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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

GARY JAY LIVERS,

Defendant and Appellant.

C069767

(Super. Ct. No. 10F04722)

A jury convicted defendant Gary Jay Livers of crimes related to his sexual exploitation of his daughter's friend. Defendant was convicted of six counts of lewd and lascivious acts with a child under age 14 (Pen. Code, § 288, subd. (a)<sup>1</sup>; counts 1 & 6 through 10), two counts of oral copulation with a child age 10 or younger (§ 288.7, subd. (b); counts 2 & 4), and two counts of sexual intercourse with a child age 10 or younger

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of defendant's crimes.

(§ 288.7, subd. (a); counts 3 & 5). He was sentenced to state prison for a determinate term of 16 years plus a consecutive indeterminate term of 80 years to life.

On appeal, defendant contends (1) CALCRIM No. 371 on suppression of evidence and CALCRIM No. 372 on flight created an unconstitutional presumption that defendant was “aware” of his guilt, and (2) his sentence of 96 years to life violates the state and federal proscriptions of cruel and unusual punishment.

We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **Prosecution Evidence**

The victim, B.J., was born in September 1998. B.J. had known defendant’s daughter, M.L., since kindergarten. They became close friends at age nine when they played on the same baseball team, which defendant coached.

B.J. and M.L. often had sleepovers at defendant’s house. During the first sleepover, defendant was present with B.J. and M.L. They played card games and challenged one another to “nude dares.” For example, defendant dared the girls to walk around the kitchen nude, and the girls dared defendant to jump on the couch with only a hat to cover his genitals. B.J. also recalled having to do a backwards roll while naked.

During each of the ensuing sleepovers, defendant suggested that B.J. and M.L. sleep with him in the camper that was parked in the driveway. On the first such sleepover, the trio played cards together until M.L. went to sleep. Defendant then asked B.J. to lie down and kiss him on the lips. After he kissed her lips and hugged her, B.J. felt “weirded out,” so she slept in the bed with M.L. The next time B.J. spent the night, defendant told her she was pretty and asked her to take off her clothes; she refused. About a week later, defendant asked her again, and this time she agreed to lie naked on the bed with him.

Thereafter, the sexual conduct increased. When B.J. was 10 years old, defendant kissed her vagina and tried to have sexual intercourse with her approximately 20 times.

Eventually, defendant was able to partially penetrate her vagina and it hurt when he did that. "Stuff came out" every time defendant put his penis in B.J.'s vagina. B.J. testified that the "stuff" went "in me." At defendant's request, B.J. kissed his penis once or twice and a liquid came out of defendant's penis that got on her mouth. Most incidents occurred in the camper after M.L. had fallen asleep. One incident occurred while they were on a hunting trip, and two incidents occurred at a hotel. The trips to the hotel took place during the day after school. Defendant told B.J.'s parents he was taking B.J. to his house to work on a Mother's Day present with M.L.

Defendant told B.J. that he loved her almost every day, and she told him that she loved him, too. He told her that they were "making love," and that he would get in trouble if she told anyone about their relationship.

The sexual relationship continued when B.J. was 11 years old. During that year, they had sexual intercourse 20 to 25 times. Also, defendant orally copulated her vagina approximately 15 times, telling her that he loved her whenever he did that. B.J. also orally copulated defendant's penis approximately 10 times. When defendant kissed her vagina, he also kissed her breasts and buttocks.

The last sexual encounter occurred at defendant's residence, when B.J. helped him paint M.L.'s bedroom. They had sexual intercourse in that room and in defendant's bedroom.

On July 28, 2010, B.J.'s father noticed that her cellular telephone kept ringing and that she was receiving several text messages. When he entered B.J.'s room, she threw the phone under her pillow and said her friend, "Hanna," was trying to reach her. The father took the phone, but B.J. refused to unlock it for him. When the father viewed his records for the phone, he saw that B.J. had received more than 500 text messages from the same phone number. B.J.'s older sister told the father that the number was for defendant's second telephone. When the father confronted B.J. and demanded that she unlock her phone, she refused, but eventually she unlocked it and exclaimed, "I love him!" B.J. then

threw the phone at her father, ran to her bedroom, and jumped out the window. The father got in his car, drove toward defendant's house, and found B.J. halfway there. Eventually she got in the car. Thereafter, they picked up B.J.'s mother and then called the police.

