

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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,**

**A131271**

**v.**

**(Contra Costa County  
Super.Ct.No. 51000273)**

**KEVIN SCOTT MUELLER,**

**Defendant and Appellant.**

\_\_\_\_\_ /

A jury convicted appellant Kevin Scott Mueller of, among other things, committing lewd acts upon a child under 14 (Pen. Code, § 288, subd. (a)),<sup>1</sup> committing sexual acts on a child 10 years old or younger (§ 288.7, subd. (b)) and possessing child pornography with a prior conviction (§ 311.11, subd. (b)). The trial court sentenced him to state prison.

On appeal, appellant contends the court erred by: (1) denying his motion to sever the child molestation charges from the child pornography charges; (2) permitting the prosecution to introduce evidence of a prior conviction for committing a lewd and lascivious act on a child under 14 pursuant to Evidence Code section 1108; (3) admitting “the written pedophilic story and jokes found on [his] computer;” and (4) denying his

<sup>1</sup> Unless otherwise noted, all further statutory references are to the Penal Code.

motion to strike testimony given by the prosecution's child abuse pediatrician. Appellant also contends his sentence constitutes cruel and unusual punishment under the state and federal Constitutions.

We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

The People charged appellant with committing a lewd act upon a child under 14 (§ 288, subd. (a) (Counts One through Seven)), possessing child pornography with a prior conviction (§ 311.11, subd. (b) (Count Eight)), committing sexual acts with a child 10 years old or younger (§ 288.7, subd. (b) (Count Nine)) and using a minor to model a sex act (§ 311.4, subd. (b)) (Count Ten). The operative information also alleged appellant had a 1989 conviction in Nevada for committing a lewd and lascivious act on a child under 14.

In 1998, appellant moved in with his then girlfriend, E.F. In 1999, their daughter, Jane Doe, was born. Appellant and E.F. lived together until 2003, when he told E.F. he was a convicted sex offender. Appellant told E.F. "it wasn't true," but he moved out of the house they shared and into an "awfully small" one-bedroom apartment nearby. After appellant moved to his own apartment, he saw Doe on weekends; Doe sometimes spent the night at his apartment.

In 2008, Antioch police officers and Contra Costa sheriff's deputies searched appellant's apartment pursuant to a county-wide sweep to insure sex offenders were complying with sex offender registration laws. Appellant and Doe — then nine years old — were at the apartment during the search. In the apartment, law enforcement officers found a computer, several computer hard drives, and a camera memory card. The memory card contained nine photographs of Doe, naked. In one picture, Doe spread the labia of her vagina with her fingers.<sup>2</sup>

One of the hard drives contained 37 images of naked seven-to-nine-year-old girls in sexual poses. It also contained jokes about pedophilia and a story about a man's

---

<sup>2</sup> Officers also found a box for a blow up sex doll and various sex toys.

sexual desire for a little girl who lived next door. Another hard drive contained 300 images of prepubescent girls in sexual positions that had been downloaded from the Internet; a third hard drive contained 7,000 images of young girls — some as young as three or four — in sexual positions and six videos of young girls in sexual acts or positions.<sup>3</sup> Law enforcement officers arrested appellant. Doe was interviewed at the Children’s Interview Center six times shortly after her father was arrested.

At trial, Doe testified appellant first molested her when she was about three years old. When she was six or seven, he made her touch his penis. While he was naked, appellant touched Doe on her chest and private parts at least 15 times. He also licked her vagina, put a vibrator against her vagina, and made her touch his penis. On one other occasion, appellant tried to put his penis in Doe’s anus. When Doe told appellant she did not want to touch him, he would “get really mad and . . . just yell.” When she was eight, appellant began photographing Doe: appellant told her to take her clothes off and sometimes he made her lie down and touch her private parts while he photographed her.<sup>4</sup> Though she did not want to be photographed in this manner, Doe did not object because she was afraid appellant would get angry with her. Doe did not tell her mother about the molestation because she did not want her mother to get angry.<sup>5</sup>

Dr. James Carpenter, a child abuse pediatrician, testified for the prosecution. The court qualified him to “testify as an expert witness in the area of child sexual abuse and conducting sexual assault examinations, and interpretation of sexual assault examinations.” Dr. Carpenter testified he examined Doe and found no evidence of any recent or significant past trauma to her vagina. He opined, however, that this lack of physical evidence was not inconsistent with Doe’s sexual abuse claims because nine out

---

<sup>3</sup> 200 pictures and several videos were shown to the jury.

