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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL JASNOSZ,

Defendant and Appellant.

A128146

(Humboldt County
Super. Ct. No. CR085674)

Defendant Paul Jasnosz appeals from a judgment entered after a jury convicted him of 44 felonies and one misdemeanor arising from offenses committed against his wife, Jane Doe II (Doe II), and his two stepdaughters, Jane Does I and III (Doe I and Doe III),¹ consisting of false imprisonment (two counts) (Pen. Code, § 236²), battery (§ 242), assault with a firearm (two counts) (§ 245), forcible rape (31 counts) (§ 261, subd. (a)(2)), oral copulation of a minor (six counts) (§ 288, subd. (b)(1)), criminal threats (two counts) (§ 422), and possession of a firearm by a felon (former § 12021, subd. (a)(1))³. The jury also found true multiple-victim and fire-arm use allegations. (§§ 667.61, subd. (b), 12022.5, subd. (a)(1).) Defendant was sentenced to state prison for an aggregate term of 422 years to life. On appeal defendant challenges the trial court’s rulings

¹ At trial the victims were referred to by the pseudonyms Jane Doe I, Jane Doe II, and Jane Doe III.

² All further unspecified statutory references are to the Penal Code.

³ Section 12021 was repealed and reenacted as section 29800, operative January 1, 2012. (Stats. 2010, ch. 711, §§ 4, 6.)

regarding the admission of certain evidence and argues his sentence constitutes cruel and unusual punishment under the federal and state constitutions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Doe II married in December 1990. At that time Doe II had three children from a previous relationship: five-year-old Doe I, three-year-old Doe III, and a two-year-old son. During the marriage, the couple had two daughters. According to Doe II, the marriage started well, but over the years defendant began to have explosive rages. During these rages, defendant, armed with a gun or a machete, would threaten to kill family members, fire his gun in the direction of Doe I and Doe III, and physically beat family members, including Doe I, Doe II, and Doe III, and their brother. Doe II attributed defendant's violent behavior to the fact that he suffered from bipolar disorder or to her own behavior. Defendant would take prescribed medication sporadically for his disorder and he was briefly hospitalized. Defendant complained about the medication, and at some point, he stopped taking medication altogether. However, Doe II found that when defendant took his medication, he was calmer and less active. Doe II did not equate defendant's issues of self-control and violence with sexual deviance and she never had any concerns that defendant was sexually molesting her daughters. She never saw or heard any inappropriate sexual conduct between defendant and Doe I or Doe III, and her daughters did not complain to her until after the incidents that resulted in defendant's arrest in October 2008. Doe II had never reported any of defendant's violent behavior inflicted on her or other members of the family because she was afraid defendant would come after her and kill her.

Defendant began sexually molesting Doe I when she was six years old, and Doe III when she was five years old, and the sexual abuse continued on a regular basis throughout the children's entire childhood into earlier adulthood. As to each stepdaughter, defendant first engaged in mutual touching and then mutual oral copulating, and later progressed to sexual intercourse. The stepdaughters described the circumstances of the sexual molestation and where it took place. The stepdaughters did not tell anyone about the sex abuse because they were afraid defendant would act on his

threats to beat or kill them or other family members.⁴ The molestation stopped for Doe III when at the age of nineteen she moved out of the house in late August 2006. The molestation stopped for Doe I at the age of twenty-two after a series of incidents in the family home in October 2008 that led to defendant's arrest on the current charges.

On October 2, 2008, defendant got into a physical fight with Doe I and threw her against a bedroom wall causing bruising and a wound on Doe I's shoulder. Doe I then went to school and returned to the house that evening. The next day, defendant got angry at Doe I because he believed she had a secret boyfriend, and defendant threatened to kill her. Defendant then took "anxiety pills before going to sleep."

