

Not Reported in Cal.Rptr.3d, 2008 WL 1991998 (Cal.App. 1 Dist.)

Not Officially Published

(Cal. Rules of Court, Rules 976, 977)

[Briefs and Other Related Documents](#)

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, First District, Division 4, California.

The PEOPLE, Plaintiff and Respondent,

v.

Eric DUCHINE, Defendant and Appellant.

No. A114732.

(Contra Costa County Super. Ct. No. (05) 050047-0).

May 8, 2008.

Office of the Attorney General, San Francisco, CA, for Plaintiff and Respondent.

First District Appellate Project, [Linda M. Leavitt](#), San Francisco, CA, for Defendant and Appellant.

[SEPULVEDA](#), J.

*1 A jury convicted defendant Eric Duchine of committing a lewd or lascivious act upon a child under the age of 14. ([Pen.Code, § 288](#), subd. (a).) The jury also found that defendant had substantial sexual conduct with the child. ([Pen.Code, § 1203.066](#), subd. (a)(8).) The court sentenced defendant to the mitigated term of three years in state prison. ([Pen.Code, § 288](#), subd. (a).) Defendant appeals, and raises a number of contentions. We reject the contentions and affirm the judgment.

FACTS

Defendant was 21 years old when he had sexual intercourse with a 13-year-old girl. The girl did not testify at trial, and the events were related at trial mostly through police testimony and defendant's videotaped confession.

Richmond Police Officer Aaron Pomeroy testified that he was dispatched to a hospital emergency room at about 11:45 p.m. on July 24, 2004. He contacted an African-American female juvenile wearing a hospital gown, and asked her name, age, and date of birth. The girl gave her name, said she was 13 years old, and said her date of birth was in

September 1990.^{FN1} The police collected clothing from the room, which included female underwear with possible seminal fluid in the crotch area.

FN1. At trial and on appeal, the girl is referred to as Jane Doe to protect confidentiality.

A physician conducted a sexual assault examination of Jane Doe several hours later. The hymenal area was red and tender but the physician could not conclusively say whether or not the girl had recent intercourse. Vaginal swabs were taken from Jane Doe, and later testing revealed sperm on the swabs. The sperm in Jane Doe's vagina matched defendant's deoxyribonucleic acid (DNA).

Meanwhile, around 1:00 a.m. on July 25, 2004, Officer Pomeroy left the hospital and went to defendant's house in Richmond. Officer Pomeroy and other police officers arrived at the house in patrol cars without using sirens or lights. Officer Pomeroy and two other officers went to the front of the house, and two officers went to the side or rear of the residence. The house had a front porch and a metal security gate attached to the wooden front door.

Officer Pomeroy knocked on the security gate “about three times,” and waited 10 to 20 seconds between each knock. An African-American male, later identified as defendant, came to the door. He was wearing only a pair of blue shorts. Defendant opened the wooden front door, then the security gate. Defendant “almost simultaneously opened both doors, one right after the other.” The police said nothing and made no motion toward the door. Defendant said: “ ‘You're here for me. Just let me get dressed.’ “ Defendant “turned around and walked back into the family room, which was the front room of the residence.” The police followed defendant into the room. Defendant sat down on the couch and started to get dressed. An elderly African-American man came into the adjacent room and spoke. Defendant responded that it was “ ‘okay,’ “ and “ ‘[t]hey are here for me, Papa.’ “ The elderly man spoke again, and defendant replied “ ‘I'm going to jail for no reason,’ “ but whispered to Officer Pomeroy that he “did not want [Papa] to know the real reason.” The police arrested defendant.

*2 Defendant was questioned at the police station for about an hour, and a redacted videotape of the interview was played for the jury. The interview shows that defendant was advised of his *Miranda* rights and said he understood his rights.^{FN2} Defendant admitted knowing Jane Doe. He said he had known the girl for about three or four years, saw her frequently, and knew she was 13. Initially, defendant denied ever having sex with Jane. The interviewing officer told defendant that Jane was being taken to a hospital for a sexual assault examination and a physician would look for traces of defendant's semen. Defendant then admitted having sex with the girl, but said it was two or three days earlier. The officer then confronted defendant with evidence that Jane's underwear had evidence of fresh semen on it, and defendant admitted having sex with Jane that night. Defendant said that Jane had been visiting his house, and the two had sex.

