Filed 1/10/17 P. v. Ham CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CARL HAM, Defendant and Appellant.	B267322 (Los Angeles County Super. Ct. No. MA062771)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

In 2015, the Los Angeles County District Attorney filed a 10-count second amended information against defendant and appellant Robert Carl Ham. It charged him with five counts of lewd act upon a child under 14 years old (Pen. Code, § 288, subd. (a);[1] counts 1, 3-6); one count of continuous sexual abuse (§ 288.5, subd. (a); count 2); one count of forcible lewd act[2] upon a child under 14 years old (§ 288, subd. (b)(1); count 7); one count of forcible rape[3] of a child under 14 years old (§ 261, subd. (a)(2); count 8); one count of furnishing marijuana to a minor under 14 years old (Health & Saf. Code, § 11361, subd. (a); count 10); and one count of lewd act upon a child who was 14 years old by a person 10 years or more older than the victim (§ 288, subd. (c)(1); count 11).[4] As to counts 1 through 8, the information alleged that appellant committed sex crimes against multiple victims pursuant to section 667.61, subdivisions (b) and (e).

A jury found appellant guilty on all counts and found the multiple-victim allegations true. At the sentencing hearing, the trial court denied probation and sentenced appellant to state prison for a determinate term of five years eight months, and an indeterminate term of 105 years to life as follows: as to counts 1 through 6 and 8, a consecutive sentence of 15 years to life as to each count; as to count 10, a consecutive sentence of five years (midterm); and as to count 11, a concurrent sentence of eight months (one third midterm). The sentence on count 7 was ordered stayed pursuant to section 654.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Section 288, subdivision (b)(1) applies to a person who commits a lewd act on a child who is under 14 years of age by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. In this opinion, we refer to an act described in the statute as "forcible lewd act."

[3] Section 261, subdivision (a)(2) applies to a person who rapes a person against his or her will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. In this opinion, we refer to an act described in the statute as "forcible rape."

[4] Count 9, which alleged a violation of Health and Safety Code section 11361, subdivision (b), was dismissed.

Appellant seeks reversal of the judgment on the following grounds: (1) the police obtained incriminating statements from him without admonishing him that his statements can and will be used against him at trial; (2) the trial court erred by failing to instruct sua sponte on nonforcible lewd act (§ 288, subd. (a)) as a lesser included offense of the crime charged in count 7, forcible lewd act (§ 288, subd. (b)); (3) the trial court erred by failing to instruct sua sponte on statutory rape of a minor (§ 288, subd. (c)) as a lesser included offense of the crime charged in count 8, forcible rape (§ 288, subd. (c); and (4) the 105 years to life term is a de facto sentence of life without the possibility of parole and therefore is cruel and unusual punishment under the California and federal Constitutions. We find no error and affirm.

FACTS

I. Prosecution Evidence.

A. Background.

Appellant was born in November 1976.

Elizabeth S. (Lizzie) was born in 1996, Amy S. (Amy) was born in 2000 and their brother Joey S. (Joey) was born in 2003. Their mother is Rebecca S. (Rebecca), and for a while they had a stepfather named Kenneth (Kenny).

Appellant was Kenny's friend. Lizzie was 10 years old when she met appellant at Rebecca's wedding. Amy met him when she was six years old. When Lizzie was almost 11 years old and Amy "about" seven, appellant came to live with them in one house and then a second house, both in Lancaster. According to Amy, appellant lived with the family for four years. Lizzie testified that appellant lived with the family for two or three years. Appellant served as a babysitter when Rebecca and Kenny were at work.

B. Testimony of Lizzie and Amy Regarding Counts 1 Through 3 and 11.

Lizzie was 11 years old the first time appellant did something inappropriate. She went to lie down for a nap in her bedroom. Appellant offered to massage her to sleep because she had insomnia. He pulled up her nightgown and told her to take off her underwear. Lizzie did not want to, so appellant removed them. She felt something wet and hard on her back. Lizzie turned around and saw it was appellant's penis. Lizzie

could not remember what happened after that point. Later, when she woke up, her "butt" was sore and she had to go to the hospital.

On 10 or more occasions Lizzie woke up and her "butt area" hurt.

Appellant massaged Lizzie almost every day from the time she was 11 years old until she was 13 years old.[5] He would start out massaging Lizzie's back and would move to her breasts. He kissed her on the lips, neck, shoulders, legs and thighs "a lot." Appellant used his tongue when kissing her. Appellant touched Lizzie "[n]early every night." She had insomnia and would often "crash and fall and go to bed wherever [she] landed," which was usually downstairs on the couch in the family room. Lizzie would wake up almost every night and appellant's fingers would be inside her vagina. She would try to stop appellant when he was putting his fingers in her vagina, and she was successful in stopping him most of the time. On one occasion, Lizzie woke up after falling asleep in the living room and found appellant on top of her. He was drunk and wearing only a T-shirt. Like appellant, Lizzie did not have any pants on. She pushed appellant off, and he hit his head on the coffee table. Appellant screamed at her, saying, "What the hell did you do that for?"

