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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. FRED DIPAOLO, Defendant and Appellant.	B237485 (Los Angeles County Super. Ct. No. LA062053)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael K. Kellogg, Judge. Affirmed.

William L. Heyman, 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, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General for Plaintiff and Respondent.

For the second time, defendant and appellant Fred DiPaolo (defendant) appeals from his conviction of three counts of felony sex abuse.[1] Defendant contends that the trial court failed to comply with this court's directive to exercise its discretion in determining whether to impose a concurrent or consecutive term as to count 2. He also contends that the consecutive term amounting to 30 years to life in prison violates the constitutional prohibition against cruel and unusual punishment. We conclude that the trial court exercised its discretion as directed and that defendant's sentence was not cruel or unusual. We thus affirm the judgment.

BACKGROUND

After a court trial defendant was convicted of three counts of oral copulation of his 24-month-old grandson in violation of Penal Code section 288.7, subdivision (b).[2] The evidence consisted primarily of a video secretly recorded by the child's parents, as well as the confession that defendant gave to law enforcement when faced with the video, which showed defendant orally copulating the child three times. The victim's mother testified that before and after the recorded incident, she observed the child engaging in behaviors such as simulating oral sex on a little girl who was his play date, "humping his teddy bear," and breathing heavily and rapidly when he kissed his mother. Psychological counseling was sought due to the behavior.

When defendant was first sentenced, the trial court imposed two consecutive terms of 15 years to life in prison (counts 1 & 2), plus one concurrent term of 15 years to life (count 3). In pronouncing sentence, the trial court stated: "[M]andatory consecutive sentencing in this matter has already been established by case law. The issue that the court had is count 1, 2 and 3 is whether or not count 2 and 3 merged in to one code of conduct. And the case . . . I read yesterday is *People v. Jimenez* cited officially at 80 Cal.App.4th 286. It just went, in comparison to the 269s, 288s and 667.6 whether or not

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[1] Defendant's first appeal resulted in an unpublished opinion. (*The People v. Fred DiPaolo* (June 30, 2011, B223962) (*DiPaolo I*).)

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

consecutive sentencing is applicable, even though it's absent from the statute and Court of Appeals by analogy said absolutely yes."

Defendant appealed, and in an unpublished opinion, we vacated the sentence because the trial court's comment, and its reliance on *People v. Jimenez* (2000) 80 Cal.App.4th 286 (*Jimenez*), suggested a mistaken belief that a consecutive sentence was mandated by section 667.6, subdivision (d), rather than one of discretion. In *Jimenez*, the defendant's conviction under section 269, subdivision (a)(3), satisfied the factual predicate necessary to apply section 667.6, subdivision (d), even if the offense was not expressly listed in the statute. (See *Jimenez*, *supra*, at pp. 290-291.) A violation of section 288.7, however, is not expressly listed in section 667.6; nor are the facts underlying a violation of section 288.7 encompassed within any of the offenses listed in section 667.6. We thus concluded that consecutive sentencing was not mandatory for violations of section 288.7, subdivision (b), and construed the trial court's comments as indicative of a mistaken belief that consecutive sentencing was mandatory under the cited statutes. (*DiPaolo I*, *supra*, at p. 6.) Because the trial court had the discretion to impose consecutive sentences in this case, but was not required by law to do so, we remanded the matter for the trial court to exercise its discretion in selecting either a consecutive or concurrent sentence. (*Ibid*.)

The remittitur was filed on September 2, 2011, and on November 9, 2011, the trial court once again sentenced defendant to two consecutive terms of 15 years to life in prison as to counts 1 and 2, plus one concurrent term of 15 years to life as to count 3. Defendant filed a timely notice of appeal.

DISCUSSION

I. The trial court properly exercised its discretion

Defendant contends that the sentence must be vacated and the matter remanded a second time because the trial court again failed to properly exercise its discretion.