<sup>4</sup> Doe saw appellant look at pornography on his computer. He made Doe watch adult pornography with him.

<sup>5</sup> With a few minor exceptions, Doe’s description of the molestation during the interviews was consistent with her trial testimony. For example, during the interviews, Doe said she told her mother about the molestation but at trial, she testified she did not tell her mother.

of ten children who have been sexually abused have “normal” exams. On redirect examination, Dr. Carpenter testified generally about how children behave following sexual abuse. Counsel for appellant moved to strike the testimony as misleading and beyond Dr. Carpenter’s expertise. The court denied the motion.

A jury convicted appellant of the charges and the court sentenced him to 135 years to life in state prison.

## DISCUSSION

### *The Court Did Not Abuse its Discretion by Denying the Motion to Sever*

Before trial, appellant moved to sever the child molestation charges (Counts One through Seven and Count Nine) from the child pornography charges (Counts Eight and Ten). Appellant argued severance was proper because: (1) “the charges . . . are inflammatory;” (2) the child molestation charges are “different in quality and evidentiary strength” from the child pornography charges; and (3) “different proof elements render them inadmissible to prove each other.” Appellant contended the “risk of prejudice in a joint trial is extreme[.]”

Following a hearing, the court denied the motion. It concluded the evidence was cross-admissible to show “motive and intent” and was relevant to “propensity . . . [¶] It appears . . . the defendant [was] grooming the child. . . . [¶] The computer images of the young nude girls are relevant to show the defendant’s intent to commit the lewd acts.” The court also determined the pornographic images were “not more inflammatory than the child molestation charges themselves.”

Section 954 expresses the legislative preference for joint trials of similar offenses committed by a defendant. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 557.) Where, as here, “the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant’s severance motion.” [Citation.] “““The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” [Citation.] . . .’ [Citation.]” (*Id.* at p. 557.)

““We review the trial court’s ruling for abuse of discretion, which will be found ““when the trial court’s ruling ““falls outside the bounds of reason.””” [Citation.]’ [Citation.] ‘In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling.’ [Citation.] “““The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.’ [Citation.] . . . [Citation.]”” ‘The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.’ [Citations.]” (*Sullivan, supra*, 151 Cal.App.4th at p. 557.)

Appellant does not argue the child molestation charges and the child pornography charges are not of the same class of cases. (See *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1112; *People v. Soto* (2011) 51 Cal.4th 229, 238; *In re Alva* (2004) 33 Cal.4th 254, 289-290.) Instead, he contends the denial of his motion to sever constituted an abuse of discretion because the “the strong child pornography case bolstered the weaker child molestation case.” According to appellant, the evidence supporting the child molestation charges was weak because it “turned on the sometimes vague and contradictory statements made by Doe” during her interviews with the police “and while on the witness stand.” Appellant does not identify what statements were purportedly “vague and contradictory.”

Appellant’s claim fails. The evidence proving his guilt on the molestation charges was not weak. Although Doe admitted at trial she was reluctant to share the story of her molestation, her trial testimony was not — as appellant contends — vague or contradictory. Doe recounted specific acts of sexual abuse that began when she was very young. She described, in detail, what appellant did to her and how it made her feel. Additionally, the pictures of Doe found in appellant’s apartment corroborated her

testimony, though no corroboration was needed because, “[i]n California[,] conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix.” (*People v. Poggi* (1988) 45 Cal.3d 306, 326.) Finally, any inconsistencies between Doe’s description of the molestation during the interviews and at trial were — at most — minor.