When Lizzie was around 12 years old, appellant took her to a friend's trailer, pulled out his penis, and told her to touch it and put it in her mouth. Lizzie refused and tried to leave, at which point he grabbed her arm to stop her. She "smacked" him, ran out and said she wanted to go home.

Appellant often told her that he loved her, that she was beautiful, and that he always wanted to be with her. He made Lizzie feel like someone cared for her. He bought her an American Girl doll and accessories for the doll, took her out to eat, to the movies and anywhere she wanted to go.

---

[5] On cross examination, Lizzie testified that appellant "massaged my back and breasts twice that I remember," once when she was in his truck and another time when he told her to take off her underwear.

While living in Lancaster, Lizzie never told anyone about what appellant was doing to her because she felt ashamed and dirty, and thought that everyone would look at her differently.

Lizzie did not think that she was dating appellant, but she "thought like he was dating [her]." When she was about 13 years old, she and her family moved to Palmdale to live with her grandmother. Before she moved, Lizzie tried to tell him that she was "breaking up with him" and he got "really mad." After the move, appellant would take her out and buy her things such as a laptop computer, a "Nintendo, Wii–system," and anything she asked for.

When Lizzie was 13 years old, there was a night when appellant drove her and Amy to "see the lights." Lizzie got car sick and appellant pulled over at the top of the mountain, near the aqueduct. He told Lizzie he would massage her, and she was too sick to say yes or no. Appellant got in the backseat with Lizzie and massaged her back and breasts while Amy looked at the lights. Lizzie said she was not comfortable and told him to get off of her. She told him to take her home. Appellant got angry and drove so fast she was scared. Lizzie thought that they were going to get into a car crash.

The molestation finally stopped when Lizzie was 15 years old. She ignored appellant's phone calls and text messages, and she hid in the bathroom whenever he visited her home. When she was 17 years old, she was depressed and Rebecca sent her to see a social worker named Melissa Marroquin (Marroquin). At her first session, Lizzie told Marroquin she had suffered sexual abuse.

Amy testified that appellant acted as though Lizzie was his girlfriend, and he did inappropriate things to her. "He would act like they were dating; like how my stepfather and mom acted. [Appellant] would try acting like that to [Lizzie]." He would say "I love you" to Lizzie. Amy saw appellant massage Lizzie's back, "try touching her breasts" and "go down into her pants." The massages happened "a lot." Lizzie was scared when she was around him. No one other than Amy was around when appellant touched or massaged Lizzie. Lizzie told Amy that she was scared of appellant.

Amy remembered that at one point appellant drove her and Lizzie to the mountains in his truck. He made Lizzie lie down on her stomach in the back seat, and he massaged her. Amy heard Lizzie fidget and say "stop." At some point, Amy looked back and saw that appellant was touching Lizzie in inappropriate places, and Amy pushed his hand away from Lizzie.

C. Testimony of Amy Regarding Counts 4 Through 8 and 10.

When Amy was between 7 and 9 years old, appellant would give her money to touch his penis. This happened "a lot." It first happened when appellant took Amy to work with him and he forced her hand onto his penis. In addition, he tried to put his penis in Amy's mouth, which also happened "a lot." Usually, she was able to resist him. But on one occasion appellant succeeded, and something came out of his penis. Appellant would lay Amy on her side and "dry hump[]" her from behind while she was clothed. During these incidents, his penis would be sticking out. These incidents occurred at the family home, and they occurred "a lot." Amy never told anyone about it because she was scared and embarrassed. Appellant told her not to tell anyone. He bought her toys, and food, and let her do "fun things." When she was older, appellant gave her alcohol and marijuana.

When the family moved in with Amy's grandmother, Amy did not see appellant for about a year. He started texting her, asking for her whereabouts and questioning why she had not sent him any messages. She reconnected with him when she was 11 or 12 years old. Eventually, as they got closer, he started molesting her again. When she was about 12 years old, he would put Amy's hand on his penis when they were in his truck, and he would drive Amy to the mountains and try to put her mouth on his penis.

When Amy was between 12 and 14 years old, appellant would message and say his daughter L. wanted to see Amy. She would then "hang out" with L., and appellant would be there.

Appellant would take Amy to parties organized by his friends. The two of them smoked marijuana and drank alcohol together. Sometimes he bought the marijuana, and sometimes he gave her money so she could buy it. Other times, he already had some

marijuana. She was the youngest person at these parties. Amy saw appellant sell marijuana to her friend Jadella, as well as others, all of whom were around ages 12, 13 or 14 years old.

When Amy was between the ages of 12 and 14, appellant made her feel like the two of them were dating. He would tell Amy that he loved her and would call her "babe." When Amy said, "We're not dating," he would get angry and slam his hands on the steering wheel. Amy still spent time with appellant because he gave her money, food and "a whole bunch of clothes." She was used to the feeling of getting things.