In the early hours of October 4, 2008, defendant got up very angry, and said that he was right about Doe I having a secret boyfriend because he had seen a text message on Doe I's cell phone. Defendant, armed with a gun, took Doe I and Doe II into his room. He threatened to kill them. Doe I struggled with defendant. Defendant took Doe I and Doe II into the kitchen, and then he took Doe I back into his room, leaving Doe II in the kitchen. While in the bedroom, defendant put his gun into Doe I's vagina slightly, and then after he removed the gun, he put on a condom and raped her.⁵ Doe I did not try to get away by jumping out the window because she knew her mother and her sister were not going to be safe. Defendant threatened to kill Doe I many times. Eventually, defendant calmed down and he gave Doe I her clothes, some food, and he made her take one of his tranquilizers. Doe I was kept in the bedroom until the next morning. Defendant seemed really calm, like nothing had happened. On October 5, 2008,

⁴ Doe I testified that defendant had pointed a loaded gun at her head, held a machete to her throat, and on one occasion shot directly at Doe I's head while she was sitting in a chair in the living room. On another occasion, defendant fired his gun at Doe I and Doe III while they were standing in the hallway near the kitchen. In 2006, Doe I told an unidentified adult about the sexual abuse and in 2007 she told the managers of the apartment complex where the family was living about the sexual abuse. Doe I did not recall if the police were called or if she told the police that nothing had happened. When Doe II confronted defendant, he initially told her it was true and then he recanted.

⁵ Doe II testified defendant told her he had raped Doe I while they were in the bedroom.

defendant took tranquilizers and once he was asleep, Doe I, together with her two sisters and her mother, went to the sheriff's office to report the recent incidents.

After trial, the jury found defendant guilty of (a) battery of Doe I on October 2, 2008; rape of Doe I on October 4, 2008; false imprisonment (with special firearm-use allegation), assault with a firearm, and criminal threats (with special firearm-use allegation) against Doe I and Doe II on October 4, 2008; and possession of a firearm by a felon; (b) forcible rape of Doe I in 2003 through 2008 (18 counts; three incidents a year), with multiple-victim allegations relating to the rapes committed in 2003 through 2006 (12 counts); and (c) oral copulation of a minor committed against Doe III in 2003 through 2004 (six counts; three incidents a year), and forcible rape of Doe III in 2003 through 2006 (12 counts; three incidents a year) with multiple-victim allegations related to the rapes. The jury found defendant not guilty of forcible rape of Doe I on October 2, 2008, and, found not true the multiple-victim allegations related to the forcible rape of Doe I on October 4, 2008, and the six separate forcible rapes of Doe I committed in 2007 through 2008.

At sentencing, the court imposed an aggregate determinate term of 62 years consisting of eight years (the upper term) on one count of forcible rape of Doe I, with consecutive terms of an aggregate two years on one count of false imprisonment and the related firearm-use allegation; four years for oral copulation of a minor, Doe III (eight months (one-third of the middle term) for each of six counts); and 48 years for forcible rape of Doe I (eight years (upper term) for each of six counts). Pursuant to section 654, the court stayed sentences imposed on possession of a firearm by a felon; one count of false imprisonment and a related firearm-use allegation; two counts of criminal threats and related firearm-use allegations; and two counts of assault with a firearm. An award of 180 days time served resolved the misdemeanor battery conviction. Applying the One Strike law for the commission of certain sex offenses against multiple victims (§ 667.61), the court sentenced defendant to an aggregate indeterminate term of 360 years to life, consisting of consecutive terms of 15 years to life on 24 counts of forcible rape of Doe I and Doe II for which the jury found true the related multiple-victim allegations.

