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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GUADALUPE LOPEZ DURAN, Defendant and Appellant.	B225893 (Los Angeles County Super. Ct. No. NA082258)

APPEAL from a judgment of the Superior Court of Los Angeles, Tomson T. Ong, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Eric Reynolds and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On June 4, 2009, defendant Guadalupe Lopez Duran forcibly raped and sodomized his cousin, J., who then was 10 years and 11 months old. The People charged defendant with two counts of violating Penal Code[1] section 288.7, subdivision (a), which provides that "[a]ny person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life." A jury found defendant guilty of both counts, after which the trial court sentenced him to state prison for a total term of 50 years to life.

Defendant contends the judgment must be reversed because the evidence is insufficient to support the jury's determinations that J. was "10 years of age or younger" and that he was "18 years of age or older" within the meaning of section 288.7, subdivision (a), at the time the crimes were committed. Defendant also asserts evidentiary error and instructional error, claims he was denied the effective assistance of trial counsel and contends his sentence constitutes cruel and/or unusual punishment. We affirm.

FACTS

A. *Prosecution*

J.'s parents and defendant operate ice cream trucks in the City of Wilmington and store the trucks in a parking lot in Long Beach. Defendant is J.'s father's cousin.

On June 4, 2009, J.'s parents went out on their ice cream route, while J. accompanied defendant on his route. They had planned to meet at the parking lot in Long Beach at the end of the business day. This was the first time J. had accompanied

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

defendant alone. On a previous occasion, J. and her brother went with defendant on his ice cream route.

Sometime during the day, defendant stopped his truck and went into a building. J. waited in the truck. Upon his return to the truck, defendant offered J. money to let him do whatever he wanted. J. said nothing, after which defendant drove off and continued selling ice cream.

Approximately three hours later, defendant stopped the truck in a secluded area on E. Street, between Figueroa Street and Figueroa Place. Defendant went to the back of the truck where J. was and pushed her onto the floor, face up. J. told defendant to leave her alone. Defendant lowered J.'s pants to her feet. As he did so, he kissed J. on the neck and told her "to let him." J. threatened to tell her father and tried to push defendant away but was overpowered. Defendant inserted his penis into her vagina, causing J. a lot of pain. J. was upset and crying. Defendant then sodomized J., causing her more pain. Defendant stopped when J. started to scream. J. did not know if defendant ejaculated.

Defendant drove back to the parking lot in Long Beach. En route, he told J. not to tell her parents what had happened, explaining that her father would become angry and hit her.

Defendant and J. did not reach the parking lot at the scheduled time. By the time they arrived, J.'s parents had driven home. J. went to the bathroom and cleaned her genital area with paper towels because she was bleeding. J. disposed of the paper towels in a waste basket.

Shortly thereafter, defendant's cousin arrived in the parking lot and drove defendant and J. to J.'s parents' home. J.'s parents had been home for 15 to 20 minutes.

J.'s mother noticed that J.'s hair was messed up, that her eyes were red and swollen and that she appeared to be sad. When her mother suggested that she eat something, J. said she had gotten her period and was not hungry. J.'s mother told J. to lie down and that she would check on her later.

Initially, J. said nothing to her parents, fearful of defendant's warning. When J. went to the bathroom, she noticed that she still was bleeding. She wiped herself with toilet paper which she discarded in a waste basket.

J. later told her mother that defendant had assaulted her sexually in the ice cream truck. The mother went to the living room and confronted defendant about J.'s accusations. When defendant denied any wrongdoing, the mother called the police.

Los Angeles Police Officers Cynthia Bello and Antonio Hurtado arrived at the residence and interviewed J. and her mother. J., who was upset and crying, told the officer that defendant had assaulted her sexually and that she had cleaned her genital area at two different bathrooms and had disposed of the paper towels or toilet paper in trash cans.

Officer Hurtado recovered the bloodied toilet tissue from J.'s bathroom. Los Angeles Police Sergeant Minh Nguyen recovered bloodied paper towels from the trash can in the public bathroom of the parking lot in Long Beach.