Amy would sometimes spend the night at appellant's house when he had visitation with L. Amy estimated that she had stayed over at appellant's house more than 10 times.

Twice during the summer of 2013, appellant put his penis inside of Amy against her will. One of the times, they were at a hotel with L. While L. was asleep, appellant held Amy down and put his penis in her vagina. Amy tried to stop him but could not. The other time, Amy was at appellant's house. He held her down, put a pillow over her head, and put his penis inside her vagina. Amy never thought about telling anyone.

D. Rebecca's Testimony.

Appellant lived with Rebecca and her family. He bought things for Lizzie, including a laptop, an American Girl doll and other things. For Amy, he bought clothes, jewelry, and "hair."

One day, Lizzie's therapist told Rebecca that Lizzie had something to report. About 45 minutes later, the Department of Children and Family Services came to the family home. Rebecca was told that there had been an "inappropriate" relationship between appellant and Lizzie.

Rebecca once saw appellant and Amy arguing. According to Amy, he said "to go suck the guys on the street." Amy threw a rock at appellant's car in response. Rebecca screamed at appellant and told him to leave.

When Amy came home after being with appellant, she was sometimes "really drunk" or high.

E. Marroquin's Testimony.

Marroquin was a licensed clinical social worker, and Lizzie was her patient. Marroquin met with Lizzie on October 10, 2013. After the session, Marroquin contacted the Department of Child and Family Services because Lizzie had disclosed that she was sexually abused.

F. Prior Uncharged Sexual Offenses.

Holly B. (Holly) was nine years old at the time of trial. She has a twin brother named Brandon and her mother is named Charlotte. Appellant was Charlotte's boyfriend. He lived with Holly's family for about a year. During that time, they lived in multiple places.

When Holly was six or seven, appellant would invite Holly into the bedroom and ask her to take off her clothes. She would comply. He took his clothes off, too. He would rub her vagina on the outside with his hands, but did not put his finger inside it. Appellant would also rub Holly's butt on the outside. Charlotte was not at home during these incidents. They usually happened "mid-day," every day or every other day. The molestation occurred the entire time that appellant lived with Holly and her family.

Sometimes when he molested Holly, he told her not to tell anyone. He said he was an adult, and she should listen to him. After her family moved away, Charlotte kept asking Holly if anyone had touched her private parts. Holly eventually "gave out" and told Charlotte about the molestation.

Charlotte was friends with appellant in high school and then went their separate ways. In 2009, they reconnected. They dated from 2009 to 2012, and lived together during that time. Appellant would pick up Lizzie and Amy and bring them to Charlotte's house. Sometimes Lizzie spent the night. Amy may or may not have spent the night. Though Amy planned to spend the night, several times appellant had to take Amy home because she felt uncomfortable.

Appellant and Lizzie "seemed incredibly close," "almost too friendly," and appellant seemed more like Lizzie's boyfriend than an adult male figure. "He would always buy her things; anything she wanted, pretty much she was able to get from him[.]"

"They always seemed like they were flirting and more than just hanging out and doing things. He would allow her to ride his dirt bike; and nobody else was allowed to ride his dirt bike. It was a special privilege for Lizzie." Between appellant and Lizzie, there "was a lot of hugging." He would "hold her arm, touch her shoulder, give her hugs." The hugs happened on an ongoing basis. To Charlotte, they were not "just a hug when you first see somebody." Appellant did not hug Amy as much. Charlotte found pictures of Amy and Lizzie on appellant's laptop. In some, they were wearing bikinis. In others, they were "modeling."

Charlotte felt as though "the things he was doing [were] inappropriate" and confronted him. Those discussions quickly turned into arguments that would get "emotional and physically abusive on both sides." Charlotte broke up with appellant because of the "situation."

On several occasions, Charlotte saw appellant at his friends' house and noticed that he was sitting next to his friends' daughter, Brittney, on the couch. Appellant would go over to his friends' house when his friend was not home. Once, when appellant was supposed to meet Charlotte at a rental house they were considering, he did not show up. Charlotte saw him and Brittney driving together. When Charlotte later questioned him about it, he told her he could do "whatever he want[ed], whenever he want[ed] and however he want[ed]."

Charlotte remembered a day when Amy was crying and upset, and she told Charlotte that appellant had shown her his penis. Charlotte confronted him. He told Charlotte "that he didn't realize that his zipper was unzipped when he bent down to work on a dirt bike and that's why she saw his penis."

Charlotte learned from Holly that appellant touched her. Holly became upset and she did not want to say anymore "because she was scared that he was going to get in trouble and that he would come hurt them."

Appellant would have sex with Charlotte while he appeared to be asleep. In the morning, he claimed not to recall having sex. Charlotte did not know whether appellant was telling the truth.

