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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALAN GIL, Defendant and Appellant.	B236796 (Los Angeles County Super. Ct. No. MA049799)

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

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Shira B. Seigle, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Alan Gil of seven counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)[1])—four counts with respect to victim L.R. and three counts with respect to victim C.R.—and one count of possessing matter depicting a minor engaging in sexual conduct (§ 311.11, subd. (a)). With respect to the committing a lewd act upon a child offenses, the jury found true the allegations that there were multiple victims. (§ 667.61, subd. (b).) The trial court sentenced defendant to 33 years to life in state prison. The trial court imposed a three year term with respect to the possession of matter depicting a minor engaging in sexual conduct offense. As to each of the remaining offenses, the trial court sentenced defendant to terms of 15 years to life—imposing consecutive terms on two of the offenses and concurrent terms on the remaining offenses. Among other fines, the trial court imposed on defendant a $300 sexual offender fine. (§ 290.3.)

On appeal, defendant contends that his consecutive terms of 15 years to life are cruel and/or unusual punishment and that the abstract of judgment must be modified to reflect that he was sentenced to a term of 15 years to life on count eight (one of the committing a lewd act upon a child offenses) and not on count six (the possession of matter depicting a minor engaging in sexual conduct offense). We asked the parties to submit supplemental letter briefs addressing whether the trial court erred in failing to impose on the section 290.3 fine a mandatory penalty assessment pursuant to section 1464, subdivision (a)(1); a mandatory state surcharge pursuant to section 1465.7, subdivision (a); a mandatory state court construction penalty pursuant to Government Code section 70372, subdivision (a); and a mandatory penalty assessment pursuant to Government Code section 76000, subdivision (a)(1), and the proper amount of any such penalty, surcharge, or assessment. We affirm defendant's sentence and order the abstract of judgment modified to reflect that defendant received a term of 15 years to life on count eight and not on count six and that defendant is to pay a $300 mandatory section 1464,

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1 All statutory citations are to the Penal Code unless otherwise noted.

subdivision (a)(1) penalty assessment; a $60 mandatory state surcharge pursuant to section 1465.7, subdivision (a); a $90 mandatory state court construction penalty pursuant to Government Code section 70372, subdivision (a)(1); and a $210 mandatory penalty assessment pursuant to Government Code section 76000, subdivision (a)(1).

BACKGROUND

In June 2009, C.R. turned 13 years old. In July 2009, C.R. met defendant through the website "MySpace" when he "friend-requested" her. C.R. listed her age as 14 on her MySpace page. C.R. looked at defendant's MySpace page which listed defendant's age as 17. C.R. believed that defendant was 17 years old and did not ask about defendant's age. Later, when C.R. became suspicious and asked defendant about his age, defendant said, "I'm really 17." There was evidence that defendant was in his mid-20's.

C.R. and defendant chatted over MySpace. Later, they "exchanged numbers" and began talking with each other. When C.R. first started talking with defendant, she did not tell him her real age. About a week later, she told him she was 13 years old.

On July 5, 2009, C.R. met defendant in person. They had agreed to meet at a movie theater. C.R. went to a movie with friends and met defendant after the movie was over. They walked around for a while and then went to defendant's car where they "made out" in the backseat. Thereafter, C.R. left with her friends.

On August 5, 2009, C.R. and defendant went to the beach. They removed their clothes and made out, but did not "do anything else." A week or two later, C.R. sneaked out of her home and defendant picked her up and took her to Venice Beach. There, C.R. and defendant engaged in sexual intercourse in the backseat of defendant's car and defendant placed his mouth "in her vagina." Thereafter, C.R. and defendant had intercourse every time she saw him—about three or four times a week. C.R. and defendant did other things together besides having sexual intercourse. Defendant took C.R. to the mall, theaters, and Universal Studios. However, they engaged in sexual intercourse in defendant's car at Universal Studios.

On October 26, 2009, C.R. sneaked out of her house during the night to see defendant. C.R. tried to return home before morning, but the door and windows were locked, so she called defendant to pick her up. C.R. was afraid of being caught because she had gotten in trouble in September for sneaking out. When C.R. returned home later that day, police officers were at her home. C.R. had been reported missing, and the officers asked her questions about where she had been.