Officers Bello and Hurtado took J. to a hospital where a nurse practitioner conducted a sexual assault examination of her. The nurse practitioner observed multiple bruises and scratches on J. back, as well as dark bruises on her right thigh. She also found fresh injuries in J.'s vagina and anus. J. was "in a lot of pain" during the examination. The injuries to J.'s genital area were so fresh that the lacerations started to bleed when the nurse practitioner performed the examination. A rectal examination revealed purple bruises around J.'s anal opening and a laceration. According to the nurse, J.'s injuries were consistent with her account of the sexual assault. The nurse collected numerous swabs from various parts of J.'s body. These swabs were booked into evidence.

Defendant was arrested and taken to a rape treatment center. During a sexual assault suspect examination, a nurse collected swabs from defendant's penis.

The swabs collected from J. and defendant were analyzed by Ernest Park, a criminalist with the Los Angeles Police Department. Criminalist Park found one sperm fragment on the internal vaginal sample collected from J. Defendant's penile swab

contained sperm fragments and epithelial cells and was brownish reddish in color and tested positive for blood. The paper towels and toilet paper collected by police officers tested presumptive positive for blood. Criminalist Park sent the evidence for DNA testing.

The parties entered into the following stipulation: "'DNA analysis was done in this case and the following results were obtained: The sperm found on defendant's penis was determined to be the defendant's sperm. The victim's DNA found on the defendant's penis and the single sperm cell fragment found in the victim's vaginal swab was insufficient for performing DNA analysis.'"

Over defendant's lack of foundation objections, Los Angeles Police Detective Marta Elena Orta was permitted to testify that defendant was 18 years of age at the time the crimes were committed. Detective Orta calculated defendant's age based on his birth date of December 10, 1990 noted on the police report.

B. *Defense*

Defendant did not testify and did not call any witnesses to testify on his behalf. He made a motion to dismiss pursuant to section 1118.1 on the grounds of insufficiency of the evidence, which the trial court denied.

In his summation to the jury, defense counsel argued that the People failed to prove beyond a reasonable doubt that defendant was 18 years of age at the time of the crimes. Defense counsel emphasized that in the absence of reliable evidence of defendant's age, a verdict of not guilty was compelled, even if the jurors found the other elements of the crime had been proven.

DISCUSSION

A. *Sufficiency of the Evidence*

When the sufficiency of the evidence is challenged, we review the entire record in the light most favorable to the judgment to determine if it contains substantial evidence—

i.e., evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Solomon* (2010) 49 Cal.4th 792, 811; accord, *People v. Mendoza* (2011) 52 Cal.4th 1056, 1068-1069.) This standard of review is applied regardless of whether the People rely primarily on direct or circumstantial evidence. (*Solomon, supra,* at p. 811.) We presume in support of the judgment the existence of any fact the jury reasonably could have deduced from the evidence. (*People v. Vines* (2011) 51 Cal.4th 830, 869.) Thus, we must accept logical inferences that the jury could have drawn even if we would have reached a contrary conclusion. (*Solomon, supra,* at pp. 811-812.)

1. J.'s Age

As previously stated, section 288.7, subdivision (a), provides that "[a]ny person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life." Defendant challenges the sufficiency of the evidence to support the jury's determination that J. was "10 years of age or younger" at the time he engaged in sexual intercourse and sodomy with her. Resolution of this challenge entails a construction of the relevant statutory language.

J. was born on June 20, 1998. The charged offenses took place on June 4, 2009 when J. was 10 years and 11 months old. Defendant contends that the phrase "10 years of age or younger" only includes victims who have not yet passed their 10th birthday. In defendant's view, since J. was almost 11 at the time of the crimes, the People failed to establish that he violated section 288.7. The People, on the other hand, maintain that the phrase includes a child whose 10th birthday has passed but who has yet to attain the age of 11, and that since J. was under the age of 11, the evidence sufficiently supports the jury's determination that J. was "10 years of age or younger" at the time defendant sexually assaulted her. The People are correct.