G. Matthew K.'s Testimony.

Matthew K. (Matthew) met appellant at Charlotte's house when Matthew was 13 years old. They were friends, and they would work on their dirt bikes together. Appellant and Matthew would send pornographic pictures of girls back and forth to each other.

Appellant talked about Brittney and said, "She's hot." Matthew lived at appellant's house for a year. Appellant took Matthew to parties where the guests were in their 20's, drank alcohol and smoked marijuana. To Matthew's knowledge, appellant never drank or smoked anything.

Appellant said he liked Amy, and that he had dated her for four months. At the time, she was 13 or 14 years old. Matthew asked appellant, "Have you yet?" By that, he was asking if appellant had sexual intercourse with Amy. Appellant said, "Yes."

After appellant broke up with Charlotte, he had a hotel room. Matthew saw him there with Amy and L.

H. Police Investigation.

On April 14, 2014, Detective Sara Gillis of the Los Angeles County Sheriff's Department helped Lizzie place a pretextual phone call to appellant.

The recorded conversation was played for the jury.

Lizzie said she broke up with her boyfriend, and asked appellant to help because she did not know what she was going to do. She said, "I don't remember everything that you did and I just. . . ." She then said, "I just don't want. . . . [¶] . . . [¶] that you would do that to me, I was so little." He replied, "Okay. I, I know, you know, people make mistakes and they make wrong calls and they do stupid shit, you know? And certain things you do, you, you know? When I, you know, you regret. But, um, and I know . . . not all sure what you remember or don't remember or what but, or exactly what, but I, I do know there's, you know, some things that I've done with you or did with you that I could have done differently and that's for sure. And I do regret that. You know, and I told you I'm sorry once for some of the . . . negative things I've done to you and for that

. . . I've always been sorry and I apologize, apologize, you know? And I apologized for that before."

She said, "Well, you know, you were my first and you're always going to be my first." He asked, "Um, what do you mean I was your first?" She said, "I mean, you're my first for actually touching me and actually being with me and . . . I don't mean that sexually that you were my first, I mean, you were like my first, like, love, you were my, you were the first one who showed me that you cared." He said, "Yes, uh, because I . . . did care and I do care[.]"

Lizzie asked appellant if he missed the way they used to be and he said, "Of course I miss the way we used to be. . . . All the time." She asked, "Um, why is it that you liked to touch me when I was just a little girl?" He replied, "Not sure." She said "we could have just been in love. It didn't have to be sexual[]." He said he was confused. When she said he was not confused when he would touch and kiss her, he said, "Uh . . . I, oh, okay. I think I remember, I remember I was kissing you twice. And I remember the last time I kissed you I told you that we needed to back off that, you know, instead of kind of, like, you know, unless my memory is wrong. You know?" Lizzie asked whether he remembered fingering her on the couch. He said, "No." She replied, "It was the best I've had." To that, he replied, "Well, thank you, I think. But, no, I don't remember that." He admitted to giving her a back massage when they drove out to an aquaduct with Amy, but said he did not "think anything else happened." He also said he remembered giving her "back rubs all the time." Further, he recalled being in his truck and looking at the lights, and said, "[Y]our head was resting on my shoulder and I was sitting in the front seat."

She said she was asking him "to own up to actually being with me and actually doing things to me and kissing me and . . . I need to know." He replied, "All right, well, I just told you that I admitted to that. You know, I can admit to things that really happened. I can't admit to something I don't—" He said he was sorry and then said, "I've had people tell me I do shit in my sleep, okay? So, I'm not sitting here telling you

that you're wrong. I'm not sitting here telling you that, that you're right. I'm not saying anything like that."

Lizzie asked about his relationship with Amy. He said Amy asked him to be "[a] dad figure" and that he tried. He said, "I don't know what to do with Amy." He also said, ". . . I've gotten to the point where I don't want to give her money." When Lizzie said Amy claimed that appellant had kissed her, he denied it at first, and then said that he had kissed her on the forehead.

Appellant was arrested on April 17, 2014.

Detective Gillis interviewed appellant. A recording of the interview was played for the jury.

In the interview, appellant said "the kissing thing" with Lizzie happened twice, and he rubbed her back and head. Detective Gillis asked if something could have happened at night he did not remember. Then she asked if he thought Lizzie was "lying about it." He did not accuse of her lying. Rather, he explained that due to a sleeping disorder, he has sex when he is asleep and does not remember it the next day. Appellant said girls leave him messages and "hit [him] up first." Regarding Amy, appellant stated that every time he saw her, he gave her money. He said that when Amy hugged him, he would usually give her a kiss on the forehead. He admitted that he once looked at child pornography on the internet.

II. Defense Evidence.

Detective Michael Becker of the Los Angeles Sheriff's Department interviewed Holly. She told the detective that on five or six occasions appellant rubbed her vagina and buttocks with his hand.