Sacramento County Sheriff's Deputy Daron Epperson arrived at B.J.'s house that evening. Based on information he received from B.J. and her parents, Epperson informed other responding deputies that defendant likely was at his home and possibly armed. Epperson also asked B.J. to make contact with defendant via text messaging. At Epperson's request, B.J. suggested in one of the messages that she might be pregnant. Thereafter, several text messages were exchanged between B.J. and defendant. In one of the messages, defendant indicated he was coming over to B.J.'s house. He also indicated he had a gun. Deputies were dispatched to go to defendant's house and wait for him to leave.

Deputy Paul Jbeily was surveilling defendant's residence when, in the early morning, he saw an individual enter a pickup truck that had been parked in the driveway. The truck had a sign which read, "Gary's Tile." Jbeily attempted to execute a traffic stop but the driver led deputies on a high speed chase through Orangevale. The chase lasted five minutes and reached speeds upwards of 95 miles per hour before deputies lost sight of the truck.

The next morning, deputies went to a Sacramento motel looking for defendant. Upon searching defendant's motel room, deputies discovered spots in the garbage can consistent with hair dye. Deputies viewed surveillance video from the motel and saw that defendant had thrown an orange bag in the motel dumpster. When they searched the dumpster, they found the bag, which contained a box for hair dye, clear plastic gloves with hair dye on them, two bottles of used hair dye, and a stained white washcloth. Outside the bathroom window, a crime scene investigator found a torn up photograph of B.J.

Deputies located defendant about three blocks from the motel. His hair was shorter and darker than it had appeared on the motel's surveillance video. Later that day, defendant's pickup truck was found abandoned in a farm field. Inside the truck, deputies found a pair of B.J.'s underwear and a piece of paper bearing an abbreviated version of B.J.'s first name and a date in May 2010.<sup>2</sup> Further investigation revealed that B.J. had stored defendant's cell phone number in her phone under the name "Hanna," and defendant had stored B.J.'s phone number under the name "A Cheri." Deputies discovered that the pass code for B.J.'s phone was defendant's date of birth.

Shortly after his arrest, defendant spoke to his adult son, Cory, and asked him what the officers who had searched his house had been looking for. Defendant asked Cory to remove his camper, boat, and personal possessions from the house. Defendant also admitted to Cory that he had fled from the deputies when they tried to pull him over. Defendant had previously told Cory that he was having an affair with a woman named "A Cheri." Cory asked defendant to give him contact information for "Cheri" but defendant refused to do so.

Defendant also told a friend, Johnny R., he was having an affair with a woman named "Cheri." Defendant said he planned to marry Cheri after the kids were grown and out of school.

Defendant also told M.L. about "A Cheri," explaining that they could not get married until M.L. was out of high school. Defendant told M.L. she had previously seen "Cheri," and that M.L. would probably be surprised to know who she is. B.J.'s middle name is "Cherie."

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<sup>2</sup> Deputies also found a broken cellular telephone and a small, loaded pistol behind the driver's seat inside of the truck.

Defendant's wife testified that he had become "obsessed" with B.J. Instead of M.L. making plans for B.J. to visit their home, defendant did. He also tried to include B.J. in all of the family vacations.

### **Defense Evidence**

Defendant testified on his own behalf. He admitted fleeing from deputies during the high-speed chase but claimed he had been delusional from taking medication for bipolar disorder. Following the chase, he tried to turn himself in at the sheriff's substation, but the station was unattended. He left his truck nearby and walked to a Sacramento motel. On the way, he made a cash withdrawal and bought a shirt, hat, shorts, and hair dye from a supermarket. He bought the hair dye at his attorney's suggestion, because the attorney had told him he would be in jail for at least a few months. Defendant denied that he ever tried to have sex with B.J. and said she was like a daughter to him.

## **DISCUSSION**

### **I. Suppression of Evidence and Flight Instructions--"Awareness" of Guilt**

Defendant contends the jury instructions on suppression of evidence (CALCRIM No. 371) and flight (CALCRIM No. 372) created an unconstitutional presumption that he was guilty because the instructions referred to him being "aware of his guilt." Defendant asserts that both instructions "amounted to mandatory presumption[s] or burden-shifting presumptions that [he] was guilty of the charges if [his] behavior was substantially consistent with the behavior the instructions described."

#### **A. The Instructions**

The trial court instructed the jury with CALCRIM No. 371 as follows: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was *aware of his guilt*. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." (Italics added.)

The court also instructed with CALCRIM No. 372 as follows: “If the defendant fled after he was accused of committing a crime, that conduct may show that he was *aware of his guilt*. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.” (Italics added.)