Recently, in *People v. Cornett* (2012) 53 Cal.4th 1261, the California Supreme Court interpreted the statutory language "10 years of age or younger" to include "children

younger than 10 years of age and children who have reached their 10th birthday but who have not yet reached their 11th birthday"—i.e., "under 11 years of age." (*Id*. at pp. 1263-1264, 1275.) Because J. was under the age of 11 at the time the crimes were committed, the evidence is sufficient to support the jury's determination that J. was "10 years of age or younger" within the meaning of section 288.7, subdivision (a). (*Cornett*, *supra*, at pp. 1263-1264, 1275; *People v. Mendoza*, *supra*, 52 Cal.4th at pp. 1068-1069.)

2. Defendant's Age

Defendant contends the evidence is insufficient to support the jury's determination that he was "18 years of age or older" within the meaning of section 288.7. In order to resolve this contention, we must first address defendant's claim that the trial court erred prejudicially in allowing Detective Orta to testify that defendant was 18 at the time of his arrest based on his date of birth noted in the police report. If Detective Orta's challenged testimony was properly admitted into evidence, it would be sufficient to support the jury's determination that defendant was "18 years of age or older" within the meaning of section 288.7 at the time he engaged in sexual intercourse and sodomy with J. If, however, her testimony was inadmissible on the specific grounds raised by defense counsel, there would be no evidence establishing that defendant was "18 years of age or older" and the evidence would be insufficient to support his convictions.

Detective Orta, a member of the sex crime detail, was assigned to investigate this case. During the prosecutor's direct examination of Detective Orta, the following transpired:

"[THE PROSECUTOR]: And as part of your investigation of this case, did you have to obtain the defendant's age?

"[DETECTIVE ORTA]: Yes, I did.

"[THE PROSECUTOR]: And what is the defendant's age?

"[DEFENSE COUNSEL]: Object: Foundation.

"THE COURT: Overruled. We'll find how she knows what's the defendant's age.

"[DETECTIVE ORTA]: May I just review . . . the arrest report?

"[THE PROSECUTOR]: Please.

"THE COURT: Sure.

"[DETECTIVE ORTA]: December 10, 1990.

"THE COURT: No. What is his age? That's the date of birth.

"[DETECTIVE ORTA]: Sorry. He was 18 at the time of the arrest.

"[DEFENSE COUNSEL]: Object: Foundation.

"THE COURT: Overruled. Fine. How do you know his name [*sic*]?

"[DETECTIVE ORTA]: Arrest report has birthday. When he was arrested.

"[THE PROSECUTOR]: Thank you.

"[DEFENSE COUNSEL]: May we approach, your Honor?

"THE COURT: No. You may cross. Continue."

Later, the prosecutor inquired, "I believe you told us the defendant's date of birth is December 10, 1990?" Defense counsel again objected on the ground of lack of foundation.[2] The court said, "That's already [been] asked and answered." The prosecutor then concluded her direct examination of Detective Orta, after which defense counsel elected not to cross-examine the detective.

Defendant maintains that the information in the police report was unreliable hearsay for which there was no foundation. He further maintains that he was deprived of his state and federal constitutional rights to confrontation and to a fair trial. In response, the People argue that defendant only objected below on grounds of lack of foundation and thus has forfeited his hearsay and constitutional claims on appeal. The People are correct. (Evid. Code, § 353[3]; *People v. Abel* (2012) 53 Cal.4th 891, 924; *People v.*

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[2] Defendant also objected on the ground of speculation at this point. On appeal, however, he does not reassert this as a ground for exclusion.

[3] Evidence Code section 353 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make

Nelson (2011) 51 Cal.4th 198, 223; *People v. Rivera* (2011) 201 Cal.App.4th 353, 360-361.)

In *People v. Partida* (2005) 37 Cal.4th 428, our state's high court observed: "The objection requirement is necessary in criminal cases because a 'contrary rule would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal."' [Citation.] 'The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.' [Citation.]

"Thus, the requirement of a specific objection serves important purposes. But, to further these purposes, the requirement must be interpreted reasonably, not formalistically. 'Evidence Code section 353 does not exalt form over substance.' [Citation.] The statute does not require any particular form of objection. Rather, 'the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.] What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason

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clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida*, *supra*, 37 Cal.4th at pp. 434-435.)

