of its overall resentencing procedure.

VII

In another version of his due process argument, defendant contends the jury should have been instructed on the specific date ranges applicable to each count. However, defendant cites no authority for this contention. As we have found no due process problem with the range of dates alleged in the information, which the trial court read out to the jury in full at the start of trial, we reject defendant's unsupported contention.

## DISPOSITION

Defendant's convictions and sentences on counts 1 through 18 are reversed. The matter is remanded for resentencing on the remaining counts and for recalculation of defendant's custody credits in accordance with parts V and VI of the Discussion. In all other respects, the judgment is affirmed.

SIMS, Acting P.J.

We concur:

NICHOLSON, J.

HULL, J.