DISCUSSION

I. No Prejudice Due to Ineffective Assistance of Counsel.

The police did not warn appellant before his interview that his statements can and will be used against him in a court of law. Therefore, his statements were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, 469 (*Miranda*). As the parties agree, appellant's trial counsel did not object to the introduction of his interview

statements based on *Miranda*, and therefore the issue is whether we must reverse due to ineffective assistance of counsel.

A. Relevant Facts.

Appellant was arrested by Detective Gillis on April 17, 2014. She informed him of his *Miranda* rights as follows:

"[Detective Gillis]: Well, if you want to listen, I'll tell you. All right. Well, um, first of all, you know you have rights. Right? You have the right to remain silent. You are under arrest. Do you understand that?

"[Appellant]: Yeah.

"[Detective Gillis]: Yes? You have the right to have an attorney present during questioning. Do you understand that?

"[Appellant]: Yes.

"[Detective Gillis]: Okay. And if you can't have one, one will be appointed to you. Do you understand that?

"[Appellant]: Yes."

No more admonitions were given before the police interviewed appellant.

B. Analysis.

An ineffective assistance of counsel claim requires a showing that counsel's performance fell below an objective standard of reasonableness, and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*In re Cox* (2003) 30 Cal.4th 974, 1019.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (*Id*. at pp. 1019–1020.)

We find no prejudice.

Appellant points out that during the interview he said that "the kissing thing" with Lizzie happened twice; he said he did sexual things in his sleep; he said he gave Amy lots of money, and that it was always the girls who "hit [him] up first." In appellant's view, these statement corroborated the testimony of Lizzie and Amy because they allowed an inference that he was having sexual contact with the two of them. He contends that without his statements, the jurors could reasonably have rejected the testimonies of Lizzie and Amy because they contained numerous inconsistencies.

But statements made by appellant during his interview were cumulative of other evidence. In the pretextual call with Lizzie, appellant admitted to kissing her twice, to giving her back massages, and to kissing Amy on the forehead. He explained that a sleep disorder causes him to do sexual things in his sleep, and that he has no recollection of it later. Also, he said he had gotten to the point where he did not want to give money to Amy any more. Charlotte testified that appellant would always buy Lizzie things, and she could get anything she wanted from him. Further, she testified that appellant seemed more like Lizzie's boyfriend than an adult male figure because they flirted and hugged, and because he gave her the special privilege of riding his dirt bike. Thus, the jury would have heard appellant's statements and Charlotte's testimony regarding the same matters covered in his police interview even if counsel had objected under *Miranda*, and even if the trial court had sustained the objection.

In addition, the testimony from Lizzie, Amy and Holly was powerful and consistent evidence of appellant's sex crimes. Moreover, the tenor and content of the pretextual call demonstrated that appellant had been in a relationship with Lizzie. They reminisced, they talked about sex, and when Amy made provocative statements regarding appellant's sexual conduct toward her, he often equivocated or offered an excuse (such as his sleeping disorder). This conversation—which was between an older man and an underage girl—established that they had an inappropriate physical, mental and emotional relationship. The testimony of the three victims was corroborated by Marroquin and Charlotte regarding inappropriate touching, and the fact that appellant had an

inappropriate "dating" relationship with Amy, and that they had sex, was corroborated by his admissions to Matthew.

II. No Instructional Error.

Appellant contends that the trial court committed instructional error by failing to instruct on lesser included offenses in counts 7 and 8.

A. A Trial Court's Duty to Instruct on Lesser Included Offenses.

"'[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154, fn. 5 (*Breverman*).) A trial court has a sua sponte obligation to instruct on a lesser included offense whenever the evidence that the defendant is guilty only of the lesser offense is substantial enough to merit consideration by the jury. "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id.* at p. 162.) A trial court's failure to instruct on a lesser included offense is reviewed de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

B. Count 7.

Appellant was convicted in count 7 of committing a forcible lewd act on Amy in violation of section 288, subdivision (b). According to appellant, the trial court erred by failing to sua sponte instruct the jury on nonforcible lewd act with a child in violation of section 288, subdivision (a).

1. *Relevant Facts Regarding Count 7.*

Amy testified that in the summer of 2013, appellant took her and L. to a hotel. While L. was sleeping, appellant held Amy down and put his penis inside her vagina against her will. Amy tried to stop appellant but was not strong enough. During closing argument, the prosecutor argued that count 7 pertained to the incident at the motel involving Amy.

2. *Relevant Law*.

A person is guilty of section 288, subdivision (a) if he or she commits a lewd or lascivious act with a child under 14 years of age. Section 288, subdivision (b) is violated if the lewd or lascivious act is accomplished by the use of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person," making it aggravated. (§ 288, subd. (b).) Section 288, subdivision (a) is a lesser offense that is necessarily included in section 288, subdivision (b). (*People v. Ward* (1986) 188 Cal.App.3d 459, 472.)