DISCUSSION

I. The Trial Court Properly Admitted Evidence of Uncharged Domestic Violence and Sexual Offenses and 2005 Recording

A. *Relevant Facts*

Before trial, the prosecutor moved to introduce evidence that defendant had been sexually abusing and molesting Doe I and Doe III the entire time he lived with them, as well as evidence of uncharged acts of domestic violence against Doe II and other members of the family. The evidence was proffered (1) to show defendant's "motive, intent, a common design, and a lack of consent of the victims" (Evid. Code, §§ 1101, subd. (b)); (2) to demonstrate defendant's propensity to commit sexual assaults (Evid. Code, § 1108) and domestic violence as defined in § 13700 (Evid. Code, § 1109); and (3) "to corroborate and to explain the victims' and the other family members' subjective and objective fear of the defendant, their conditioned helplessness and their failure to report these offenses earlier than they were reported." The prosecutor also asserted the potential prejudice of the evidence was minimal, and presentation of the evidence would not likely confuse the jury or result in an undue consumption of time. According to the prosecutor, "to prohibit the admission of the evidence would make the People's case seem incredible and create the false impression that the defendant has lived in this family for years and everything was fine, or, at least, unremarkable. Then suddenly, things start to happen. However, the evidence would establish that the defendant created an environment of compliance and conditioned hopelessness through force, violence, duress, menace and fear of immediate and unlawful bodily injury to [the victims] or others, during, in essence, the Does' entire remembered lives." Additionally, the evidence would establish why Doe II failed to intervene and take necessary steps to prevent, stop or report defendant's conduct. The prosecutor submitted various Sheriff's Department case reports detailing interviews with Doe I, Doe II, Doe II, defendant's stepson, and defendant's oldest biological daughter in which they described the uncharged offenses the prosecutor sought to introduce into evidence. Defendant opposed the prosecutor's request on the grounds that the probative value of all the proposed evidence was substantially

outweighed by the possibility of an undue consumption of time and a substantial danger of undue prejudice, and evidence of sexual misconduct with children that allegedly occurred as far back as 18 years earlier effectively precluded defendant from identifying potential defense witnesses and establishing an alibi.

At a hearing, the trial court reviewed the various reports and tentatively ruled it would allow testimony as to uncharged sex offenses committed against Doe I and Doe III, as well as uncharged domestic violence offenses committed against members of the family, pursuant to Evidence Code sections 1101, subdivision (b), 1108, and 1109, subdivision (a)(1). The trial court stated the probative value of the proposed evidence was not significantly outweighed by undue prejudice and would be appropriate testimony to prove motive, intent, common design, or lack of consent, propensity to commit sexual offenses and domestic violence, and to corroborate and explain the victims' subjective and objective fears and their states of mind that "would lead them to remain in this situation over the years." The court told defense counsel that its tentative rulings did not preclude objections being made during the trial as the court could not be sure how a witness would actually testify.

Additionally, the prosecutor was allowed to introduce into evidence an April 2005 video recording Doe II had found in the house during the Christmas break in the trial proceedings. The nine-minute recording reportedly showed defendant filming himself, then he had Doe III hold the camera and film him for a while, then he took back the camera and filmed himself "during a rage." The recording showed defendant in the presence of Doe I, Doe III, and defendant's youngest biological daughter. The prosecutor offered the recording to show a common plan, scheme, or design (Evid. Code § 1101, subd. (b)) and defendant's propensity to commit acts of domestic violence (Evid. Code, § 1109, subd. (a)(1)). Defense counsel objected to the admission of the recording on the ground that it was substantially more prejudicial than probative as it portrayed a "raging" defendant. Overruling the objection, the court noted the recording was not too remote as it appeared to have been made in 2005, and defendant's comments and threats were directed at Doe I, Doe II, and Doe III, not at third parties. The court found the recording

was relevant and probative of whether defendant committed the charged offenses in that it demonstrated defendant's propensity to commit acts of domestic violence, and corroborated the victims' testimony explaining their subjective and objective fears of defendant, and why they endured the abusive conduct and did not just leave or report the abuse.

In closing arguments, the prosecutor showed the recording to the jury, and argued that it corroborated the testimony of the family members regarding defendant's violent and controlling behavior and their fear of him. Defense counsel repeatedly argued the jury should view the nine-minute recording during deliberations because Doe I could be heard to taunt and insult defendant demonstrating she never had any fear of her stepfather and her testimony to the contrary was not credible.

The jury deliberated over two days. At the end of three hours of deliberations and immediately before the jurors were dismissed on the first day, the jurors asked if they could have the transcript of the recording or if they would watch the recording. The court told the jury that the transcript was not in evidence but the jury could watch the recording, and the court would provide the equipment to allow them to watch the recording. The court made arrangements for the jury to watch the recording when deliberations resumed the following day. The next day, the jury began its deliberations at 8:30 a.m. and presumably watched the recording. About an hour later, the jurors asked for a read back of Doe I's testimony concerning the events of October 2, 2008. Shortly before the noon recess, the jurors notified the court that they had "reached a decision on all verdicts."