In November 2009, C.R. missed her period and discussed the matter with defendant. In December 2009, C.R. "broke up" with defendant. In January 2010, C.R. discussed with defendant the possibility that she might be pregnant. Defendant said, "I hope you and your baby die giving birth." On June 7, 2010, C.R., still 13 years old, gave birth to a boy. The parties stipulated that defendant is the biological father of C.R.'s son.

In March 2010, L.R. met defendant, whom she described as her former boyfriend, through MySpace. Defendant had sent a "request" to L.R.'s aunt who showed the request to L.R. L.R. sent defendant a friend request which he accepted. L.R. was 13 years old and her MySpace page listed her age as 13. Defendant's MySpace page listed his name as "Eric Gutierrez," and said that defendant was 17. L.R. and defendant sent each other instant messages for awhile. At some point, they began speaking on the phone. L.R. told defendant that she attended junior high school and was in the eighth grade. Defendant said that he was in high school.

On April 1, 2010, defendant asked L.R. if she wanted to see him. They had not yet met face-to-face. L.R. asked her aunt about defendant's request. L.R.'s aunt told her to be home at a decent hour. Defendant picked up L.R. outside of her grandmother's house. They drove around for a while, and then stopped. They listened to music and talked and then went into the backseat of defendant's car and engaged in sexual intercourse. Defendant and L.R. drank alcohol and walked around the neighborhood for a while and then returned to the car and engaged in sexual intercourse again.

L.R.'s aunt attempted to call defendant, but defendant's cell phone died. Defendant dropped off L.R. outside of her grandmother's house. L.R.'s aunt was upset with her, wanted her to break up with defendant, and threatened to call the police about

defendant. When her aunt threatened to call the police, L.R. became upset and decided to run away from home. She called defendant and asked him to pick her up. Defendant picked up L.R. outside of her school and took her first to Venice Beach and then to his house where they had sex twice.

Defendant's mother and brother took defendant and L.R. to a motel and left them there. While at the motel, they "just watched TV, ate whatever he picked up or what his mother [brought], and had sex." Defendant took pictures of L.R. and filmed himself and L.R. engaging in sexual intercourse. After staying at the motel for five days, L.R. decided to go home. Defendant's parents dropped off L.R. a couple of blocks from her school. L.R.'s mother picked up L.R. and took her home.

L.R. shut down her MySpace account and stopped communicating with defendant. About a month later, she resumed communicating with defendant through a friend's MySpace account. On June 2, 2010, L.R. decided to visit defendant, but ended up running away again. Defendant picked up L.R. near her school and took her to his house where they had sex. Defendant's mother, father, sister, brother, and brother-in-law also lived in the house. L.R. stayed with defendant and his family for about two months.

At defendant's request, L.R. told his family that she was 16 years old. While at the house, L.R. turned 14 years old. During her stay at defendant's house, before L.R. turned 14, she and defendant had sexual intercourse every other day, she performed oral sex on defendant, and she and defendant attempted to have anal sex.

While L.R. was staying with defendant, she went through his wallet and found his driver's license. Defendant's driver's license said that his name was "Alan Gil" and that he was 25 years old. L.R. confronted defendant, and he denied that he was 25 years old.

On July 20, 2010, a Los Angeles County Sheriff's Department detective and several deputies went to defendant's house. Defendant ordered L.R. to go into one of the closets. L.R. was found in the closet. L.R. was given a sexual assault exam. The parties stipulated that DNA from a vaginal swab and an external genital swab taken during the exam was a mixture of L.R.'s and defendant's DNA. Prior to that exam, L.R. had not had sex with anyone other than defendant.

DISCUSSION

I. Defendant's Claim That His Life Sentence Is Cruel And/Or Unusual Punishment

Defendant contends that a sentence of 30 years to life for two of his convictions for committing a lewd act on a child is cruel and/or unusual punishment under the facts of this case. Defendant alternatively argues that if appellate review of this contention was forfeited by the failure to raise it specifically in the trial court, then he received ineffective assistance of counsel. We hold that defendant forfeited appellate review of this contention, and, even if we considered the contention, the challenged part of his sentence is not cruel and/or unusual punishment.

