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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY WAYNE TIBBITTS,

Defendant and Appellant.

A130868

(Solano County
Super. Ct. No. VCR206212)

I. INTRODUCTION

Defendant, Jerry Wayne Tibbitts, appeals from his conviction of two counts of violating Penal Code section 288, subdivision (a) (lewd and lascivious acts upon a child) and his sentence of 105 years to life. He argues that (1) the trial court abused its discretion when it excluded evidence that a third party alleged by one of the victims to have molested her in the past was acquitted in the trial of this incident; (2) Evidence Code section 1108,¹ which permits the introduction of propensity evidence in cases like this one, violated his due process and equal protection rights; (3) by instructing the jury with CALCRIM No. 1191 regarding the appropriate use propensity evidence under section 1108, the trial court violated his due process and equal protection rights; and (4) the trial court denied his right to a jury trial when it found that he had suffered a prior conviction. With regard to his sentence, Tibbitts argues that his 105 years to life sentence violates

¹ All further statutory references are to the Evidence Code unless otherwise noted.

both the federal and state constitutional prohibitions against cruel and unusual punishment. We will affirm the judgment, including the sentence imposed.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *J.K. Incident*

J.K., who was seven years old when she testified, lived next door to M.S., the other victim in this case. Defendant Tibbitts is her grandfather. When J.K. was six years old, her grandfather touched her. This happened one time on a date she did not remember. She told the police that her grandfather touched her in a place she didn't like. On a sketch of a girl, she circled the area. This incident occurred when she was on the couch in the living room of her house watching a cartoon on television. Her father was in the kitchen, washing dishes. Her friend, M.S., was also there. She and M.S. were very close, having grown up together.

At some point, J.K. told her mother what had happened to her. On cross-examination, J.K. testified that she told her mother “right away.”

J.K.'s mother called the police. Late at night, J.K. talked to them and then, a little while later, J.K. was interviewed at a place called the Rainbow Center. The interviewer showed J.K. a drawing like the one J.K. had been shown in court and J.K. indicated on the drawing where she had been touched, as she had done when she testified in court.

J.K.'s mother (Mother) testified that she lived with her husband and three children. Defendant Jerry Tibbitts is her father. Between 2009 and 2010, she permitted Tibbitts to stay in her house a number of times, typically between two and four days. When he stayed with her, Tibbitts slept on a couch in the living room.

Sometime in 2009, Mother woke up at around 1:00 a.m. and went to J.K.'s room. She saw Tibbitts' shadow over J.K.'s bed. Mother thought he was trying to hide from her. She asked him what he was doing in J.K.'s room and he told her he was “stretching his legs.” Later, he told Mother that he heard another of her daughters, who slept on the top bunk of a bunk bed with J.K., wake up. She had never asked her father to check on the girls. After this incident, she put the children into her room and Tibbitts packed his things up and left. Mother thought this incident occurred sometime in December 2009.

Mother had some idea of her father's prior history of child abuse and, therefore, "would never let him babysit."

On January 24, 2010, Mother had a conversation with a neighbor (Neighbor). Based on this conversation, Mother asked J.K. if anything had happened to her involving Tibbitts. J.K. "started crying and she told me he put a blanket over her and him when she was sitting in his lap when my husband was in the kitchen, and I went in the back room, and [he] had started fondling her . . . [i]n the vaginal area." Because the Vallejo Police Department was closed when she called, Mother called 911. She told the dispatcher what had happened, and the police responded.

B. *M.S. Incident*

M.S., who was seven when she testified at trial, lived next door to J.K. She testified that one day when she was at J.K.'s house, "I sat down next to him [Tibbitts], and then J.K. sat down next to me." J.K.'s younger sister was on his lap "and then he covered her up and kind of got on me, and then he started touching me." She testified that he touched her on her vagina underneath her clothes with his finger. After this occurred, she told her grandmother. A little while later, the police came and talked to her. She also recalled being interviewed about the incident at a place called the Rainbow Center.

M.S.'s grandmother, (Neighbor), testified that M.S. lived with her. In January 2010, while she was taking a bath, M.S. told her grandmother that her vagina, which was red, hurt. She said that "Jerry [Tibbitts] touched me down there, hurt me down there." M.S., who was shy, looked like she wanted to cry.