With exceptions we found inapplicable here (see *DiPaolo I*, *supra*, at p. 6), when a defendant is convicted of two or more crimes, the trial court must determine whether to run the terms of imprisonment concurrently or consecutively. (§ 669.) The California

Rules of Court include factors affecting the decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.425.) In addition, the mitigating and aggravating circumstances set forth in the determinate sentencing guidelines are proper criteria to consider in evaluating whether leniency should be granted in imposing an indeterminate term. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149; Cal. Rules of Court, rules 4.421, 4.423.) When making a sentencing choice, the court is vested with broad discretion to weigh aggravating and mitigating factors, including the authority to minimize or even disregard allegedly mitigating factors. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) A single aggravating factor will justify a consecutive term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

Defendant contends that the trial court's comments at the resentencing hearing show that the court did not exercise its discretion, but instead once again ruled that the imposition of the consecutive sentence was mandatory once it found that the conduct in count 1 was separate from the conduct in count 2. Defendant quotes several of the comments, emphasizing in italics the portions that defendant construes as a failure to exercise discretion. In relevant part, defendant points to the following:

> 1. "[T]he issue . . . is whether or not this Court understood that it . . . did have and could have exercised discretion in the consecutive or concurrent sentencing [scheme] based on the facts of this case *and in light of Penal Code section 667.6, subdivision (d).*" (Italics added.)
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> 2. "[T]he appellate court might not have known explicitly that *this Court did exercise its discretion in finding two separate acts*. . . ." (Italics added.)
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> 3. "Under the review standard of this Penal Code section 667.6[, subdivision] (d) time alone is not controlling. It is whether or not the defendant had the opportunity for reflection of what he was doing and it was obvious to this Court that he did. That is why I incorporated the video into the Court's decision. So if the appellate court or reviewing court had an issue with the [section] 667.6[, subdivision] (d) finding then it could review that."
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> 4. "I[t] was according to the [section] 667.6[, subdivision] (d) analysis that they felt that I was vague in my determination. So that's why I resentenced with what I feel to be extreme clarity as to the analysis of which I have done. . . . [Defense

counsel] is asking me to look past the [section] 667[, subdivision] (d) analysis that I did. . . ."

5. "My *analysis, I followed the law, I followed the [section] 667.6[, subdivision] (d) analysis. Once I did that analysis [regardless] of the arguments from either side I had an independent responsibility to make my analysis separate of any feeling that I might have about a draconian sentence* that does not come into play. So once I decided, based on the analysis that there were two separate acts then *the consecutive sentencing mandated* would be in those circumstances proper. . . ." (Italics added.)

Defendant argues that the trial court's comments suggest that the discretion it exercised related only to whether counts 1 and 2 were separate acts, and not to a discretionary determination to impose a consecutive term based upon that finding.

Respondent contends that other comments made by the trial court demonstrate its understanding and proper exercise of its discretion in imposing a consecutive term as to count 2. In particular, respondent points to a portion of the trial court's statement omitted by defendant. Defendant showed that the trial court stated that it "did exercise its discretion in finding two separate acts," but left out the remainder of the sentence. The trial court went on to explain that it exercised this discretion "through its specific analysis using section 667.6[, subdivision] (d) as a *guide*." (Italics added.)

Respondent also points to the court's explanation that when it had previously said it had no discretion, it was referring to the minimum parole eligibility period of 15 years. The trial court explained: "[W]hen the court said [in the original sentencing hearing] [that it] had no discretion, I was talking in a broader sense not into a 667(d) saying that when the law says 15 to life I can't give less than life with determinants of 15 if that is the sentence to be imposed. I can't go life with the determinative of five, or life with the determinative of 12. That's how and why that discussion may have refocused the Court of Appeal[] to an entirely different issue."

We agree with respondent that the trial court's comments demonstrate that it exercised its discretion to run the sentence on count 2 consecutively to the term imposed as to count 1. Criteria properly supporting the imposition of a consecutive term include a

finding that the crimes involved separate acts of violence. (Cal. Rules of Court, rule 4.425(a)(2).) The trial court noted that "[i]t was clear from the evidence that count 1 and count 2 were two separate occasions . . . ."