For purposes of section 288, subdivision (b), force means "'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13, disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248 (*Soto*).) Duress in section 288 means "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 (*Pitmon*), overruled on other grounds in *Soto, supra*, 51 Cal.4th at p. 248.) "The total circumstances, including the age of the victim, and [the victim's] relationship to defendant are factors to be considered in appraising the existence of duress." (*Pitmon, supra,* at p. 51.) "[C]onsent of the victim is not a defense to the crime of aggravated lewd conduct on a child under age 14. The prosecution need not prove that a lewd act committed by use of force, violence, duress, menace, or fear was also against the victim's will." (*Soto*, *supra*, 51 Cal.4th at p. 248.) "'It is true that an assault implies force by the assailant and resistance by the one assaulted; and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where under the law there *can* be no consent. Here the law implies incapacity to give consent, and this implication is *conclusive*. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her.' [Citation.]" (*Id*. at pp. 247–248.)

3. *Analysis*.

According to appellant, the jury could have rejected Amy's testimony that appellant put his penis inside her by force, and could have determined that it was not done by force, violence, duress, menace, or fear of immediate and unlawful bodily injury. This argument is unavailing. A challenge to Amy's credibility is not the equivalent of pointing to substantial affirmative evidence that the lewd act in the motel was accomplished without any aggravating factors.

Next, appellant argues that the jury could have inferred that Amy consented because she willingly prostituted herself for consensual sex. He points out the following: Amy testified he gave her money to touch his penis when she was seven to nine years old. Appellant told Detective Gillis that Amy wanted money every single time he saw her, that he felt bad because she was "doing shit" if he did not give her money, and that he continued to give her money as a "way to keep her safe." He recounted an incident when Amy wanted him to drop her off at the freeway so she could "beg" for money, and another incident when Amy told him to drop her off at a liquor store and to leave because there was another man coming around and appellant was "costing [her] . . . money." When Amy was asked why she still spent time with appellant after he held her down and forced his penis in her, she said, "I was—I don't know what I was thinking. Maybe it was just me wanting stuff; me lik[ing] getting all that stuff; I didn't care at that point."

We reject appellant's argument on multiple grounds. First, based on the clear holding of *Soto*, Amy lacked the capacity to give consent. Second, there is no direct evidence that the lewd act was accomplished in the absence of force, duress or any other aggravating factions. Third, the inferences suggested by appellant were too weak to merit consideration by the jury.

People v. Pitts (1990) 223 Cal.App.3d 606 (*Pitts*) supports our conclusion. In that case, the defendants were charged with violating section 288, subdivision (b), and they all denied taking part in any molestations. The court rejected the argument on appeal that the trial court should have instructed on section 288, subdivision (a) as a lesser included offense, observing, "According to [the defendants], either they were misidentified or the

crimes never actually occurred. If the People's evidence were believed, they were guilty as charged. If the defendants' evidence were believed, they were not guilty of anything. Under no view of the evidence was any of them guilty of nonforcible molestation pursuant to section 288, subdivision (a)." (*Pitts, supra,* at p. 884.) Here, appellant's defense was that no molestation occurred. Thus, as in *Pitts*, if the People's evidence were believed, appellant was guilty as charged. If appellant's evidence were believed, he was not guilty of anything. The jury believed the People's evidence.

C. Count 8.

In count 8, appellant was charged with forcible rape of Amy in violation of section 261, subdivision (a)(2). Appellant contends that the trial court was obligated to instruct the jury on statutory rape in violation of section 261.5 as a lesser included offense under the accusatory pleading test.

1. *Relevant Facts*.

The caption for the second amended information read thusly: "THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff v. 01 ROBERT CARL HAM (11 [] 1976) (BK#3929345), aka BOBBY[.]"

Count 8 alleged that the "the crime of FORCIBLE RAPE-CHILD VICTIM UNDER 14 YEARS, in violation of PENAL CODE SECTION 261(a)(2), a Felony, was committed by ROBERT CARL HAM, who did unlawfully have and accomplish an act of sexual intercourse with . . . Amy S., not his/her spouse, against said person's will, by means of force, violence, duress, menace, and fear of immediate and unlawful bodily injury on said person and another."

The prosecutor indicated during closing argument that count 8 pertained to the incident at appellant's Lancaster house during the summer of 2013. Amy testified that appellant held her down, put a pillow over her head, and inserted his penis inside her vagina against her will.

2. *Relevant Law*.

The accusatory pleading test "is satisfied if the charging allegations describe the offense in such a way that, if committed as alleged, the lesser offense necessarily must

have been committed. [Citation.]" (*People v. Cheaves* (2003) 113 Cal.App.4th 445, 454.) Nonetheless, even if the accusatory pleading test is met, a trial court need not instruct on a lesser included offense if there is "no substantial evidence that the defendant was guilty only of that offense[.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 985.)

Section 261, subdivision (a)(2) provides: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another." (§ 261, subd. (a)(2).)