FN2. *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

At trial, Jane Doe's grandmother testified. She identified Jane in a photograph, and gave the girl's birth month and day. The grandmother said she believed Jane was “about

15 now,” in April 2006, but could not remember the birth year. After reviewing a birth certificate, the grandmother recollected that Jane Doe's birth date was September 1990. The birth certificate was also admitted as evidence.

DISCUSSION

Defendant raises a number of claims on appeal: (1) the victim's statement of her name and age to a police officer at the hospital was wrongly admitted at trial, in violation of defendant's constitutional right to confront witnesses against him; (2) defendant's statements to police officers when he was arrested in his home should have been excluded from evidence because he did not consent to the warrantless entry of his home; (3) defendant's police station confession should have been excluded from evidence because he did not expressly waive his *Miranda* rights; and (4) a standard jury instruction violated defendant's constitutional right to due process by limiting the jury's determination of reasonable doubt to the evidence received at trial and preventing the jury from considering that a lack of evidence may give rise to a reasonable doubt of defendant's guilt. We discuss, and reject, these claims in turn.

A. The victim's statement of her age was nontestimonial, and properly admitted

Defendant argues that evidentiary admission of Jane Doe's statement of her name and age to Officer Pomeroy violated defendant's constitutional right to be “confronted with the witnesses against him.” ([U.S. Const., 6th Amend.](#)) The argument is untenable.

Testimonial statements of witnesses absent from trial are inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. ([Crawford v. Washington \(2004\) 541 U.S. 36, 59.](#)) The confrontation clause of the Sixth Amendment is concerned solely with hearsay statements that are *testimonial*. ([Davis v. Washington \(2006\) 547 U.S. 813](#); [People v. Cage \(2007\) 40 Cal.4th 965, 984.](#)) The term testimonial applies “to prior testimony at a preliminary hearing, before a grand jury or at a former trial; and to police interrogations” ([Crawford, supra](#), at p. 68) when there is no “ongoing emergency” and “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” ([Davis, supra](#), at p. 822.) “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency” or for other “nonevidentiary purposes.” ([Ibid; Cage, supra](#), at p. 987.)

*3 Jane Doe's statement of her name, age, and birth date was not testimonial. The police officer was dispatched to a hospital to interview a possible victim, and his questions asking for name and birth date were meant to elicit basic preliminary information necessary to establish the speaker's identity. The trial court properly recognized that this preliminary information was not testimonial, while excluding substantive accusatory statements by Jane that were testimonial. ([People v. Cage, supra, 40 Cal.4th at p. 984-986](#); see [People v. Brenn \(2007\) 152 Cal.App.4th 166, 177](#) [identifying victim information given to emergency dispatch operator nontestimonial].)

Hearsay statements are testimonial when “they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.” ([People v. Cage, supra, 40 Cal.4th at p. 984.](#)) The statement “must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial.” (*Ibid.*, original italics.) The police officer asked Jane her name and birth date to establish the identity of a person seeking police assistance, not for the primary purpose of proving facts for a criminal trial. It is true that Jane's age and birth date were, in fact, later used to prove an element of a crime. But “the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which, *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial.” ([Id. at p. 984, fn. 14,](#) original italics.) The statement here was primarily given for nonevidentiary purposes; it was not testimonial. ([Id. at p. 987 .](#))

In any event, any error in admitting Jane's statement of her name, age, and birth date was harmless beyond a reasonable doubt because the disputed evidence was cumulative. The same information was established by other means. Defendant is particularly concerned with Jane's statement of her age, because it is an element of the crime. But Jane's grandmother testified to Jane's age; a certified copy of Jane's birth certificate was admitted as evidence; and defendant himself admitted that Jane was only 13 years old when he had sex with her. Admission of Jane's statement of her age was not prejudicial given the weight of other evidence establishing the same fact.