At resentencing the trial court emphasized that it understood its discretion to impose consecutive terms and explained that when it had previously stated that it had no discretion, it referred to the minimum parole period, not consecutive sentencing, and set forth in great detail how it had exercised its discretion to determine that counts 1 and 2 were separate, using the statutory criteria in section 667.6, subdivision (d), merely as an established *guide*.[3] Implicit in the court's comments is that the trial court properly exercised its discretion to find as an aggravating factor, the commission of two *separate* violent acts. (Cal. Rules of Court, rule 4.425(a)(2).) Remand for resentencing is thus not required.

II. Cruel or unusual punishment

Defendant contends that his sentence constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and cruel or unusual punishment under article I, section 17 of the California Constitution. Such claims must be made in the first instance in the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 886-887.) Respondent contends that defendant has forfeited his constitutional claims by failing to raise them below. Defendant counters that there was no forfeiture, and if we find otherwise, that defense counsel was ineffective for failing to raise the issues. We reach the claims in response to defendant's claim of ineffective counsel. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125-1126.)

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[3] The criteria are "whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d).)

A. Proportionality

Defendant contends that a prison term of 30 years to life for a man his age is grossly disproportionate to three counts of oral copulation with a child under 10 years old where the victim was just two years old and was neither killed nor physically injured, and the incident lasted only a few minutes.

In noncapital cases, a proportionality review under the Eighth Amendment is narrow and required, if at all, only in extreme cases where the punishment gives rise to an inference that it is grossly disproportionate to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20.) In general no such inference arises from a sentence of less than death. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 962-964, 996.) Thus successful proportionality challenges to noncapital sentences are and should be '"exceedingly rare."' (*Ewing v. California, supra,* at p. 22, quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 374; see also *Harmelin,* at pp. 995-996, & 1001 (conc. opn. of Kennedy, J.).)

Great deference is given to the Legislature's determination that the gravity of a particular crime justifies a certain penalty. (*Rummel v. Estelle, supra,* 445 U.S. at pp. 275-276.) A defendant bears a "considerable burden" to show that his punishment was cruel and unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

Defendant cites the objective criteria proposed in *Solem v. Helm* (1983) 463 U.S. 277, 292, as a guide to determining proportionality under the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." However, defendant provides no analysis of such factors in relation to the crimes he committed, and relies solely upon his analysis under the California Constitution. We thus turn first to that discussion.

Defendant contends that his sentence violates the California Constitution, because it is cruel or unusual under the proportionality tests of *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*), and *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), which analyze the nature of the offense and of the offender to determine whether the sentence is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends

fundamental notions of human dignity." (*Lynch*, at p. 424, fn. omitted; *Dillon*, at pp. 478-479.) Defendant "must overcome a 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197 (*Weddle*).)

Following *Dillon* and *Lynch*, California courts have developed three categories of review to guide the determination whether a sentence is cruel or unusual: "(1) the nature of the offense and the offender, with particular regard to the degree of danger which both present to society; (2) a comparison of the challenged penalty with the punishment prescribed in the same jurisdiction for other more serious offenses; and (3) a comparison of the challenged penalty with the punishment prescribed for the same offense in other jurisdictions. [Citation.]" (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359 (*Mantanez*); see also *Lynch*, *supra*, 8 Cal.3d at pp. 425-428.) Defendant relies on the first two categories. A determination whether a punishment is cruel or unusual may be based solely on the first category, the nature of the offense and offender (*Weddle*, *supra*, 1 Cal.App.4th at pp. 1198-1200), but not solely upon the second. (See *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 530-531.)

A review of the nature of the offense involves "such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts. . . ." (*Dillon*, *supra*, 34 Cal.3d at pp. 478-479.) For example, if an examination of the facts of the offense reveal that it was trivial, nonviolent, or victimless, life in prison is more likely to be found to be disproportionate. (See *Lynch*, *supra*, 8 Cal.3d at pp. 425-426.) To consider the nature of the offender, we inquire "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon*, at p. 479.) We must also take into account defendant's recidivism. (*People v. Gray* (1998) 66 Cal.App.4th 973, 992.)