Neighbor went next door to speak to Mother. After their conversation, Mother called the Vallejo police.

Officer Thompson of the Vallejo Police Department testified that on January 24, 2010, he responded to a call that came in at 5:00 p.m. that evening, which was dispatched to him at about 9:00 p.m. He spoke to Neighbor, her granddaughter, M.S., Mother and her daughter, J.K.

Neighbor told him that when she was preparing M.S. for a bath, M.S. told her that “Jerry [Tibbitts] was back.” M.S. then told her grandmother that Tibbitts had touched her inappropriately. Neighbor also told Thompson that a few weeks earlier she had taken M.S. to the hospital because she was complaining of pain to her vaginal area.

Thompson also interviewed M.S. She told Thompson that “she was next door visiting (J.K.). And that they were sitting on the couch together, with Mr. Tibbitts, and that he had put a blanket over them and that Mr. Tibbitts had fondled her private area.” M.S. said this had occurred several weeks earlier, while they were watching a movie on television.

J.K. testified that she had seen her grandfather “do something that [she] thought he shouldn’t be doing” to M.S. He touched M.S. on the same area he had touched J.K. The incident involving M.S. occurred on a different day, before her touched J.K.

C. *Evidence of Prior Molestation of M.S.*

When M.S. was three years old, her mother reported to the police that a man named Larry Sweaza had sexually assaulted her. In an interview at the Rainbow Center in Vacaville after this report, M.S. said that Sweaza had “hurt her potty,” after he inserted his finger into her vagina. Sweaza was acquitted in the trial of that incident.

M.S.’s grandmother also related at trial how, when M.S. was between three and six years old and living with her mother, an incident involving a man named Larry Sweaza occurred. She believed M.S.’s mother may have discussed with M.S. on more than one occasion the difference between appropriate and inappropriate touching.

D. *Uncharged Crimes*

At trial, the jury was presented with evidence, via stipulation or brief testimony of three incidents involving defendant’s sexual misconduct with other children.

E. *Defense Expert*

Carl Lewis, an expert in child sexual assault investigations and interviews, and in particular on child sexual abuse accommodation syndrome, testified for the defense.

Lewis had conducted 500 or more interviews at the Rainbow Center, where both victims in this case were interviewed. Lewis reviewed the original crime report, the

transcripts of the interviews of M.S. and J.K., the police reports from the incidents involving M.S. and J.K., along with the Solano County protocol for child abuse investigation. He also reviewed other crimes evidence, including the police reports from the other incidents involving Tibbitts, and the Rainbow Center interview transcript and court testimony transcript of the incident involving Larry Sweaza and M.S. Lewis saw his role as a “peer reviewer.”

Lewis testified that the three and a half hour delay between the receipt of Mother’s call and the time the call was dispatched was “surprising” because the call reported that the offender was “known and present with the caller at the time the call was being made, and the allegation was the commission of felonies.”

He found the “actual mechanical completion of the reports appeared satisfactory,” but lacking in information regarding the location and arrest of the defendant. There was, for example, no information about how Tibbitts was apprehended and what, if anything, he said when he was first contacted by the police. From an investigative standpoint, any spontaneous statement made by Tibbitts upon confrontation by the police would have been useful.

With regard to the interviews of M.S. and J.K. by the Vallejo police, there was no discussion of “what background the officers might have had for conducting those investigations. There was no apparent standard protocol followed in conducting those interviews, and the interviews appeared not to have been recorded, which, even at the preliminary investigation level, is a standard in many areas throughout the state and should be a standard.”

His initial impression on reading the police report was that “it met the standards of probable cause, but it certainly was not a complete investigation going as we were taught in DA investigator school to go to the point of proof beyond a reasonable doubt.”

Lewis also reviewed the videotaped forensic interviews of the two victims. In his opinion, there was no apparent protocol followed in the interviews. There was no rapport building with the victims. The interviews were quite short and did not elicit much in the way of factual details. Although there were several instances in which the victims

provided conflicting information as to dates and times, for example, there was no follow-up. In addition, Lewis identified as less than ideal certain interview techniques, including the use of blocks to elicit information, the lack of follow-up with regard to M.S.'s abuse by Larry Sweaza, and the somewhat leading method of questioning. In Lewis's view, the investigation and the forensic interviews conducted in the case were not done in accordance with the standards in his field. On cross-examination, Lewis agreed that neither M.S. nor J.K. retracted their accounts of the incidents. Nor did Lewis have any reason to question the identification of defendant as the person who abused them.