B. Defendant consented to police entry of his home when he was arrested

Defendant claims his statements to police officers when he was arrested in his home should have been excluded from evidence because he did not consent to the warrantless entry of his home. The claim is contradicted by the record, which plainly shows that defendant consented to the entry.

Defendant opened the wooden front door, then the security gate in response to police knocking on the gate. Defendant “almost simultaneously opened both doors, one right after the other.” The police said nothing and made no motion toward the door. Defendant immediately said: “ ‘You're here for me. Just let me get dressed.’ ” Defendant “turned around and walked back into the family room, which was the front room of the residence.” The police followed defendant into the room, through the open door, where defendant dressed.

*4 The police did not ask for consent to enter, nor did defendant expressly invite the officers into his house. It is well-settled, however, that “[c]onsent to enter a residence may be given nonverbally.” ([People v. Martino \(1985\) 166 Cal.App.3d 777, 791 .](#)) Consent has been found where a defendant, facing a police officer conducting a narcotics investigation, opened the door wider and stepped back. (*Ibid.*) In [People v. Panah \(2005\) 35 Cal.4th 395, 466-467,](#) defendant's mother was found to have consented to entry of an apartment when she agreed to telephone defendant and let a police officer speak to him,

then unlocked the door of the apartment and did not object when the officer followed her to the telephone. Likewise, consent was found where a police officer asked to enter a residence and defendant made no verbal reply but stepped aside and extended his hand about two feet from his leg. ([People v. Harrington \(1970\) 2 Cal.3d 991, 995.](#)) The situation here is similar. Defendant opened the door to police officers and left the door open when he walked inside the house, saying: “ ‘You're here for me. Just let me get dressed.’ “ Defendant obviously understood that the officers were there to take him into custody, and expected the officers to keep him in sight and follow him into the house as he dressed. Substantial evidence supports the trial court's determination that defendant impliedly consented to police entry. Defendant's statements to the police at the house were properly admitted.

Even if the statements should have been excluded, defendant was not prejudiced by introduction of the statements in evidence. The only material statement made by defendant inside the house was his reassuring comment to his relative that it was “ ‘okay,’ “ and “ ‘[t]hey are here for me, Papa.’ “ This statement indicates guilty knowledge, but it was cumulative of defendant's previous statement before the police entered the house, when defendant said to the police: “ ‘You're here for me. Just let me get dressed.’ “ The only other reported statements inside the house consisted of defendant saying to his relative, “ ‘I'm going to jail for no reason,’ “ while whispering to Officer Pomeroy that he “did not want [his relative] to know the real reason.” This last statement suggests that there was reason for the police to arrest defendant, but that point was already clear from defendant's immediate acknowledgement that the police had come to arrest him. Any error in admitting the statement in evidence was harmless beyond a reasonable doubt.

C. Defendant impliedly waived his Miranda rights before confessing

Defendant argues that his police station confession should have been excluded from evidence because he did not expressly waive his *Miranda* rights. The argument ignores plain precedent holding that “waiver may be found without express words of waiver.” ([People v. Johnson \(1969\) 70 Cal.2d 541, 557.](#) disapproved on another point in [People v. DeVaughn \(1977\) 18 Cal.3d 889, 899, fn. 8.](#))

*5 Defendant's videotaped police interrogation shows that he was fully advised of his *Miranda* rights, and said he understood those rights. The police never asked defendant to waive his rights; the interrogating officer started questioning defendant after advising defendant of his rights without obtaining an express waiver. However, it is clear from the circumstances that defendant knowingly and voluntarily waived his rights.