Section 261.5 provides: "(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a 'minor' is a person under the age of 18 years and an 'adult' is a person who is at least 18 years of age. [¶] . . . [¶] (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170. [¶] (d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years."

3. *Analysis*.

Appellant argues that the accusatory pleading, when taken as a whole, sets forth the age elements required by section 261.5, subdivision (c) and/or (d) because the charge in count 8 identified Amy as being under 14 years old, and because the caption on the pleading alleged appellant's date of birth as November 1976, which made him 36 at time he committed the crime.

It is true that the allegations in count 8 establish the section 261.5, subdivision (d) requirement that the victim be under 18 years old. But the language of count 8 does not

allege the age requirement for the perpetrator or victim needed to violate section 261.5, subdivision (c), nor did it allege the age requirement for the perpetrator needed to violate subdivision (d) of the statute. Thus, the charging allegations do not describe the crime in such a way that if a forcible rape was committed as alleged, the lesser offense of statutory rape necessarily must have been committed. Further, the caption does not provide the missing piece—appellant's age—because the caption of the complaint is not an allegation. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829; *Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 418.)

In any event, even if the accusatory pleading test were met, the trial court did not have to instruct on the lesser included offense of statutory rape because the record did not contain substantial evidence that appellant committed statutory rape but did not commit forcible rape.

III. No Cruel and Unusual Punishment.

Appellant challenges his sentence of 105 years to life prison term as a violation of the state and federal Constitutions. As he concedes, this claim was waived because he did not raise it in the trial court. (*People v. Em* (2009) 171 Cal.App.4th 964, 971, fn. 5 (*Em*).) Nonetheless, we determine the merits of the claim "'in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim.' [Citation.]" (*People v. Russell* (2010) 187 Cal.App.4th 981, 993 (*Russell*).)

A. Relevant Law.

The Eighth Amendment of the United States Constitution and California Constitution, article 1, section 17 ban cruel and unusual punishment. (*Robinson v. California* (1962) 370 U.S. 660; *People v. Mendoza* (2016) 62 Cal.4th 856, 911.) "A sentence violates the federal Constitution if it is 'grossly disproportionate' to the severity of the crime. [Citations.]" (*Russell, supra,* 187 Cal.App.4th at p. 993.) According to the Supreme Court, the "gross disproportionality principle reserves a constitutional violation for only the extraordinary case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 77 (*Andrade*).) Outside the context of capital punishment, "successful challenges to the proportionality of particular sentences have been exceedingly rare.' [Citation.]" (*Ewing*

v. California (2003) 538 U.S. 11, 21 (*Ewing*).) That said, a "gross disproportionality principle is applicable to sentences for terms of years." (*Andrade*, *supra*, at p. 72.) For example, the Supreme Court has indicated that it would be unconstitutional for a Legislature to make "'overtime parking a felony punishable by life imprisonment[.]'" (*Ewing*, *supra*, at p. 21.)

A sentence violates the prohibition against cruel and unusual punishment in the California Constitution if '"'"it is so disproportionate to the crime for which it is inflicted that it shocks the conscience."' [Citations.]" (*Russell, supra,* 187 Cal.App.4th at p. 993.) "The three techniques often suggested for determining if punishment is cruel and unusual are (1) the nature of the offense and the offender with regard to the degree of danger present to society, (2) comparison of the challenged punishment with the punishment prescribed for more serious crimes in the jurisdiction, and (3) comparison of the challenged punishment with punishment for the same offense in other jurisdictions. [Citation.]" (*Ibid.*)

"Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) An appellate court will keep in mind that "[f]ixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*Id.* at p. 494.)

B. Analysis.

1. *No Violation of Federal Constitution.*

Appellant maintains that his sentence requires him to serve a term of years which cannot possibly be served in his lifetime, and he relies on this premise to argue that his sentence violates the first of the two definitions of excessive punishment in *Coker v. Georgia* (1977) 433 U.S. 584 (*Coker*).

In *Coker*, the Supreme Court reviewed the constitutionality of a death sentence as punishment for rape. (*Coker*, *supra*, 433 U.S. at p. 586.) The court stated: "[T]he Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed. . . . [Under case law] a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." (*Id.* at p. 592.) The court held that a sentence of death is "grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." (*Ibid*.)

According to appellant, his sentence makes no measurable contribution to acceptable goals of punishment. In support, he cites the concurring opinion of Justice Stanley Mosk in *People v. Deloza* (1998) 18 Cal.4th 585, 600–601 (*Deloza*).) Justice Mosk concluded that a sentence of 111 years in prison is impossible for a human being to serve and therefore violates the state and federal Constitutions. He stated that a grossly excessive sentence "makes no measurable contribution to acceptable goals of punishment." (*Id*. at p. 602.) Concurring opinions, however, are not binding precedent (*In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 629), and we therefore decline to consider Justice Mosk's concurrence.