A. Forfeiture

At sentencing, defense counsel made the following remarks that defendant contends constitute an objection to a life sentence for committing a lewd act on a child on the ground of cruel and/or unusual punishment:

"I just wanted to say that the statutory crime that [defendant] was convicted of where—there's really no room to take any individual conduct or circumstances into account. I think it's a tragedy that [defendant] is not going to be able to see his son that he fathered. . . .

"I think life in prison for such crimes is something that really should be left to true child molesters, someone that was creeping on little children, which is absolutely nonapplicable to this case here. What [defendant] was doing was engaging in sexual activity with girls well into puberty, old enough to make decisions for themselves, prime example of bearing a child. There was no force, coercion, trickery used. They were engaging in consensual sexual activity.

"Static 99 report also places him in the low category, low risk category, terms of risk of recidivism. [Defendant] was evaluated by Dr. Malinek. The psyche report indicates that [defendant] is not a sexual deviant. He made a mistake, used extremely

poor judgment in engaging in the activity that he did, and I really just ask the court to give him a second chance.

"There's—court use some discretion in sentencing. He's not a child molester. He's a young man that used poor judgment by getting involved with two girls that were just a few calendar months shy of being 14 years old. I think what he does need is some sexual offender counseling, some psychotherapy, something along those lines. I definitely don't think this is something deserving of life in prison and there's, again, the Static 99 that Dr. Malinek's report—several letters from friends, family, professional acquaintances, that I'll ask the court to just have some mercy on [defendant] and that are willing to give him the support that he needs."

Although defense counsel argued in the trial court for a term less than life for defendant's offenses of committing a lewd act on a child, she did not expressly argue that a life term would constitute cruel and/or unusual punishment, and her remarks are not fairly construed as making such an argument. Accordingly, defendant forfeited this issue by failing to raise it in the trial court. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Defendant argues that if this issue has been forfeited, then he received ineffective assistance of counsel. "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) The record on appeal does not reveal the reason defense counsel failed to object to a life term for any of defendant's convictions for committing a lewd act on a child. Any claim of ineffective assistance with respect to that claimed deficiency is better suited to a petition for writ of habeas

corpus.[2] (*People v. Anderson, supra,* 25 Cal.4th at p. 569; *People v. Mendoza Tello, supra,* 15 Cal.4th at p. 267.)

B. Cruel and/or Unusual Punishment

Although we have held that defendant forfeited his claim that his life sentence is cruel and/or unusual punishment and that any claim of ineffective assistance of counsel with respect to that claim properly is addressed through a petition for writ of habeas corpus, we nevertheless address the merits of defendant's claim.

The United States Constitution prohibits the imposition of cruel and unusual punishment (U.S. Const., 8th Amend.), and the California Constitution prohibits the imposition of cruel or unusual punishment (Cal. Const., art I, § 17). The California and federal constitutional provisions have both been interpreted to prohibit a sentence that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; see also *Ewing v. California* (2003) 538 U.S. 11, 32-35; *Harmelin v. Michigan* (1991) 501 U.S. 957, 962.) The federal constitutional standard is one of gross disproportionality. (*Ewing v. California, supra,* 538 U.S. at p. 21; *Harmelin v. Michigan, supra,* 501 U.S. at p. 1001.) Successful challenges to the proportionality of particular sentences have been very rare. (*Rummel v. Estelle* (1980) 445 U.S. 263, 272; *Ewing v. California, supra,* 538 U.S. at p. 21 ["outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare"]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196 ["Findings of disproportionality have occurred with exquisite rarity in the case law"].)