The exchange was as follows: “[Officer]: Okay. I'm gonna advise you of your rights, okay? [¶] You have the right to remain silent. You do not have to answer my questions or talk to me. Do you understand that? [¶] [Defendant]: Uh-huh. [¶] [Officer]: You need to say yes or no, okay? [¶] [Defendant]: Yes. [¶] [Officer]: Okay. Anything you say can be used against you in court. You understand that? [¶] [Defendant]: Yes. [¶] [Officer]: You have the right to talk to a lawyer before you're asked any questions and to have the

lawyer present with you during the questioning. Do you understand that? [¶] [Defendant]: Yes. [¶] [Officer]: Okay. If you cannot afford to hire a lawyer, one will be appointed to represent you free of charge before any questioning if you wish. Do you understand that? [¶] [Defendant]: Yes. [Pause of less than one minute as officer writes notes.] [¶] [Officer]: Okay. Do you know, do you know why you're under arrest? [¶] [Defendant]: Yeah. I wanted to talk to the people when they-'cause, okay, I'm not ... nothing like that." Defendant then provided his first version of events, in which he admitted Jane Doe came to his house but denied any sexual activity. He later admitted having sex with her, after being confronted with incriminating evidence. At no point did defendant express any reluctance in answering questions.

"[A]n explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case." ([North Carolina v. Butler \(1979\) 441 U.S. 369, 375-376.](#)) "[W]aiver can be clearly inferred from the actions and words of the person interrogated." ([Id. at p. 373.](#)) The inference of waiver is strong here, where defendant was fully advised of his rights in a quiet interview room, affirmed that he understood his rights and (despite being told by the officer "You do not have to answer my questions or talk to me") said he wanted to talk and immediately launched into an exculpatory description of events. Waiver has been found under similar circumstances. In [People v. Johnson, supra, 70 Cal.2d at p. 558](#), our high court stated: "Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows his rights and chooses not to exercise them." *Johnson* "remains good law on this point." ([People v. Sully \(1991\) 53 Cal.3d 1195, 1233.](#))

*6 In any event, as with defendant's other claims on appeal, any error in admitting defendant's confession was harmless. Defendant's semen was found in the vagina of a 13-year-old girl, as DNA tests demonstrated. The uncontroverted physical evidence thus showed that defendant committed a lewd or lascivious act upon a child under the age of 14, and had substantial sexual conduct with the child. Defendant would have been convicted even if his confession had been excluded at trial.

D. The jury was properly instructed on reasonable doubt pursuant to CALCRIM No. 220

Defendant's final claim on appeal is that a standard jury instruction (CALCRIM No. 220) violated defendant's constitutional right to due process by limiting the jury's determination of reasonable doubt to the evidence received at trial and preventing the jury from considering that a lack of evidence may give rise to a reasonable doubt of defendant's guilt. The instruction provides, in relevant part: "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (CALCRIM No. 220.) Defendant observes that reasonable doubt may arise from the evidence or a *lack of evidence*, and faults CALCRIM No. 220 for focusing the jury's attention on the evidence received at trial.

Defendant's argument is not original, nor is it persuasive. The argument has been made and considered in numerous cases and been rejected in all. ([People v. Campos \(2007\) 156 Cal.App.4th 1228, 1237-1238](#); [People v. Guerrero \(2007\) 155 Cal.App.4th 1264, 1267-1269](#); [People v. Flores \(2007\) 153 Cal.App.4th 1088, 1091-1093](#); [People v. Westbrook \(2007\) 151 Cal.App.4th 1500, 1509-1510](#); [People v. Hernández Rios \(2007\) 151 Cal.App.4th 1154, 1156-1157](#).) As has been explained, “the instruction did not tell the jury that the reasonable doubt had to arise out of the evidence in the case. It merely said that the jury was to consider all of the evidence presented.” (*Campos, supra*, at p. 1238.) The jury was properly instructed.

DISPOSITION

The judgment is affirmed.

We concur: [REARDON](#), Acting P.J., and [RIVERA](#), J.

Cal.App. 1 Dist., 2008.

People v. Duchine

Not Reported in Cal.Rptr.3d, 2008 WL 1991998 (Cal.App. 1 Dist.)

Not Officially Published

(Cal. Rules of Court, Rules 976, 977)

Briefs and Other Related Documents ([Back to top](#))

• [A114732](#) (Docket) (Jul. 6, 2006)

END OF DOCUMENT