The exchange quoted above clearly shows that defendant at no time interposed a hearsay objection or asserted a violation of his constitutional confrontation and fair trial rights. As such, he has forfeited those challenges on appeal. (Evid. Code, § 353; *People v. Abel*, *supra*, 53 Cal.4th at p. 924; *People v. Nelson*, *supra*, 51 Cal.4th at p. 223; *People v. Rivera*, *supra*, 201 Cal.App.4th at pp. 360-361.) The only evidentiary challenge properly before us is whether defendant's lack of foundation objections were overruled properly. We conclude they were.

Detective Orta testified that she had to obtain defendant's age as part of her investigation. When asked for defendant's age, she could not remember off hand, and she asked to review the police report. After doing so, she said, "December 10, 1990." Although the trial court interjected that was his birthday, not his age, defense counsel did not move to strike Detective Orta's answer as nonresponsive.

Defense counsel also did not object on hearsay grounds or move to strike when, in response to the prosecutor's question how she knew defendant's birthday, Detective Orta answered, "Arrest report has birthday." In light of Detective Orta's testimony that she knew defendant's age because his date of birth was listed in the police report, and in the absence of a hearsay objection to the police report or to the information contained therein, the detective had a basis upon which to state defendant's age at the time he committed his offenses. The trial court, therefore, did not abuse its discretion in overruling defendant's lack of foundation objections and permitting Detective Orta to testify as to defendant's age and birth date. (*People v. Vieira* (2005) 35 Cal.4th 264, 292; *People v. Cortes* (2011) 192 Cal.App.4th 873, 908.) It follows, therefore, that Detective Orta's testimony regarding defendant's date of birth and age at the time of his arrest was sufficient to support the jury's determination that defendant was "18 years of age or older" within the meaning of section 288.7 at the time he engaged in sexual intercourse

and sodomy with J. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 811; *People v. Mendoza*, *supra*, 52 Cal.4th at pp. 1068-1069.)

B. *Ineffective Assistance of Counsel*

Defendant contends he was deprived of the effective assistance counsel as a result of his trial attorney's failure to object to Detective Orta's testimony regarding his age on the ground that it was inadmissible hearsay. This contention cannot be resolved via this appeal.

In *People v. Vines*, *supra*, 51 Cal.4th 830, the state's high court observed that "'[t]he law governing defendant's claim is settled. "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.'" [Citation.] It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] We have summarized defendant's burden as follows: "'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when 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."'" [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' [Citation.] If

the record on appeal '"'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,"' and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*Id.* at pp. 875-876.)

In this case, the record sheds no light on trial counsel's reasons for not objecting to Detective Orta's testimony on hearsay grounds and, in particular, the detective's reliance on information in the police report. It also sheds no light on why, after the lower court denied trial counsel's request for a side bar conference, counsel did not renew his challenge to the admissibility of Detective Orta's testimony on additional grounds and move to strike it at the earliest opportunity outside the presence of the jury. Indeed, trial counsel's decision not to cross examine Detective Orta, when considered in light of his summation to the jury—i.e., the People failed to prove beyond a reasonable doubt that defendant was 18 years of age at the time of the crimes with reliable evidence—suggests the possibility that he may have had a tactical reason for not pressing the matter further. Under these circumstances, we reject defendant's claim of ineffective assistance of counsel. His claim is more appropriately resolved via a writ of habeas corpus. (*People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876.)

C. *Jury Instructions on Lesser Included Offenses*

1. Assault

Defendant contends his request below for an instruction on simple assault as a lesser included offense should have been granted. We disagree. It is well established that the trial court has a duty to "instruct on lesser offenses necessarily included in the charged offense if there is substantial evidence that defendant is guilty only of the lesser. [Citation.] On the other hand, if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1063-1064.) The basis for defendant's request for an instruction on the lesser offense of

simple assault was his ill perceived belief that there was an absence of evidence of penetration. To the contrary, there was ample evidence of penetration such that the offense was not less than that charged. The trial court did not err in refusing to instruct the jury on simple assault.