The California Supreme Court has instructed that, when reviewing a claim of cruel or unusual punishment, courts should examine the nature of the offense and offender,

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[2] Because, as we explain below, defendant's cruel and/or unusual punishment contention fails, defendant cannot establish prejudice in support of an ineffective assistance of counsel claim. (*People v. Foster* (2003) 111 Cal.App.4th 379, 383; *People v. Ledesma* (1987) 43 Cal.3d 171, 217–218 .)

compare the punishment with the penalty for more serious crimes in the same jurisdiction, and measure the punishment to the penalty for the same offense in different jurisdictions. (*People v. Dennis* (1998) 17 Cal.4th 468, 511; *In re Lynch, supra,* 8 Cal.3d at pp. 425-427.) Defendant does not contend that his punishment is unconstitutional in the abstract, but as applied to him. Thus, defendant's argument addresses the first factor identified in *In re Lynch*—the nature of the offense and the offender. Regarding the nature of the offense and the offender, we evaluate the totality of the circumstances surrounding the commission of the current offenses, including the defendant's motive, the manner of commission of the crimes, the extent of the defendant's involvement, the consequences of his acts, and his individual culpability, including factors such as the defendant's age, prior criminality, personal characteristics, and state of mind. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

As to the nature of the offense, defendant argues that while he may "technically" have violated section 288, subdivision (a), he never used physical force in committing lewd acts on C.R. and L.R. and both of his victims willingly participated in the sexual conduct. According to defendant, he and C.R. did not meet just to engage in sexual conduct, but went on dates and acted as boyfriend and girlfriend. Apparently to minimize his conduct, defendant argues that he and his victims engaged in sexual conduct over extended periods of time, including periods of time when L.R. lived with defendant at a motel and at his family's house. Defendant argues, "due to the nature of today's highly sexualized society which influences teenagers to grow up too fast, [C.R.] and [L.R.] were doing nothing more, by engaging in sexual intercourse, than a good percentage of their peers. [He] did not force either [C.R.] or [L.R.] to do anything they were not ready to do." According to defendant, "there is no doubt that both [L.R.] and [C.R.] knew what they were doing and actively pursued, and participated in, the sexual conduct with [defendant]."

As to the nature of the offender, defendant relies primarily on a report by Hy Malinek, PsyD, that was submitted to the trial court. Notwithstanding defendant's "poor judgment in this case," Dr. Malinek did not find evidence of pedophilia or sexual

deviance in defendant. Pedophiles typically are interested in prepubescent females, and neither C.R. nor L.R. appeared to be prepubescent. The doctor noted that the C.R. and L.R. had participated in consensual sexual activity with defendant, and that one of his victims had initiated contact with him online before they met. Dr. Malinek did not believe that defendant was psychopathic, criminally oriented, or violent. According to the doctor, defendant was emotionally vulnerable, immature, and unsophisticated, and suffered from low self-esteem. It was reasonable to assume, based on the Million Clinical Multiaxial Inventory-III test that defendant was "experiencing a moderately severe mental disorder." The doctor believed that "in many ways, [defendant] was quite 'lost at the time of his involvement with the two victims." Defendant also had a significant history of marijuana and alcohol abuse.

Dr. Malinek opined that defendant posed a low risk of recidivism due to the absence of factors associated with recidivism. Defendant's scores on two "actuarial (statistical) formulas for determining baseline recidivism"—the Static-99R and Static-2002R—fell in the low range and had been associated with recidivism rates of five percent or less in five years. The doctor stated that defendant did not "impress me as a predator or as an individual who has sought to victimize minors as a result of an enduring attraction to children."

Although defendant told Dr. Malinek that he believed that L.R. was an adult and that she had "'tricked'" him, defendant acknowledged that he had erred and wished that he had been "'more mature.'" Defendant told the doctor that he "'did not know about the law'." Defendant expressed what appeared to be genuine regret to the doctor.

Defendant also relies on letters that were submitted to the trial court that attested to his good character and friendship. Among the letters was a letter from C.R. who asked the trial court to show defendant mercy. C.R. wrote that neither she nor her family held anything against defendant. C.R.'s father and family had met defendant's family members and believed that they were hardworking and supportive. C.R.'s brother believed defendant's family was very nice.