F. *Prior Conviction and Sentencing*

After a three-day trial, the jury deliberated for an hour and convicted defendant on both counts. The matter of defendant's alleged prior offense was tried the next day and the jury found the allegation true.

Two months later a sentencing hearing was held. At that time, defendant was sentenced to 105 years to life.

This timely appeal followed.

III. DISCUSSION

A. *Evidence of Prior Molestation*

When M.S. was three years old, her mother reported to the police that a man named Larry Sweaza had sexually assaulted her. In an interview at the Rainbow Center in Vacaville after this report, M.S. said that Sweaza "hurt her potty," when he inserted his finger into her vagina. Sweaza was prosecuted for this incident and acquitted.

Tibbitts sought to introduce evidence of M.S.'s prior sexual conduct with regard to this incident for two purposes. First, he contended that the fact that M.S. reported that Sweaza had inserted a finger into her vagina was admissible as evidence of prior sexual conduct and would "cast doubt on the conclusion that the victim must have learned of these acts through the defendant." The People conceded that this evidence was relevant under section 782, which permits the introduction of prior sexual conduct in cases such as this one.

Second, Tibbitts argued that the minute order of Sweaza's acquittal was admissible because it was relevant to M.S.'s credibility and, in particular, would show that M.S. had falsely accused Sweaza of molestation. The trial court denied this request on the ground that there was no evidence that M.S. had, in fact, made a false report.

When defendant renewed his motion on federal constitutional grounds a month later, the court again denied the request, finding that the evidence of Sweaza's acquittal was also inadmissible under section 352.

The court noted that "if I allow that information in . . . [defense counsel] could just ask a couple quick questions and she would be done in one minute. I agree with that, but I think in fairness, [the People] would be allowed to attack maybe other witnesses and so forth and could make a second trial here, and I don't think it's appropriate. And the fact that an allegation of sexual misconduct [was] made and the defendant was acquitted doesn't mean that was a false accusation. I think it would be confusing to the jury if I allowed it in."

The trial court did not abuse its discretion. Evidence that the victim of sexual molestation or rape has previously made a false accusation is only relevant to impeach the victim's credibility when there is evidence that the prior accusation was, in fact, false. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097; see also *People v. Franklin* (1994) 25 Cal.App.4th 328, 335 [false accusation of previous sexual molestation relevant on the issue of victim's credibility].) The fact that there was an acquittal in an earlier case does not support an inference that the victim's statement regarding the event was false. The jury's reasoning in finding that the People had failed to prove Sweaza's guilt beyond a reasonable doubt is not available to us. Therefore, we cannot infer that the jury reached its verdict because it concluded that M.S.'s report was false.

Defendant, however, argues that *People v. Tidwell* (2008) 163 Cal.App.4th 1447 (*Tidwell*), which the trial court relied on when it ruled on the admissibility of Sweaza's acquittal, supports his position because there the trial court found that a prior false accusation of rape is relevant to the issue of the victim's credibility. We do not agree.

Tidwell concerned the admissibility of evidence that the victim allegedly made two previous false accusations of rape. The *Tidwell* court ruled that section 782, which permits the introduction of evidence of sexual conduct under certain circumstances was not applicable “because the evidence that defendant sought to introduce was of complaints of rape, not of sexual conduct.” (*Tidwell, supra*, 163 Cal.App.4th at p. 1454.) Instead, the trial court found that the evidence that the victim in that case had made previous false reports was “weak” and, therefore, inadmissible. Here, as in *Tidwell*, the trial court correctly concluded that the evidence defendant wished to introduce had no bearing on the victim's credibility and, therefore, was inadmissible.