### **B. Analysis**

Defendant claims the disputed instructions affected his substantial rights; thus, section 1259<sup>3</sup> authorizes our consideration of his argument on appeal notwithstanding his failure to assert it in the trial court. The Attorney General counters that the contention has been forfeited. We consider the issue on its merits, without deciding whether these instructions implicate substantial rights.

The parties recognize that the California Supreme Court has upheld earlier CALJIC instructions concerning a defendant’s “consciousness of guilt.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101-102 [CALJIC Nos. 2.04, attempt to obtain false testimony or fabricate evidence, and 2.06, attempt to suppress evidence]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1223 [CALJIC Nos. 2.03, willfully false statement, 2.04 & 2.06]; *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021 [CALJIC No. 2.52, flight after crime]; *People v. Mendoza* (2000) 24 Cal.4th 130, 179-180 [same].) More recently, this court upheld CALCRIM No. 372 on flight after a crime, rejecting the contention that because the instruction presumes a crime was committed, the instruction

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<sup>3</sup> Section 1259 provides, “Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.”

deprives defendants of the presumption of innocence, the right to a jury trial and proof beyond a reasonable doubt. (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 29-32.)

As defendant recognizes, the court in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1160 held the phrase “aware of his guilt” in CALCRIM No. 372 is equivalent to the CALJIC phrase “consciousness of guilt.” (*Hernandez Rios, supra*, 151 Cal.App.4th at pp. 1158-1159.) Defendant disagrees and asserts *Hernandez Rios* was wrongly decided. Defendant contends the reference to the defendant being “aware of his guilt” is not equivalent to the “more vague, impersonal suggestion of ‘a consciousness of guilt.’ ” We disagree with defendant and agree with the *Hernandez Rios* court.

Furthermore, the instructions clearly tell jurors they *may* conclude defendant was aware of his guilt from evidence showing that he suppressed evidence or fled, but that it is up to them to decide the meaning and importance of such evidence and such evidence cannot prove guilt by itself. As this court noted in *People v. Mathson* (2012) 210 Cal.App.4th 1297 (*Mathson*), the “ ‘meaning of instructions is no[t] ... determined under a strict test of whether a “reasonable juror” *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a “reasonable likelihood” that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel.’ ” (*Id.* at p. 1312.) We conclude there is no reasonable likelihood the jury understood CALCRIM Nos. 371 and 372 as meaning that defendant was guilty if he engaged in certain conduct described in the instructions. The instructions permitted, but did not require, the jury to conclude defendant’s suppression of evidence and flight from law enforcement showed his awareness, or consciousness, of guilt. Defendant’s claim that the instructions “leave no room for the possibility of innocence” borders on frivolous.

Defendant’s reliance on *Carella v. California* (1989) 491 U.S. 263, 265-266 [105 L.Ed.2d 218] (*Carella*), *People v. Godinez* (1992) 2 Cal.App.4th 492, 501 (*Godinez*), and *People v. Higareda* (1994) 24 Cal.App.4th 1399 (*Higareda*) is misplaced.

In *Carella*, a theft of a rental vehicle prosecution, the United States Supreme Court rejected an instruction which told the jury that a person “shall be presumed” to have embezzled a vehicle if it is not returned within five days of the rental agreement expiration and that intent to commit theft by fraud “is presumed” from the failure to return rented property within 20 days of a demand. (*Carella, supra*, 491 U.S. at p. 265.) The high court concluded that “[t]hese mandatory directions” foreclosed independent jury consideration of whether the proven facts established elements of the charged offense and relieved the prosecution of its burden of proof. (*Id.* at p. 266.)

In *Godinez*, the appellate court rejected the trial court’s instruction in a gang case that “[h]omicide is a reasonable and natural consequence to be expected in a gang attack.” (*Godinez, supra*, 2 Cal.App.4th at p. 501, italics omitted.) The *Godinez* court reasoned that the instruction “usurped the factfinding role of the jury by explaining that homicides are in fact reasonable and natural consequences of gang attacks, rather than leaving to the jury the question of whether the homicide . . . was a natural and reasonable consequence of the gang attack Godinez aided and abetted.” (*Id.* at p. 502.)