B. Analysis

Trial court rulings regarding the admission of evidence are reviewed for an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) In assessing evidentiary admissions, Evidence Code section 352 gives "the court discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.]"

(*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.) Defendant argues that “the sheer volume of testimony about uncharged offenses” and the recording, either individually or collectively, was “cumulative and unnecessary.” However, we agree with the Attorney General that defendant’s appellate argument is not properly before us. At no time in the trial court did defendant object to any evidence of uncharged offenses or the recording on the ground that its admission would be or was cumulative or unnecessary. “Because ‘a party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct,’ [citation],” defendant’s cumulative and unnecessary arguments are forfeited on appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 991.)

Nor do we see any merit to defendant’s arguments that the admission of the challenged evidence rendered the trial “fundamentally unfair.”⁶ The jurors heard testimony regarding defendant’s commission of numerous uncharged acts of domestic violence and/or sexual offenses against Does I and III, and they viewed a nine-minute recording of one of defendant’s explosive outbursts from 2005. However, defendant has not demonstrated that the uncharged incidents and recording, either individually or collectively, were more prejudicial than the evidence of the charged offenses. “ ‘ “The prejudice which [Evidence Code section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.” [Citations.] “Rather, the statute uses the word in its etymological sense of ‘prejudging’ a person or cause on the basis of extraneous factors.” ’ [Citation.] Painting a person faithfully is not, of itself, unfair.” (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) Additionally, the jury was properly advised as to how to evaluate the challenged evidence including its limited use in considering whether the People had proven each charge and allegation beyond a reasonable doubt. There is no indication the jury was confused or

⁶ A defendant may not argue on appeal that the court should have excluded evidence for a reason not asserted at trial, but he may argue that the asserted error in overruling the objection had the legal consequence of violating due process. (*People v. Partida* (2005) 37 Cal.4th 428, 431; see *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [“The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant’s trial fundamentally unfair”].)

misled by the challenged evidence. The jurors’ request to view the 2005 recording may have been prompted by defense counsel’s argument that the evidence brought into question the credibility of Doe I. The read back of Doe I’s testimony during deliberations — and the jurors’ ultimate verdicts — demonstrate their separate consideration of the evidence of the charged offenses and the related fire-arm use and multiple-victim allegations. Thus, despite defendant’s argument to the contrary, on this record, there is no substantial likelihood that the challenged evidence, either individually or collectively, was used by the jury for an illegitimate purpose, or otherwise rendered his trial unfair.

II. Defendant’s Sentence Is Not Cruel and Unusual Punishment

Defendant argues his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution.⁷ We disagree.⁸

Defendant argues that his sentence is unconstitutional because he has been sentenced to a term he cannot possibly serve, and he is essentially serving a life term without the possibility of parole, which is reserved for aggravated first degree murder, or habitual offenders who inflict serious bodily injury. However, California appellate courts have found that punishment which effectively imprisons a sex offender for life without the possibility of parole is not cruel and unusual punishment. (See, e.g., *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1232 [upholding sentence of 135 years to

⁷ “The Eighth Amendment of the United States Constitution prohibits infliction of ‘cruel and unusual punishment.’ This prohibition is applicable to the states by virtue of its incorporation in the due process clause of the Fourteenth Amendment. [Citation.]” (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382, fn. 13 (*Byrd*)). Article I, section 17 of the California Constitution provides, in pertinent part: “Cruel and unusual punishment may not be inflicted”

⁸ Defendant forfeited his cruel and unusual punishment arguments because he did not assert them at any time in the trial court. (See *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) Nevertheless, we have considered the merits of his arguments in light of his contention that his trial counsel was ineffective for failing to object to the sentence as cruel and unusual punishment. (See *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 [court considers constitutionality of sentence to “ ‘forestall a subsequent claim of ineffectiveness of counsel’ ”].)