Appellant also contends the court erred by denying the motion to sever because the pornographic images and videos were inflammatory. He notes the prosecutor and two jurors cried while one video played, and the court described the videos as “difficult” to watch. Appellant is correct that the pornographic images and videos were inflammatory, but his argument misses the point. The evidence underlying the child molestation and the child pornography charges was equally disturbing. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1155.) At trial, Doe described in detail how her father molested over a lengthy period of time beginning when she was a toddler.

Appellant concedes pornographic images of children are admissible in cases alleging improprieties with minors to show “lewd intent and criminal disposition.” (Evid. Code, § 1101, subd. (b); *People v. Page* (2008) 44 Cal.4th 1, 40.) Thus, as the court observed, the pornographic images of children would have been “cross-admissible” at a separate trial of Counts One through Seven and Count Nine to prove his intent in committing those acts. Standing alone, this circumstance is sufficient to dispel “any inference of prejudice” and to justify the court’s refusal to sever the child molestation charges from the child pornography charges. (See *Carter, supra*, 36 Cal.4th at p. 1154.) Finally, we have examined the evidence introduced at trial and have concluded there was no “gross unfairness” that deprived appellant “of a fair trial or due process of law.” (*People v. Thomas* (2012) 53 Cal.4th 771, 800-801, quoting *People v. Bean* (1988) 46 Cal.3d 919, 940.)

*The Court Did Not Abuse Its Discretion by Admitting Evidence  
Regarding Appellant’s 1989 Conviction*

Before trial, the prosecutor moved in limine to admit evidence of appellant’s 1989 conviction for lewd and lascivious conduct with a child under 14 pursuant to Evidence Code section 1108. The prosecutor argued Evidence Code section 352 did not preclude

the admission of the evidence.<sup>6</sup> Defense counsel objected, claiming the evidence was unduly prejudicial. The court granted the motion and admitted the evidence pursuant to Evidence Code section 1108, concluding the offenses were similar and the 1989 conviction “show[s] propensity.” In addition, the court concluded the probative value of the evidence outweighed any prejudicial effect and determined the conviction was “not too remote.”

The jury heard evidence that appellant “rubbed the breast area” of his 12-year-old niece and pleaded guilty in 1989 to committing a lewd and lascivious act with a child under 14 in violation of Nevada law. The court instructed the jury it could conclude from the evidence of the 1989 conviction that appellant “was disposed or inclined to commit sexual offenses and . . . was likely to commit and did commit Counts One through Seven and Count Nine [the child molestation charges] as charged here.” The court advised the jury, however, that if it concluded appellant committed the 1989 offense, “that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that [he] is guilty of Counts [One] through [Seven] and Count [Nine]. The People must still prove each charge and allegation beyond a reasonable doubt.”

“Evidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant’s propensity to commit a sexual offense, subject to exclusion under [ ] section 352.” (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; 1 Witkin, Cal. Evidence (5th ed. 2000) Circumstantial Evidence, § 97, p. 493.) Put another way, section 1108 ““permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*” [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352.” (*People v. Hollie*

---

<sup>6</sup> Evidence Code section 1108, subdivision (a) provides: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” Evidence Code section 352 provides: “The court in its discretion may 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.”

(2010) 180 Cal.App.4th 1262, 1274, quoting *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Appellant claims the evidence of his 1989 conviction was inadmissible under section 352 because its probative value was outweighed by its “prejudicial impact.” He is wrong. The probative value of the 1989 conviction was strong. The 1989 offense was similar to the molestation involving Doe: in both instances, appellant molested a young, vulnerable relative. In both instances, appellant touched the girls’ breasts. Additionally, the 1989 offense demonstrated appellant’s propensity to molest Doe. Contrary to appellant’s argument, the evidence of appellant’s molestation of his niece was not more inflammatory than the charged crimes. (See *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406 [“evidence of . . . uncharged sexual misconduct” and charged offenses was “equally graphic”].) In fact, the evidence concerning the prior conviction was *less* inflammatory than the evidence concerning the charged offenses. With respect to appellant’s 1989 conviction, the jury learned only that he rubbed his 12-year-old niece’s breasts. With respect to the charged offenses, however, Doe testified appellant touched her on her chest and private parts, licked her vagina, put a vibrator against her vagina, made her touch his penis and tried to put his penis in her anus.