Next, appellant cites a law review article suggesting that judges impose excessive penalties for sex offenses due to moral outrage. (Mosk, States' Rights—And Wrongs (1997) 72 N.Y.U. L.Rev. 552, 557.) The author of the article opines that a sentence that is impossible for a human being to serve is per se cruel and unusual punishment, and urges courts to impose sentences that can be served within a human being's lifetime. (*Id*. at pp. 557–558.) This article does not hold sway because our analysis must be guided by the lights of the Supreme Court.

As explained in *Graham v. Florida* (2010) 560 U.S. 48, 88, the Eighth Amendment does not require strict proportionality between crime and sentence. It only forbids sentences that are grossly disproportionate to the crime. (*Ibid.* (conc. opn. of

Stevens, J.)) "[C]ourts conducting 'narrow proportionality' review should begin with a threshold inquiry that compares 'the gravity of the offense and the harshness of the penalty.' [Citation.] This analysis can consider a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history. [Citation.]" (*Ibid*.) "Only in 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,' [citation] should courts proceed to an 'intrajurisdictional' comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an 'interjurisdictional' comparison with sentences imposed for the same crime in other jurisdictions. [Citation.] If these subsequent comparisons confirm the inference of gross disproportionality, courts should invalidate the sentence as a violation of the Eighth Amendment." (*Ibid*.)

In our view, the gravity of counts 1 through 6 and 8 warranted terms of 15 years to life. The crimes involved repeated sex crimes against children by a person in a position of trust over several years. Appellant has shown himself to be a predator of the most reprehensible order. These facts mandate long sentences to protect society and punish appellant. We easily conclude that they make measurable contributions to acceptable goals of punishment, and there is no need to engage in intrajurisdictional and interjurisdictional comparison of punishments.

Moreover, case law supports the imposition of sentences exceeding human life expectancy. For example, in *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382 (*Byrd*), the court upheld a sentence of 115 years plus 444 years to life in a case involving robbery, mayhem and attempted murder. The court disagreed with Justice Mosk's concurring opinion in *Deloza*, stating, "[I]t is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution. [Citation.]" (*Byrd, supra,* 89

Cal.App.4th at p. 1383.) *Byrd* noted that a long sentence of this nature "serves valid penological purposes: it unmistakably reflects society's condemnation of defendant's conduct and it provides a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future." (*Ibid*.) Other cases are in accord. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1130, 1134–1137 [upholding sentence of 375 years to life plus 53 years for sexual assaults under the "Three Strikes" law]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666–667 [upholding sentence of 283 years eight months for multiple violent sex offenses]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 532 [upholding sentence of 129 years for repeated sex crimes against a minor].)

Finally, even if there was an inference of gross disproportionality, appellant's argument would fail. His appellate briefs do not demonstrate that his sentence is disproportionate when compared with prison sentences imposed under California law or under the law of other jurisdictions.

The sentence is not grossly disproportionate.

2. *No Violation of State Constitution*.

Appellant maintains that the three considerations in *Russell* demonstrate that his sentence is unconstitutional.

With respect to the danger to society posed by appellant and his crimes, he suggests that the danger should be discounted because his crimes did not involve violence. We cannot accede. He victimized multiple children over many years through force and manipulation. The nature of appellant and his crimes indicates that he poses a severe threat to the most vulnerable citizens in our society. "California has recognized, and reasonably so, that sex offenders present a serious danger to society because of their tendency to repeat their sexual offenses. Sexual offenses not only invade the deepest privacies of a human being, and thereby may cause permanent emotional scarring, but they frequently result in serious physical harm to, or death of, the victim." (*People v. Meeks* (2004) 123 Cal.App.4th 695, 709.) Both the Legislature and the courts have repeatedly recognized the "'need to provide children with special protection "from sexual exploitation" because they 'are "uniquely susceptible" to such abuse' and "suffer

profound harm whenever they are perceived and used as objects of sexual desire." [Citation.]'" (*People v. Murphy* (2001) 25 Cal.4th 136, 146.)

Regarding a comparison of the challenged sentence with the punishment prescribed in the same jurisdiction for more serious offenses, appellant argues that he "is serving far more time than he would if convicted of the first degree premeditated murder of the two victims (two terms of 25 years to life, [section] 190)." This argument misses the mark. The comparison must be between the sentences for seven murder convictions and appellant's sentence for being convicted on counts 1 through 6 and 8. For the murders, he would have received 175 years to life compared to 105 years to life for the sex crimes. Given the nature of the sex crimes, and the recidivism rate of sex offenders, the comparison of sentences for murder versus for sex crimes does nothing to suggest that appellant's sentence is unjust.

The last consideration is a comparison of appellant's sentence for sex crimes against minors to sentences in other jurisdictions for the same offenses. Appellant offers no comparison. We therefore take this as a concession that his sentence is in line with sentences for similar sex crimes against children in other jurisdictions. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231.)

The sentence does not shock the conscience

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