life for numerous sex crimes against four young girls, including rape of 10-year-old child]; *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 522, 528-532 (*Bestmeyer*) [upholding constitutionality of sentence of 129 years in state prison for 25 sexual crimes committed against minor stepdaughter].⁹

We also see no merit to defendant’s argument that his sentence is unconstitutional as applied to him. “To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant’s involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant’s acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is ‘grossly disproportionate to the defendant’s individual culpability’ [citation], or, . . . the punishment ‘ ‘shocks the conscience and offends fundamental notions of human dignity’ ’ ’ [citation], the court must invalidate the sentence as unconstitutional.” (*People v. Hines* (1997) 15 Cal.4th 997, 1078.)

Defendant asks us to consider that he does not have a long or serious criminal record, his mental illness played a role in his behavior, and he neither killed, attempted to kill, nor inflicted great bodily injury on his victims. However, these factors do not render the sentence unconstitutional. The forty-three-year-old defendant took advantage of a position of trust and authority to sexually abuse his two stepdaughters for many years and was found to have committed 31 separate offenses of forcible rape. Despite his lack of a significant criminal record,¹⁰ defendant’s substantial sexual predatory behavior is

⁹ Defendant’s reliance on certain comments in the concurring opinion of the late Justice Mosk in *People v. Deloza* (1998) 18 Cal.4th 585, 600-602, is misplaced. In *Deloza*, Justice Mosk found that a sentence of 111 years to life in state prison was unconstitutional because it could not be served within the defendant’s lifetime. (*Id.* at pp. 660-601.) However Justice Mosk’s comments were both dicta (*id.* at p. 660), and have no precedential value (*Byrd, supra*, 89 Cal.App.4th at p. 1383).

¹⁰ The probation department officer reported that (1) in 1984, defendant was convicted of “211 PC [robbery],” and given three years probation, and in September 1987, the conviction was set aside and dismissed pursuant to section 1203.4; (2) in 1999, defendant

deserving of the harshest punishment. Defendant’s reliance on the fact that he was diagnosed as suffering from bipolar disorder is misplaced. In his trial court statement in mitigation of sentencing, he conceded he did not follow the medication regimen that was prescribed for his bipolar disorder. There is nothing in the record that demonstrates his bipolar disorder caused his sexual predatory behavior. Finally, we see no relevance to his argument that he was not convicted of killing, attempting to kill, or inflicting great bodily injury on his victims. “The seriousness of the threat a particular offense poses to society is not solely depended upon whether it involves physical injury. [Citation.]” (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8; see *Rummel v. Estelle* (1980) 445 U.S. 263, 275 [“the presence or absence of violence does not always affect the strength of society’s interest in deterring a particular crime or in punishing a particular criminal”].) The Legislature has found the commission of sexual offenses is deserving of harsh punishment even in the absence of any physical injury to the victims. (See, e.g., § 263 [“[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape”].) Indeed, “ ‘persons convicted of sex crimes against multiple victims within the meaning of section 667.61, subdivision (e)(4) “are among the most dangerous” from a legislative standpoint. [Citation.]’ ” (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1523; see *People v. Wutzke* (2002) 28 Cal.4th 923, 931 [“The One Strike [law]. . . contemplates a separate life term for each victim attacked on each separate occasion”].) In this case the sentence imposed — based, principally, on defendant’s commission of multiple sexual offenses against his two stepdaughters — “reflects the Legislature’s zero tolerance toward the commission of sexual offenses against particularly vulnerable victims.” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 200-201.) We agree with the trial court’s sentencing comments that there is no question the victims in this case will be impacted by defendant’s criminal behavior towards them

was convicted of “242 PC [battery],” and given three years probation; and (3) in 2007, defendant pleaded guilty to “242 PC [battery],” and given three years “summary probation.”

for the rest of their lives, and so, too, defendant will be held accountable for the rest of his life for his conduct. (Cf. *Bestelmeyer, supra*, 166 Cal.App.3d at pp. 528, 530 [constitutional to impose sentence of 129 years in state prison on defendant with no prior criminal record, who suffered from mental impairment at time of commission of the crimes, and never victimized anyone other than minor stepdaughter].)

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.