2. Unlawful Intercourse and Sodomy with a Minor

Defendant argues that unlawful sexual intercourse with a minor in violation of section 261.5, subdivision (a) or (c), is a lesser included offense of section 288.7, subdivision (a). Section 261.5, subdivision (a), provides that "[u]nlawful 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 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." Subdivision (c) of section 261.5 provides that "[a]ny 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."

Defendant also argues that "[a] person cannot engage in sodomy of a child under the age of 10 years without also violating" subdivision (b)(1) of section 286. Section 286, subdivision (a), defines the crime of "sodomy" as "sexual conduct consisting of contact between the penis of one person and the anus of another person" and specifies that any sexual penetration, however slight, is sufficient to complete the crime of sodomy. Subdivision (b)(1) of section 286 provides: "Except as provided in Section 288, any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for not more than one year."

There are two tests by which it may be determined whether an offense is a lesser necessarily included offense. Under the elements test, an offense is a lesser necessarily included offense if the statutory elements of the greater offense include all of the

elements of the lesser offense, so that the greater offense cannot be committed without also committing the lesser offense. (*People v. Parson* (2008) 44 Cal.4th 332, 349; *People v. Birks* (1998) 19 Cal.4th 108, 117.) Under the accusatory pleading test, an offense is a lesser necessarily included offense if the facts alleged include all of the elements of the uncharged lesser offense. (*Parson, supra,* at p. 349; *Birks, supra*, at p. 117.)

We need not decide whether unlawful intercourse with a minor (§ 261.5, subds. (a), (c)) and sodomy with a minor (§ 286, subd. (b)(1)) are lesser and necessarily included offenses of the charged offenses under either of these tests.[4] Even if we were to assume for the sake of argument that they are, the evidence did not warrant an instruction on those offenses. (See *People v. Hernandez* (2011) 200 Cal.App.4th 1000, 1006; *People v. King* (2010) 183 Cal.App.4th 1281, 1318-1319.) "A trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged 'only if [citation] "there is evidence"' [citation], specifically, '*substantial* evidence' [citation], '"which, if accepted . . . , would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]. [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

In this case, the People introduced evidence that defendant was 18 years old at the time he sexually assaulted J. No evidence to the contrary was adduced at trial. In the absence of substantial evidence that defendant was younger than 18 years of age at that time, there was no evidence that the crimes were less that those charged. Accordingly, the trial court had no sua sponte duty to instruct on unlawful intercourse with a minor

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4 We reject outright, however, defendant's assertion that subdivision (c)(2)(B) of section 286 is a lesser included offense. It provides that "[a]ny person who commits an act of sodomy with another person who is under 14 years of age when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for 9, 11, or 13 years." Force or fear is not required for a violation of section 288.7.

(§ 261.5, subds. (a), (c)) and sodomy with a minor (§ 286, subd. (b)(1)) if they indeed were lesser included offenses.[5] (*People v. Waidla*, *supra*, 22 Cal.4th at p. 733.)

D. *Cumulative Error*

Defendant contends that the trial court's errors cumulatively amounted to reversible error. We disagree. We have found no error. Thus, there is no error to cumulate. (*People v. Lee* (2011) 51 Cal.4th 620, 657.)

E. *Cruel and Unusual Punishment*

Defendant contends his sentence of 50 years to life violates the state and federal constitutional bans on cruel and unusual punishment. (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.) This contention lacks merit.

1. State Law

A sentence is cruel or unusual within the meaning of the California Constitution "if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. Our review under this test includes an examination of the nature of the crime and the character of the defendant, and comparisons of the penalties in this state for more serious crimes and those imposed in other states for the same crime." (*People v. Murray* (2012) 203 Cal.App.4th 277, 285; accord, *In re Lynch* (1972) 8 Cal.3d 410, 424.)