In *Higareda*, the appellate court rejected an instruction which told the jury that “ ‘the aiming of a handgun or shotgun at a victim accompanied by a demand and receipt of money or personal property amounts to force and inferably fear, within the meaning of Penal Code 211, defining robbery as a felonious taking by force or fear.’ ” (*Higareda, supra*, 24 Cal.App.4th at p. 1406.) *Similar* to *Carella* and *Godinez*, the appellate court concluded that this instruction intruded on the jury’s factfinding role. (*Ibid.*) The instruction in the present case comes nowhere close to the mandatory nature of the instructions in *Carella*, *Godinez* and *Higareda*.

We also look to the arguments of counsel when determining whether there is a reasonable likelihood the jury misconstrued or misapplied the instructions. (*Mathson, supra*, 210 Cal.App.4th at pp. 1312, 1330.) Here, the prosecutor did not exploit the purported flaw defendant asserts. Indeed, the prosecutor never mentioned the awareness

of guilt instructions. He simply reminded the jury of the evidence, including defendant's direction to his son to get rid of the camper, the torn photo of B.J. found outside the bathroom window of defendant's motel room, the high speed chase, and the dyed hair and then called this evidence circumstantial evidence the jury really did not need because "you could sit here and look at [B.J.] and know that everything that came out of her mouth was the truth."

We conclude the trial court did not err by giving the CALCRIM "awareness" of guilt instructions.

## **II. Cruel and Unusual Punishment**

Defendant contends his state prison sentence of 96 years to life constitutes cruel and unusual punishment under both the state and federal Constitutions. As he notes, his sentence results primarily from section 288.7,<sup>4</sup> which in this case adds up to 50 years to life for the two counts of sexual intercourse and 30 years to life for the two counts of oral copulation, and which the court imposed consecutively to his 16-year determinate term sentence. Defendant argues section 288.7 "is unconstitutional on its face and as presently applied to him."

The Attorney General counters that defendant has forfeited this fact-bound contention by failing to assert it in the trial court. (*People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Defendant anticipates this argument by claiming the failure constitutes prejudicial ineffective

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<sup>4</sup> Section 288.7 provides, "(a) Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life. [¶] (b) Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life."

assistance of counsel. Because the question of prejudice requires an evaluation of the merits of the omitted claim, we decide the merits.

We recognize that defendant's aggregate term is substantially longer than his possible life span. However, we conclude that the sentence imposed by the trial court does not violate defendant's state or federal right against cruel and unusual punishment.

#### **A. State Constitutional Claim**

As this court has previously noted, “[t]he California Constitution’s prohibition of cruel or unusual punishment . . . prohibits imposing a criminal sentence which is ‘so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.’ [Citations.]” (*People v. Johnson* (2010) 183 Cal.App.4th 253, 296 (*Johnson*); see *In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441, 478 ; Cal. Const., art. I, § 17.) “ ‘A defendant has a considerable burden to overcome when he challenges a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California and the court should not lightly encroach on matters which are uniquely in the domain of the Legislature.’ ” (*Johnson*, at p. 296.)

“We . . . use a three-pronged approach to determine whether a particular sentence is grossly disproportionate. First, we review ‘the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.’ [Citation.] Second, we compare the challenged punishment with punishments prescribed for more serious crimes in our jurisdiction. [Citation.] Third, and finally, we compare the challenged punishment to punishments for the same offense in other jurisdictions. [Citation.] *The importance of each of these prongs depends upon the facts of each specific case.* [Citation.] Indeed, *we may base our decision on the first prong alone.* [Citation.]” (*Johnson, supra*, 183 Cal.App.4th at pp. 296-297, italics added.) We consider the totality of the circumstances surrounding the commission of the offenses in

undertaking this three-pronged analysis. (*People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092 (*Meneses*).

### **1. The Nature of the Offenses and the Offender**

Looking first to the nature of the offenses, we note that even defendant concedes the crimes are serious and reprehensible. We partially agree. We find the offenses defendant committed to be *very* serious and *extremely* reprehensible. The four counts drawing life maximum sentences were not isolated incidents. Rather, they were parts of ongoing sexual exploitation that spanned at least two years and involved significant grooming of a young girl, who was nine years old when defendant began molesting her. When the victim was only 10 years old, defendant's conduct included many acts of vaginal penetration with his penis which caused the victim pain and also acts of oral copulation by defendant of the victim and by the victim of defendant. Defendant always ejaculated inside of the victim during the vaginal penetration and on her mouth during the one or two times when she orally copulated him when she was 10. The exploitation continued when the victim was 11 years old as defendant committed multiple acts of sexual intercourse upon her, multiple acts of oral copulation of her and multiple acts of oral copulation of him by her. Before defendant's predatory conduct began, he was the victim's baseball coach. And the victim was a close friend of defendant's own daughter. Defendant took advantage of a position of trust and even lied to the victim's parents about where he was taking her when he took her to a hotel after picking her up from school, claiming he was taking her to make a Mother's Day present. Had the victim's cell phone ringtone not caused her father to become suspicious, the ongoing nature of defendant's exploitation and his obsession with her suggests he was not going to stop.