We reject appellant’s claim that the evidence was unduly prejudicial. The evidence was undoubtedly harmful to appellant, but it was not prejudicial in the sense that it would cause the jury to decide the case on an improper basis. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 806.) Moreover, the court told the jury how to evaluate the evidence of appellant’s prior conviction to avoid the possibility of undue prejudice. (See *People v. Holford* (2012) 203 Cal.App.4th 155, 186 [trial court properly admitted evidence of “prior molestation” by the defendant pursuant to Evidence Code section 1108; observing “the jury was properly instructed on how to use this evidence and on the presumption of innocence and the burden of proof”].)

Finally, appellant suggests the 1989 conviction was inadmissible because it occurred 21 years before the current offenses and, as a result, was too remote. We disagree. “No specific time limits have been established for determining when an

uncharged offense is so remote as to be inadmissible” and “[n]umerous cases have upheld admission pursuant to Evidence Code section 1108 of prior sexual crimes that occurred decades before the current offenses.” (*People v. Robertson* (2012) 208 Cal.App.4th 965, 992, citing cases; *People v. Branch* (2001) 91 Cal.App.4th 274, 284 [upholding admission of a sex crime committed 30 years before charged offense]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393, 1395 [uncharged sexual offenses involving same victim occurring between 18 and 25 years before trial were not found too remote]; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [sex crime committed 23 years before current crime was admissible].)

Appellant’s reliance on *People v. Harris* (1998) 60 Cal.App.4th 727, 737, is misplaced. In that case, the court observed that a 23-year gap between the uncharged and current offense was a “long time” and concluded that the gap, together with the fact that the defendant had led a “blameless life” during that 23-year period, militated against the admission of the uncharged offense. (*Id.* at p. 739.) In addition, the *Harris* court noted the dissimilarities between the 23-year-old prior offense and the charged offenses and concluded the prior offense had no “significant probative value.” (*Id.* at p. 741.) *Harris* is distinguishable. First, appellant did not lead a “blameless life” after his 1989 conviction. He was convicted of misdemeanor drug possession in 2007 and he began abusing Doe approximately 14 years after the conviction. Second — and in contrast to *Harris* — the prior and current offenses are remarkably similar. (*Branch, supra*, 91 Cal.App.4th at p. 285.) “[S]ubstantial similarities between the prior and the charged offenses balance out the remoteness of the prior offense[ ]. [Citation.]’ [Citation.]” (*Pierce, supra*, 104 Cal.App.4th at p. 900, quoting *Branch*, at p. 285; *Robertson, supra*, 208 Cal.App.4th at p. 992 [upholding admission of prior sex crime occurring “more than 30 years ago” because the similarities between the two offenses “balance[d] out the temporal remoteness”].)

We conclude the court did not abuse its discretion by admitting evidence of appellant’s 1989 conviction.

*The Court Properly Admitted the “Written Pedophilic Story”  
and Pedophile Jokes Found on Appellant’s Computer*

Over appellant’s objection, the court admitted a story entitled, “Young 12-Year-Old Melody” about a man’s sexual desire for an eight-year-old girl living next door and a collection of jokes entitled, “You Might be a Pedophile If . . .” The court explained, “The People are offering this as evidence of the defendant’s intent and also [as] circumstantial evidence of that intent. . . . Analyzing it under [Evidence Code section] 352, the probative value substantially outweighs its prejudicial effect. It will be allowed.” The prosecutor read the story and the jokes to the jury.