Further, even if admissible, the trial court acted well within its discretionary powers in excluding the evidence under section 352. Evidence of Sweaza’s acquittal was of no probative value because it was not to the issue of M.S.’s veracity. The court also pointed out that “if I allowed that information in, and [defense counsel] is correct, she could just ask a couple of quick questions and she would be done in one minute. I agree with that, but I think in fairness, [the People] would be allowed to attack that with maybe other witnesses and so forth and could make a second trial here, and I don't think it's appropriate.” We agree with this conclusion. (see *Tidwell, supra*, 163 Cal.App.4th 1447 [evidence of prior reports of rape inadmissible under section 352 because introduction of evidence would “consume considerable time, and divert the attention of the jury from the case at hand.”].) The evidence defendant sought to introduce was weak and its introduction ran the risk of a lengthy excursion into the truthfulness of the prior complaint. The trial court properly balanced the limited probative value of this evidence with the consumption of time and risk of confusing the jury, and concluded the evidence was inadmissible under section 352.

Defendant also argues that *People v. Mullens* (2004) 119 Cal.App.4th 648 (*Mullens*) and *People v. Griffin* (1967) 66 Cal.2d 459 (*Griffin*) support his position. They do not. Both *Mullens* and *Griffin* concern evidence of uncharged crimes allegedly committed by the defendant which is introduced to show a propensity to commit sexual offenses. The *Griffin* court held that “a properly authenticated acquittal is admissible to

rebut prosecution evidence of guilt of another crime.” (*Griffin, supra*, 66 Cal.2d at p. 466; see also *Mullens, supra*, 119 Cal.App.4th at pp. 662-663.) The other crime evidence introduced here, however, is significantly different from that in *Griffin* and *Mullens*. Defendant sought the introduction of the Sweaza offense as well as the fact that Sweaza was acquitted. This evidence was in no way propensity evidence. It was introduced for an entirely different purpose—to cast doubt on M.S.’s veracity. The rule the *Griffin* court articulated is inapplicable here.

Defendant further contends that his rights under the Sixth and Fourteenth Amendments to the constitution were violated by the omission of evidence that Sweaza had been acquitted in the prior matter involving M.S. He is incorrect. Defendant has the right to present all relevant evidence of significant probative value. However, as we noted earlier, this evidence was neither relevant nor of any probative value. Nor does *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091 convince us otherwise. *Holley* concerns the improper exclusion of admissible evidence of a previous false report of a crime. Such evidence is certainly admissible to cast doubt on a witness’s credibility as long as there is evidence that the prior accusation was, in fact, false. (*People v. Bittaker, supra*, 48 Cal.3d at p. 1097). Here, in contrast, there was no evidence that M.S. had falsely accused Sweaza of sexual abuse. Therefore, the trial court properly excluded the evidence and defendant’s federal constitutional rights were not violated.

Finally, even if the trial court erred, there was no prejudice under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18. M.S.’s testimony was corroborated by that of J.K., who witnessed the incident. In addition, defendant was able to question M.S.’s credibility through the introduction of evidence that M.S.’s familiarity with sexual matters might have been a result of a previous incident and did not stem from that involving defendant. Defendant also questioned M.S. on inconsistencies in her account of the event. The issue of M.S.’s credibility was, therefore, before the jury and there was no prejudice.

B. *Propensity Evidence*

Pursuant to section 1108, the trial court permitted the introduction of three previous uncharged crimes involving sexual abuse of minors committed by defendant.

1. *J.C.*

At trial, the following stipulation was read to the jury: “[I]t is agreed between the parties that defendant Jerry Wayne Tibbitts during the time period from 1985 to 1987 committed criminal sexual acts against his niece with the initials J.C. who was between the ages of three to five years old.”

2. *M.R.*

At trial, the following stipulation was also read to the jury: “ ‘[I]t is agreed between the parties that the defendant, Jerry Wayne Tibbitts, committed criminal sexual acts against a female child with the initials M.R. who was between the ages of six and seven years old. As a result of defendant’s criminal sexual conduct with M.R., defendant, on March 1st, 1995, was convicted of a felony violation of Penal Code section 288(a), lewd or lascivious acts upon a child under the age of 14. The defendant was granted and successfully completed probation.’ ”

James Coughlin, a retired investigator for the Vallejo Police Department testified that, in 1994, when he was assigned to investigate cases involving sexual assault, he spoke with Jerry Tibbitts. At the time of the assaults, M.R. was between six and seven years old. Tibbitts told Coughlin that the assaults took place at M.R.’s house, in a van, and sometimes at his house. The majority of the assaults took place inside while they were watching television.