As mitigation, defendant points out that the victim "willingly returned to visit [defendant] again and again with the expectation that they would mutually engage in sexual activities together." It is true that defendant did not use force or threats to carry out his exploitation of the victim. Nevertheless, we conclude that the victim's behavior is

not at all mitigating here. The victim was *only 10* when defendant engaged acts of sexual intercourse and oral copulation with her. The victim's "willingness" to engage in repeated sex acts with defendant at that age illustrates the extent to which defendant had succeeded in grooming her for sexual activity. This, we find to be an aggravating consideration, not mitigating.

Defendant points out that the victim was not physically injured. We do not find this to be a mitigating factor here. Based on the evidence, we conclude that by being careful not to inflict physical injury, defendant enhanced his chance of perpetuating his sexual exploitation of the victim for the long-term. Moreover, while there was no manifestation of a physical injury, we note that the victim nevertheless experienced pain during the acts of sexual intercourse when she was 10. And we cannot ignore the likely psychological damage defendant inflicted on the victim. Because defendant did not object on cruel and unusual punishment grounds in the trial court, the prosecution had no occasion to introduce evidence of the emotional and psychological impact of defendant's conduct on the victim. Nevertheless, common experience suggests that the ordeal defendant put the victim through may have long lasting psychological effects. In the statement of the victim's mother, which is attached to the probation report, the mother indicated that she blames herself for what happened to the victim, that they have lost the ability to trust people and that the family is receiving counseling.

Defendant asserts that, "the present crimes do not possess qualities which render them 'worse' than the average nonviolent lewd act involving a minor." We conclude the opposite, in light of defendant's grooming, his position of trust, the number and nature of the sex acts, the period of time over which defendant engaged in this exploitation, and the age of the victim.

As for the nature of the defendant, he points out he had no prior criminal convictions. This is true, but this fact does not overcome the aggravated nature of his conduct so as to make his sentence grossly disproportionate. He also points out that his

Static 99 score of one, places him in the low risk category relative to other adult male sexual offenders.<sup>5</sup> Even assuming the credibility of the Static 99 finding, that finding does not make defendant's punishment grossly disproportionate given the totality of the circumstances here.

Defendant also points out that prior to the current convictions, he managed his own business, earned a steady income and provided financial support for his family, including his two minor children. While mitigating, this conduct reflects nothing more than what the majority of people do. They work and take care of their families. This conduct does not make the punishment for the very serious and extremely reprehensible acts defendant perpetrated here grossly disproportionate. Furthermore, the evidence demonstrates that defendant used his status as a family man and his own daughter to lure the victim into the home and gain her trust and the trust of the victim's mother as part of a plan to groom the victim to fulfill his sexual desires.

## **2. Comparison of the Punishment with the Punishments for More Serious Crimes**

Defendant points out that a person who commits deliberate and premeditated murder can be sentenced to 25 years to life and this fact makes his sentence of 96 years to life grossly disproportionate.

An observation by the court in *People v. Bestmeyer* (1985) 166 Cal.App.3d 520 (*Bestmeyer*) is apropos here. "The choice of fitting and proper penalty is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will. [Citation.] Punishment is not cruel or unusual merely

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<sup>5</sup> This score is reported in the probation report. The Static 99 report is not part of the record.

because the Legislature may have chosen to permit a lesser punishment for another crime.” (*Id.* at p. 530.)

Moreover, as this court noted in *Johnson*, the importance of each prong of the test depends on the facts of each case and we can decide whether a defendant’s sentence is grossly disproportionate based on the first prong alone. (*Johnson, supra*, 183 Cal.App.4th at pp. 296-297.) Here, we find the comparison to other “more serious crimes” to be significantly less important than the first prong--the nature of the offense. Furthermore, we note that murder often involves a single event or act of violence. Here, defendant’s deliberate and premeditated activity was ongoing and involved multiple acts over two years. It was fortuitous that his exploitation was discovered because the evidence suggests a plan to continue his illegal sexual relationship with “A Cheri” for the remainder of her childhood.