Defendant does not claim that the crimes were trivial, nonviolent, or victimless. (See *Lynch*, *supra*, 8 Cal.3d at pp. 425-426.) Discussing first the nature of the offense, defendant appears to contend that his sentence of 30 years to life was grossly

disproportionate to two violations of section 288.7 because his crimes were not as serious as the abduction, rape, and murder that inspired Proposition 83 ("Jessica's Law"). As defendant concedes however, a violation of section 288.7 is a crime of violence. The 15-year-to-life punishment set by the Legislature for each violation shows that it considered this crime to be a very serious one. "[G]reat deference is ordinarily paid to legislation designed to protect children, who all too frequently are helpless victims of sexual offenses." (*In re Wells* (1975) 46 Cal.App.3d 592, 599; see also *In re DeBeque* (1989) 212 Cal.App.3d 241, 254.)

Defendant also argues that the victim was not truly harmed because the incident lasted only a few minutes, there was no evidence of physical harm, and the victim might not consciously remember the abuse, as he was only two years old at the time. Defendant's argument understates the seriousness of the crimes and the harm to the victim. While the incident did not last long, defendant took enough time to check the area for privacy and orally copulate his grandson three times. Although there was no evidence of physical injury, the victim's inappropriate sexual behavior indicated psychological harm, which can justify a longer prison term. (See *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) Defendant has cited no authority or evidence suggesting that psychological harm is less serious when the victim has no conscious memory of the abuse.[4]

Defendant also contends that the nature of the offender demonstrates a disproportionate sentence. He cites the following circumstances: defendant turned 65 on the day he committed the offenses; he had no known juvenile criminal history; his adult criminal history was "insubstantial," with one 2007 misdemeanor violation of section 273a, subdivision (b), willful cruelty to a child, for which he received four years'

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[4] The victim's sexual behavior began prior to the incident that led to defendant's conviction, suggesting there were earlier uncharged instances of abuse.

summary probation; and evidence indicated a low risk that he would reoffend.[5] A consideration of such circumstances does not show that defendant's consecutive sentence "shocks the conscience and offends fundamental notions of human dignity." (*Lynch, supra*, 8 Cal.3d at p. 424, fn. omitted; *Dillon, supra*, 34 Cal.3d at pp. 478-479.) First, there is no merit to defendant's characterization of the circumstances as indicating a low risk of reoffending. Defendant was still on probation for the misdemeanor conviction of cruelty to a child when he committed the current offenses.

Defendant suggests that his age, 65 years old at the time of the offense, is indicative of disproportionality. Although age is one of the factors used to assess individual culpability (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806), defendant's age does not suggest a lesser degree of individual culpability in this case. A life sentence may shock the conscience where the defendant was a teenager who was too immature to foresee the risk his behavior was creating, as in *Dillon*, *supra*, 34 Cal.3d at pages 487-488, but defendant fails to explain why a man of 65 who cannot control his criminal impulses toward children should be sentenced to a lesser term.

Finally, under the second *Lynch* factor, defendant compares his sentence to punishment prescribed in California for more serious offenses. (See *Lynch*, *supra*, 8 Cal.3d at pp. 425-428; *Mantanez, supra*, 98 Cal.App.4th at p. 359.) He compares his consecutive terms totaling 30 years to life to the minimum term of 26 years to life that a defendant might receive for one count of first degree murderer if he used a deadly weapon and there were no special circumstances. (See § 190, subds. (a), (c); § 12022, subd. (b)(1).) Defendant also compares his total term to the minimum sentence of 15 years to life that a defendant might receive for a single count of second degree murder. (§ 190, subd. (a).)