Appellant contends the story and jokes were inadmissible under Evidence Code section 1101, subdivision (b) because his “intent as it related to the child molestation counts was not in dispute at trial.” He is wrong. Appellant pleaded not guilty to the charges, which “placed in issue all of the elements of the offense[s], including his intent in committing” the child molestation charges. (*People v. Gillard* (1997) 57 Cal.App.4th 136, 161.) Moreover, the story and jokes found on appellant’s computer constituted evidence “from which the jury could infer that he had a sexual attraction to young [girls] and intended to act on that attraction.” (*Page, supra*, 44 Cal.4th at p. 40.)

We reject appellant’s contention that the story and jokes were inadmissible under Evidence Code section 352. This evidence was not “any more inflammatory than the evidence” that appellant molested his own daughter. (*Waples, supra*, 79 Cal.App.4th at p. 1395 [rejecting the defendant’s argument that evidence of the defendant’s molestation of another victim was inadmissible under Evidence Code section 352].) Finally, even if we assume for the sake of argument the court erred by admitting the evidence, any error was harmless because it is not reasonably probable a different result would have been reached absent the error. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750.) The story and jokes were inconsequential when compared with the images and videos of young girls — including his own daughter — in sexual positions and with Doe’s testimony describing how appellant molested her.

*Any Error in Admitting Dr. Carpenter's Testimony  
on Redirect Examination Was Harmless*

Appellant contends the court erred by denying his motion to strike Dr. Carpenter's testimony on redirect examination. According to appellant, Dr. Carpenter was not qualified to testify about "child sexual abuse accommodation syndrome" (CSAAS) because he was not a "child psychologist or behavioral expert on child sex abuse[.]" Appellant claims the court's failure to strike Dr. Carpenter's testimony "improperly bolstered the credibility of Doe's sometimes vague and contradictory testimony" and "closed the evidentiary gap in the prosecution's case caused by the lack of physical evidence of abuse."

Assuming for the sake of argument the court erred by denying appellant's motion to strike and admitting the challenged testimony, we would conclude any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Bowker* (1988) 203 Cal.App.3d 385, 395 [court's failure to limit expert's CSAAS testimony was harmless error].) As discussed above, the evidence of appellant's guilt was overwhelming. The police found thousands of images of naked young girls in sexual poses in appellant's apartment. They also found videos of young girls being victimized and nine naked pictures of Doe. Moreover, Doe testified appellant molested her and described the abuse. "We cannot conclude . . . it is reasonably probable a verdict more favorable to [appellant] would have resulted" had the court limited Dr. Carpenter's testimony. (*Bowker*, at p. 395.)

*Appellant's Sentence Was Not Cruel and Unusual  
Under the State and Federal Constitutions*

Appellant contends the aggregate sentence of 135 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) "none of his crimes were violent in nature."

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 “cannot complete his 135-year to life sentence.”<sup>7</sup> To support this argument, appellant relies on Justice Stanley Mosk’s concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, 600-601, 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.)

---

<sup>7</sup> Appellant’s other arguments — that the sentence is cruel and unusual because he has a “limited” criminal record and because his crimes were not “violent” — are unpersuasive, particularly because they are not supported by any authority.

Justice Mosk’s opinions in *Deloza* and *Hicks* do not assist appellant for two reasons. First, neither 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.) Second, 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.)

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 that 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 one 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. (*Ibid.*)

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.) 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 former Penal Code section 290 was a “technical and harmless violation of the registration law” akin to a “breach of an overtime parking ordinance.” (*Id.* at pp. 1078, 1079.) *Carmony* is inapposite. Here and in contrast to the conduct the *Carmony* defendant described as a “technical and harmless violation[,]” appellant molested his own daughter. Appellant’s actions were nothing like a “breach of an overtime parking ordinance.” (*Id.* at p. 1079.)

DISPOSITION

The judgment is affirmed.

---

Jones, P.J.

We concur:

---

Needham, J.

---

Bruiniers, J.