Defendant's claim that his sentence of 30 years to life is cruel and/or unusual punishment for his two offenses of committing a lewd act on a child is unavailing. Defendant's claim depends in large part on the assertion that L.R. and C.R. "willingly participated" in "completely consensual" sexual intercourse. Indeed, according to defendant, "there is no doubt that both [L.R.] and [C.R.] knew what they were doing and actively pursued, and participated in, the sexual conduct with [defendant]." However, "a child under age 14 is legally incapable of consenting to sexual relations." (*People v. Soto* (2011) 51 Cal.4th 229, 233.)

Moreover, the facts of this case show that defendant's sentence of 30 years to life is neither cruel nor unusual punishment. C.R. and L.R. met defendant through MySpace. Defendant misrepresented his age on his MySpace page as 17. At a time when defendant was at least 24 years old, he repeatedly engaged in sexual intercourse with C.R. and L.R. both of whom he knew to be 13 years old. Defendant impregnated C.R. who gave birth while still age 13. L.R. had not had sex with anyone prior to defendant. Defendant permitted L.R. to stay with him, and away from her family, in a motel for five days and to live in his home for about two months apparently so that he had ready access to L.R. for sexual intercourse and other sexual conduct. Defendant told L.R. to lie to his family about her true age, and lied to her when she confronted him about his age. Considering the facts related to defendant and his offenses in this case, defendant's sentence for his two offenses of committing a lewd act on a child does not shock the conscience or offend fundamental notions of human dignity. (*In re Lynch*, *supra*, 8 Cal.3d at p. 424.) Accordingly, based on the record before us, his sentence of 30 years to life is not cruel and/or unusual punishment.

II. Abstract Of Judgment

A. Counts six and eight

Defendant was sentenced to a term of three years on count six (the possession of matter depicting a minor engaging in sexual conduct offense) and 15 years to life on count eight (one of the committing a lewd act upon a child offenses). Defendant

correctly contends that the abstract of judgment instead improperly reflects that he received a sentence of 15 years to life on count six and not on count eight. We order the abstract of judgment modified to strike the part that reflects that defendant received a sentence of 15 years to life on count six and modified to reflect that defendant received a sentence of 15 years to life on count eight.

B. Penalties, surcharges, and assessments

The trial court imposed on defendant a section 290.3 sexual offender fine. The parties agree as do we that the trial court erred in failing to impose on the section 290.3 fine a $300 mandatory penalty assessment pursuant to section 1464, subdivision (a)(1); a $60 mandatory state surcharge pursuant to section 1465.7, subdivision (a); a $90 mandatory state court construction penalty pursuant to Government Code section 70372, subdivision (a)(1)[3]; and a $210 mandatory penalty assessment pursuant to Government Code section 76000, subdivision (a)(1). (*People v. Walz* (2008) 160 Cal.App.4th 1368, 1371-1372.)

DISPOSITION

We order the abstract of judgment modified to strike the part that reflects that defendant received a sentence of 15 years to life on count six and modified to reflect that defendant received a sentence of 15 years to life on count eight. We order the abstract of judgment further modified to reflect that defendant is to pay a $300 mandatory section

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[3] Applying the version of Government Code section 70372 now in effect, defendant calculated the mandatory state court construction penalty to be $150. Instead, that penalty should be calculated under the version of Government Code section 70372 in effect on the date of defendant's sentencing. (In 2011, the legislature deleted subdivision (a)(2) from Government Code section 70372. (Stats. 2011, ch. 304, § 5.)) At that time, subdivision (a)(2) of Government Code section 70372 permitted counties to reduce court construction penalties as provided in Government Code section 70375, subdivision (b). In Los Angeles County the state court construction penalty was calculated at that time as $3 for every $10 in fines. (*People v. McCoy* (2007) 156 Cal.App.4th 1246, 1251-1254.) Accordingly, the correct mandatory state construction penalty under Government Code section 70372 is $90.

1464, subdivision (a)(1) penalty assessment; a $60 mandatory state surcharge pursuant to section 1465.7, subdivision (a); a $90 mandatory state court construction penalty pursuant to Government Code section 70372, subdivision (a)(1); and a $210 mandatory penalty assessment pursuant to Government Code section 76000, subdivision (a)(1). The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.