During Coughlin’s interview with Tibbitts, Tibbitts confessed to exposing himself to M.R. between eight and a dozen times while he was masturbating. He would sometimes touch her over her clothing, was not certain whether it was under her clothing and admitted that he touched M.R. in a number of different places, including her buttocks. Tibbitts told Coughlin that when he exposed himself to children he became sexually aroused.

3. *Megan K.*

Megan K. testified that she had known Mother since they were 10 years old. She also knew Mother's father, Jerry Tibbitts. In August 2002, when Megan K. was 16 years old, she went with Mother to a doctor's appointment. Tibbitts was with them. Megan K. lay across two chairs in the waiting area and fell asleep. Tibbitts was sitting across from her in the chair farthest away from her. She woke up when she felt Tibbitts touching her breast. He had his hand on her breast for about 20 seconds. He stopped and went back to his original seat when someone walked into the waiting area. Megan K., who was afraid and didn't know what to do, read a magazine until, 10 minutes later, Mother returned from her doctor's appointment. Megan K. didn't tell Mother that same day, because Tibbitts was with Mother when they returned home. She spoke to a different friend that day and then she called the police.

Megan K. overheard a conversation between Mother and Tibbitts later that day. She testified that "[Mother] had asked him if he did it and he said, 'I don't remember, but if I did I'd like to apologize.'"

A criminal case was filed against Tibbitts. Megan K. testified at the preliminary hearing. Mother then told Megan K. that Tibbitts did not want her to testify in court and that he would pay her \$10,000 if she did not testify. Megan K. took the money and went to New York to visit her mother. She didn't tell the prosecutor that she had received money not to testify.

J.K.'s mother testified about the same event. Mother, who was then 16 years old, went with her friend, Megan K., to a doctor's appointment. Tibbitts also went to the appointment. When Mother came back into the waiting room after her appointment, she noticed that Megan K. appeared to be afraid and anxious. Megan K. reported to her that there had been an incident involving Tibbitts in the past. When Mother confronted her father, he said he didn't remember if he'd done it or not, but if he had, he was sorry. Megan K. called the police. Tibbitts paid Megan K. \$10,000 not to testify and the matter was not prosecuted.

Defendant contends that section 1108 violates the federal constitutional guarantees of equal protection and due process. While he acknowledges that this question has long been settled in California, he nevertheless raises it in order to preserve it for federal review. Bound by our Supreme Court's rulings on this issue, we reject his argument. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915, 918 [rejecting due process challenge to section 1008 and noting with approval rejection of equal protection challenge in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

For the same reason, we find no constitutional error in the trial court's decision to give the jury CALCRIM No. 1191, which instructs the jury with regard to its use of evidence admitted under section 1108. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016.)

Defendant also argues that the trial court abused its discretion in permitting the introduction of evidence regarding these three previous incidents involving defendant's sexual abuse of minors. He is incorrect. Section 1108 permits the admission of evidence of previous uncharged sexual offenses, "in a criminal action in which the defendant is accused of a sexual offense . . . if the evidence is not inadmissible pursuant to section 352." (§ 1108, subd. (a).) The trial court acted within its discretion in finding that the evidence was admissible under section 352. First, the probative value of these incidents is evident. Tibbitts' defense was that the victims were not credible. Evidence of similar incidents in the past involving children who were either family members, as with J.C., or family friends, as with M.R. and Megan K., undermined Tibbitts' claim that the victims could not be believed.

Nor was the evidence particularly inflammatory. Given that the evidence of the uncharged offenses was very similar to the charged offenses, the jury was not likely to have had a stronger reaction to defendant's criminal behavior than it might otherwise have had. (*People v. Branch* (2001) 91 Cal.App.4th 274, 283-284.)

Defendant, however, argues that the evidence should have been excluded under section 352 because it would have confused or distracted the jury. However, the three

uncharged offenses were introduced with minimal fanfare—either wholly by stipulation, as was the case with the first offense, or by stipulation and brief testimony as with the second. The third offense was introduced through the brief testimony of the victim and was corroborated by another witness.

Finally, defendant argues that the incidents were remote in time to the current offense (the first offense took place in 1985-1987, the second in 1995, and the third in 2002) and therefore of limited relevance. We disagree. The offenses were both similar and regular. The amount of time between them does not strike us as so remote as to justify excluding them. Put another way, the probative value of this evidence “balances out” their remoteness in time. (*People v. Branch, supra*, 91 Cal.Ap.4th at p. 285.) In sum, the trial court did not abuse its discretion in admitting evidence of defendant’s prior uncharged sexual offenses against minors.