We have rejected defendant's argument that the nature of the offense and of the offender indicates disproportionality, thus leaving a comparison to lesser or equal

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[5] Defendant refers to the "Static-99" report that the trial court ordered prior to sentencing. The court found it applicable only to parole and probation decisions and thus did not consider it for sentencing purposes.

punishment for more serious crimes as the sole remaining category of review proposed by defendant. (See *Mantanez*, *supra*, 98 Cal.App.4th at p. 359.) "Punishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime." (*People v. Bestelmeyer*, *supra*, 166 Cal.App.3d at pp. 530-531.) Thus a consideration solely of the second category, a comparison to other crimes, is insufficient to determine that defendant's sentence was cruel or unusual.

We conclude that defendant has failed to overcome his "'considerable burden'" to demonstrate that his sentence was disproportionate to his level of culpability. (*Weddle*, *supra*, 1 Cal.App.4th at p. 1197.) Our analysis under the California Constitution also leads us to conclude that defendant has not raised an inference that his punishment is grossly disproportionate to the crime, and has thus not established the need for an individualized proportionality review under the Eighth Amendment. (See *Ewing v. California*, *supra*, 538 U.S. at p. 20.)

B. Life expectancy

Defendant was 67 years old at the time of sentencing. He contends that to impose a 30-year-to-life term on a 67-year-old man is per se cruel and/or unusual under the federal and state constitutions. Defendant cites no binding authority for his contention, but merely relies on the concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, in which Justice Mosk stated his opinion that any sentence longer than the human life span is inherently cruel and unusual. (*Id*. at pp. 600-602.) One appellate court has pointed out that no published opinion has agreed with Justice Mosk, and that California courts have repeatedly upheld sentences that exceed the defendant's life expectancy. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230 (*Retanan*).) Indeed, many "appellate courts have held that lengthy sentences for multiple sex crimes do not constitute cruel or unusual punishment." (*People v. Bestelmeyer*, *supra*, 166 Cal.App.3d at p. 531 [129 years]; see, e.g., *Retanan*, at p. 1230 [135 years to life]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1132, 1134-1136 [375 years to life]; see also *People v. Poslof* (2005) 126 Cal.App.4th 92, 109 [27 years to life for failure to register as a sex offender].)

We agree with the *Retanan* court's rejection of Justice Mosk's view. (*Retanan*, *supra*, 154 Cal.App.4th at p. 1231; see also *People v. Haller* (2009) 174 Cal.App.4th 1080, 1090; *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383.) Guided by the categories suggested by defendant, we have examined the offense and the offender in view of the totality of the circumstances. (See *Lynch*, *supra*, 8 Cal.3d at pp. 425-428; *Dillon*, *supra*, 34 Cal.3d at pp. 478-479; *Mantanez*, *supra*, 98 Cal.App.4th at p. 359.) As our analysis did not lead to the conclusion that defendant's sentence was cruel or unusual, adopting Justice Mosk's view would be to "encroach on matters which are uniquely in the domain of the Legislature." (*People v. Wingo*, *supra*, 14 Cal.3d at p. 174.) We thus decline to do so.

C. Undeveloped contentions

Under a separate heading, defendant contends that because life without parole is imposed upon more serious crimes, characterizing his sentence as the functional equivalent of life without the possibility of parole does not save it from being cruel or unusual. Defendant lists examples of such crimes but makes no further argument to support his contention, or even to explain it. We find this contention insufficiently developed to warrant discussion. (See *People v. Medrano* (2008) 161 Cal.App.4th 1514, 1520.)

Also under a separate heading, defendant contends that running his sentence consecutively, for a total of 30 years to life, was cruel and unusual. As defendant incorporates all argument previously made in his opening brief, this point appears to be redundant and already addressed in this opinion.

III. No ineffective assistance of counsel

We conclude that defendant's sentence did not constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution or cruel or unusual punishment under article I, section 17 of the California Constitution. In light of that conclusion, and because we have found that the trial court properly exercised its discretion, we also conclude that defendant has not demonstrated a reasonable probability that his sentence would have been different had defense counsel objected to it on the

grounds asserted here. Thus his claim of ineffective assistance of counsel fails. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD