

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
SCOTT RYAN MODEST,
Defendant and Appellant.

A130603

**(Contra Costa County
Super. Ct. No. 05-100594-1)**

A jury convicted appellant Scott Ryan Modest of seven felonies, including forcible sexual penetration (Pen. Code, § 289, subd. (a)(1)(A))¹ and forcible rape (§ 261, subd. (a)(2)). The jury also found true the allegation that appellant had sexually assaulted more than one victim (§ 667.61). The court sentenced appellant to 15 years to life on each count for a total state prison term of 105 years to life.

On appeal, appellant contends the sentence constitutes cruel and unusual punishment under the state and federal Constitutions. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2010, appellant and a friend, Bernard Williams, forcibly raped, digitally penetrated, and orally copulated Williams's ex-girlfriend, Jane Doe I, after forcibly entering her bedroom at a homeless shelter in Richmond. A few days later, appellant

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

forcibly raped, orally copulated, and digitally penetrated a different friend's pregnant girlfriend, Jane Doe II.

A jury convicted appellant of forcible rape while acting in concert (§ 264.1), two counts of forcible sexual penetration (§ 289, subd. (a)(1)(A)), two counts of forcible rape (§ 261, subd. (a)(2)), forcible oral copulation (§ 288a, subd. (c)(2)), and forcible oral copulation in concert (§ 288a, subd. (d)(1)). The jury also found true the allegation that appellant committed the offenses against more than one victim (§ 667.61, subs. (b), (e).) The court sentenced appellant to 15 years to life on each count, for a total term of 105 years to life in state prison.

DISCUSSION

Appellant contends the aggregate sentence of 105 years to life constitutes cruel and unusual punishment under the state and federal Constitutions because: (1) he is unlikely to complete the sentence during his lifetime; (2) he had a "limited" criminal record; and (3) there was evidence he "might be impaired by mental illness."

A sentence may violate the California Constitution if "it 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 (*Lynch*), superseded by statute on other grounds as stated in *People v. West* (1999) 70 Cal.App.4th 248, 256.) To determine whether a sentence is so disproportionate to the crime that it violates the California Constitution, we consider "(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; (3) a comparison of the challenged penalty with punishment prescribed for the same offense in other jurisdictions." (*People v. Thompson* (1994) 24 Cal.App.4th 299, 304, citing *Lynch, supra*, 8 Cal.3d at pp. 425-427.) Appellant does not compare his sentence to more serious offenses in California or to

punishment imposed for the same offenses in other jurisdictions. We take this “as a concession that his sentence withstands a constitutional challenge on either basis.”

(*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231.)

Appellant concedes his crimes “were reprehensible” but claims his sentence is cruel and unusual because he “is unlikely to complete even half of the determinate portion of his sentence.” To support this argument, appellant relies on Justice Stanley Mosk’s concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, where he concluded “[a] sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution and the cruel or unusual punishment clause of article I, section 17 of the California Constitution.” (*Id.* at pp. 600-601.) Appellant also relies on Justice Mosk’s dissenting opinion in *People v. Hicks* (1993) 6 Cal.4th 784, where he opined “many criminal sentences have crossed the bounds of reason in this state. A sentence like the one imposed here, that cannot possibly be completed in the defendant’s lifetime, makes a mockery of the law and amounts to cruel or unusual punishment” under the California Constitution. (*Id.* at p. 797.)

Justice Mosk’s opinions in *Deloza* and *Hicks* do not assist appellant for two reasons. First, the constitutionality of the defendants’ sentences in those two cases was not an issue in either appeal and, as a result, Justice Mosk’s comments are dicta. ““Only statements necessary to the decision are binding precedents. . . .’ [Citation.] ‘The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion.’” (*Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 272.) For example, in *Deloza*, Justice Mosk noted in his concurring opinion, “[a] question arises, which our remand for resentencing does not require us to answer: Is a sentence of 111 years in prison constitutional?” (*Deloza, supra*, 18 Cal.4th at p. 600.) And in *Hicks*, Justice

Mosk observed, “[d]efendant has not challenged his 80-year sentence for the offenses of which he stands convicted, and our order limits the issue presented in this case, so I will offer no more at this time on the constitutional problem presented by this sentence.” (*Hicks, supra*, 6 Cal.4th at p. 797.) Second — and irrespective of whether Justice Mosks’s comments are dicta — neither Justice Mosk’s concurring opinion in *Deloza* nor his dissenting opinion in *Hicks* has any precedential value. (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383.)

Moreover, several courts have considered and rejected the same argument appellant makes here — that a sentence is cruel and unusual if it is so long it cannot be completed in the defendant’s lifetime. (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1089-1090; *Retanan, supra*, 154 Cal.App.4th at pp. 1230-1231; *Byrd, supra*, 89 Cal.App.4th at pp. 1382-1383.) As the *Byrd* court observed, “In our view, it is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution. [Citation.] [¶] Moreover, in our view, a sentence such as the one imposed in this case serves valid penological purposes: it unmistakably reflects society’s condemnation of defendant’s conduct and it provides a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future.” (*Byrd*, at p. 1383.) The same is true here. That appellant will “be in prison all his life” does not render his sentence cruel or unusual. And as in *Byrd*, appellant’s sentence serves a “valid penological purpose[:.]” to punish appellant’s unmistakably reprehensible conduct and to deter others from engaging in that type of conduct in the future. (*Byrd, supra*, 89 Cal.App.4th at p. 1383.)

Appellant's other arguments — that the sentence is cruel and unusual because he has a "limited" criminal record and "might be impaired by mental illness" — are similarly unpersuasive. The probation report chronicles appellant's long criminal history, beginning at age nine and increasing in severity until his arrest at age 31 for the current offenses. The fact that there was evidence appellant "might" have a mental illness does not persuade us that his sentence is cruel or unusual. First, appellant did not raise this argument in the trial court. In fact, he refused to discuss his mental issues with the probation officer and directed the court not to consider a document "from someone who appear[ed] to be a psychiatrist" at his sentencing hearing.² As a result, appellant failed to preserve this argument on appeal. (*People v. Pecci* (1999) 72 Cal.App.4th 1500, 1503; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Appellant's argument fails for the additional reason that he cites no authority supporting it.

Appellant contends his sentence is cruel and unusual under the Eighth Amendment to the United States Constitution, which "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." (*Ewing v. California* (2003) 538 U.S. 11, 21, quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 271.) He makes no effort, however, to establish how the sentence here is "grossly disproportionate to the severity of the crime." (*Id.* at p. 21.) Instead, he cites *People v. Carmony* (2005) 127 Cal.App.4th 1066. There, the appellate court determined a recidivist penalty of 25 years to life in prison under the Three Strikes Law constituted cruel and unusual punishment under the federal Constitution because the "harshness of the recidivist penalty [was] grossly disproportionate to the gravity of the offense." (*Id.* at p. 1077.) The *Carmony* court explained the defendant's violation of the annual registration requirement under

² The trial court granted appellant's *Faretta* motion and allowed appellant to represent himself at trial and at the sentencing hearing. (*Faretta v. California* (1975) 422 U.S. 806.)

former Penal Code section 290 was a “technical and harmless violation of the registration law” akin to a “breach of an overtime parking ordinance.” (*Carmony*, at pp. 1078, 1079.)

Carmony is inapposite. Here and in contrast to the *Carmony* defendant’s “technical and harmless violation[,]” appellant and his friend forcibly raped, digitally penetrated, and orally copulated two vulnerable women, one of whom was pregnant. Appellant’s actions were nothing like a “breach of an overtime parking ordinance.” (*Carmony, supra*, 127 Cal.App.4th at p. 1079.)

DISPOSITION

The judgment is affirmed.

Jones, P. J.

Needham, J.

Bruiniers, J.