Moreover, even if there was error here, it was harmless under any standard of prejudice given the strength of the victims’ testimony, and the fact that their reports of defendant’s actions to their caregivers, to the police and to sexual assault interviewers, were both clear and consistent.

C. *Proof of Prior Conviction*

In order to preserve the issue for federal review, defendant also argues that the trial court was not permitted to make factual findings that he was the person who had suffered a prior conviction for a violation of section 288, subdivision (a) on March 1, 1995. This argument was rejected in *People v. Towne* (2008) 44 Cal.4th 34, 81, a ruling we are compelled to follow. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

D. *Motion to Strike Priors*

The sentencing hearing was held on December 17, 2010. The trial court noted that defendant’s counsel had filed a sentencing brief in which she asked that a strike against

defendant be stricken because of defendant's particular circumstances.² Defendant's counsel requested a sentence of 25 years to life because "[t]he behavior in this case was not so aggravated, and also considering Mr. Tibbitts' very limited criminal history and his otherwise law abiding life with respect to his military service and his two long-term employments . . . in the interest of justice, in consideration of the constitutional constraint against cruel and unusual punishment"

The trial court had before it defendant's "lengthy sentencing brief" asking for a lesser sentence than that recommended by the People. It also had the probation department's report, which joined in the People's request for the maximum sentence. The court sentenced defendant to the maximum term, noting, in particular, defendant's prior history of sexual abuse of children. Defendant now argues that the trial court erred in sentencing him to the maximum term. We disagree.

We review the issue of whether the trial court erred in failing to dismiss or strike a prior conviction allegation under Penal Code section 1385 under the abuse of discretion standard of review. (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)). "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion

² Despite the fact that the trial court specifically referred to defendant's request as a "Romero motion" (*People v. Romero* (1996) 13 Cal.4th 497), defendant argues that the trial court was not aware that it had the discretion to strike his prior under Penal Code section 1385. Our review of the record indicates that this was not the case.

unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376-377.)

In reaching its decision, the trial court referred to a psychological report regarding defendant. The court stated that the “bottom line” in reaching a sentencing decision was that defendant was a pedophile who was a danger to the community while out of jail. The trial court also pointed to the fact that defendant was not only a repeat offender, but that he had given a victim in one case against him \$10,000 so she would not testify against him. Having reviewed the record, we conclude that the trial court considered—as it was required to—all relevant factors and circumstances in reaching its decision. Although defendant suggests that the trial court gave improper weight to the psychological report that characterized defendant as a pedophile, we disagree. The court’s decision was neither irrational nor arbitrary and there was no abuse of discretion here. (*Carmony, supra*, 33 Cal.4th at p. 378.)

E. *Cruel and Unusual Punishment*

Defendant argues that his 105 years to life sentence violates the prohibition against cruel and unusual punishment contained in the United States Constitution, which prohibits the imposition of cruel and unusual punishment (U.S. Const., 8th Amend.), and the California Constitution, which prohibits the imposition of cruel or unusual punishment (Cal. Const., art. I, § 17) because it is disproportionate to his offenses. We reject this argument. Under both California and federal law, 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” violates the prohibition against cruel and unusual punishment. (*In re Lynch* (1972) 8 Cal.3d 410, 424; see also *Harmelin v. Michigan* (1991) 501 U.S. 957, 962.) The federal constitutional standard looks for gross disproportionality. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 1001; *Cacoperdo v. Demosthenes* (9th Cir.1994) 37 F.3d 504, 507-508.)

Under California law, a court reviewing a claim of cruel or unusual punishment, should examine the nature of the offense and the offender, 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.) When we consider the nature of the offense and the offender, we evaluate the totality of the circumstances surrounding the commission of the current offense, including the defendant's motive, manner of commission of the crime, 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.)

Taken alone, the fact that the sentence imposed on defendant was the maximum possible term does not render it cruel and unusual. (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1510.) In light of defendant's long history of sexually abusing children within the circle of his family and friends, children toward whom he should have functioned as a guardian rather than a predator, as well as his evasion of responsibility for this behavior, and the damage he has inflicted on these children, we find that defendant's sentence is not grossly disproportionate to his individual culpability.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.