The California Supreme Court has also held that, provided a punishment is proportionate to the defendant's individual culpability, there is no requirement it be proportionate to the punishments imposed in other similar cases. (*People v. Webb* (1993) 6 Cal.4th 494, 536; *People v. Mincey* (1992) 2 Cal.4th 408, 476.) Stated otherwise, the

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[5] Absent instructional error, defendant's claim that his trial counsel's failure to request instructions on lesser included offenses amount to ineffective assistance of counsel has no merit.

determination as to whether a particular punishment violated the state constitutional prohibition against cruel or unusual punishment may be based solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 398-399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) Defendant has the burden of establishing that his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (*Ayon*, *supra*, at p. 399.) With respect to the nature of the offense, courts must examine the crimes in the abstract, the facts of the instant crimes and consider the totality of the circumstances, including the way the crime was committed, the extent of defendant's involvement, motive and the consequences of defendant's acts. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

Defendant is an undocumented alien who completed high school in Mexico. He came to the United States in 2007 and has since lived with three adult cousins and their two children. He has no juvenile or adult record in the United States, has no know gang involvement and has no substance abuse problems. It is unknown whether he has any criminal record in Mexico.

On the day in question, defendant had complete access to J. while on his ice cream route. At some point, defendant offered to give J. money if she would let him do whatever he wanted. J. did not know what defendant meant, and defendant continued on his route. Defendant later stopped his truck in a secluded area and forcibly engaged in sexual intercourse and sodomy with J. J. cried throughout the attack and attempted to no avail to push defendant away. Defendant only stopped when J. started screaming. Defendant attempted to avoid detection by telling J. that her father would be angry at her if he found out what had transpired.

J. underwent a very painful sexual assault examination which revealed that she had been attacked brutally. The nurse practitioner conducting the examination observed multiple bruises on J.'s back and dark bruises on her right inner thigh. She also saw fresh injuries in J.'s vaginal area. The lacerations were so fresh they started bleeding as a result of the examination. The rectal examination showed purple bruises all around the

anal opening and a laceration. Based on her experience, the nurse opined that there was a significant amount of injury. J.'s mother saw a distinct change in her daughter after defendant sexually assaulted her.

Defendant's comparison of his punishment with the punishment for other crimes in California misses the mark. That defendant was punished as severely as a person who committed two willful, deliberate and premeditated first-degree murders does not prove that his punishment was either cruel or unusual.

Also unavailing is defendant's argument that J. was almost 11 and he was only 18. If J. had been 11 or older at the time he sexually assaulted her, he would not have been charged with violating section 288.7. That he would have received a lesser sentence if J. had been 11 or he had not yet turned 18 is irrelevant.

Given the nature of defendant's crimes, his culpability and motive, as well as the consequences to his young victim, an aggregate term of 50 years to life does not violate the California Constitution. Defendant simply has failed to sustain his burden of establishing that his sentence violated the state constitution's proscription against cruel or unusual punishment.[6]

2. Federal Law

The Eight Amendment to the United States Constitution proscribes the infliction of cruel and unusual punishment, that is, punishments that are excessive or disproportionate to the crime committed. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [111 S.Ct. 2680, 115 L.Ed.2d 836].) "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. [Citations.]" (*Id*. at p. 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288 [103 S.Ct. 3001, 77 L.Ed.2d 637].) Successful claims of gross disproportionality are "'exceedingly

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[6] Defendant did not undertake to compare sentences for more serious crimes and the punishment imposed for the same crime in other jurisdictions.

rare'" and appear only in "'extreme' case[s]." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [123 S.Ct. 1166, 155 L.Ed.2d 144].) Comparative analysis of sentences for other crimes is only appropriate in rare cases where the "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." (*Harmelin*, *supra*, at p. 1005.)

Having applied the relevant federal criteria, we cannot conclude that defendant's sentence was grossly disproportionate to his crimes or that this is an extreme case. (*Lockyer v. Andrade*, *supra*, 538 U.S. at p. 73.) Defendant has failed to demonstrate that his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.[7]

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[7] Having addressed the merits of defendant's claim that his sentence constituted cruel and unusual punishment, we need not decide whether defendant waived the issue by failing to object to the constitutionality of his sentence below. (*People v. Cortez* (1999) 73 Cal.App.4th 276, 286, fn. 10.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.