Defendant also points out that the maximum sentence for continuous sexual abuse of a child is 16 years when the defendant resides in the home with the victim or has recurring access to the victim for a duration of three months. (§ 288.5, subds. (a) [sometimes called the resident child molester statute].)<sup>6</sup> This is true, but the resident child molester statute also allows this punishment for victims who are as old as 14. Here, we address punishment for crimes committed against a 10-year-old. Also, the resident child molester statute prohibits conduct that can be substantially less serious than

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<sup>6</sup> Section 288.5, subdivision (a) provides, “Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in *three or more acts of substantial sexual conduct* with a *child under the age of 14 years* at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, *or three or more acts of lewd or lascivious conduct*, as defined in Section 288, with a *child under the age of 14 years* at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.” (Italics added.)

defendant's sexual exploitation of the victim here. The resident child molester statute punishes a mere three acts of "substantial sexual conduct." "Substantial sexual conduct" includes digital penetration and masturbation.<sup>7</sup> The statute also punishes three acts of "lewd or lascivious conduct." "Lewd or lascivious conduct" includes touching any part of the body with the intent to arouse the sexual desires of either the perpetrator or the child (*People v. Martinez* (1995) 11 Cal.4th 434, 452) and constructive touching with the same intent (*People v. Lopez* (2010) 185 Cal.App.4th 1220 [touching occurred when, at the defendant's direction, the girls removed their clothing and dressed in clothing the defendant told them to wear].) Because the victim can be substantially older and the sexual conduct need not be nearly as serious as the conduct here, we reject defendant's comparison to punishment for violations of section 288.5, the resident child molester statute.

We also note that defendant's sentences imposed pursuant to section 288.7 are not disproportionate when compared to other crimes that do not cause death but result in substantial punishment. (*Meneses, supra*, 193 Cal.App.4th at pp. 1089, 1093-1094 [15 years to life for a defendant convicted of a single act of forcible intercourse with a 12-year-old who became pregnant was neither cruel nor unusual]; *People v. Nichols* (2009) 176 Cal.App.4th 428, 437 [25 years to life for failure to register as a sex offender within five days of moving was not cruel and/or unusual punishment]; *Bestelmeyer, supra*, 166 Cal.App.3d 520 [consecutive determinate term sentences totaling 129 years for multiple sex acts defendant perpetrated upon his 11-year-old stepdaughter over an extended period of time; defendant had no prior record].)

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<sup>7</sup> Substantial sexual conduct is defined in section 1203.066, subdivision (b) as follows: "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

### **3. Comparison to the Same Offense in Other Jurisdictions**

Lastly, we compare the challenged punishment to punishments for the same offense in other jurisdictions. Defendant has the burden, but fails to point out the punishment in other jurisdictions which when compared against the punishment here demonstrates that defendant's sentence was grossly disproportionate. As this court did in *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231, we treat defendant's failure to point out the punishments in other states as a concession that his sentence withstands a constitutional challenge on this basis.

### **4. Conscience Shocking**

As we have noted, the California Constitution's prohibition of cruel or unusual punishment prohibits imposing a criminal sentence which is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Johnson, supra*, 183 Cal.App.4th at p. 296.) Having engaged in the three-part analysis courts use to determine this issue, our conscience is not shocked and we conclude defendant's sentence does not offend fundamental notions of human dignity.

### **5. Facial Challenge to Section 288.7**

Defendant claims that section 288.7 is unconstitutional on its face "because it does not recognize significant gradations of culpability depending on the severity of the current offense." We disagree.

Section 288.7 is a part of a statutory scheme governing sex acts with children. (§§ 288-288.7.) Section 288 applies broadly to persons who commit any lewd or lascivious acts against children under age 14. Section 288.7, applies more narrowly to adults who commit specific acts against children age 10 years or younger. And it applies more narrowly still to two sets of acts--oral copulation and sexual penetration, which are punished by imprisonment for 15 years to life (§ 288.7, subd. (b)); and sexual intercourse and sodomy, which are punished by imprisonment for 25 years to life (§ 288.7, subd. (a)).

Thus, contrary to defendant's assertion, "significant gradations of culpability" have been built into the statutory scheme of which section 288.7 is a part. Defendant has been convicted of current offenses that bring him within each of the three gradations. His claim that section 288.7 is unconstitutional, simply because it fails to recognize further gradations within each of the defined categories, has no merit.

### **B. Federal Constitutional Claim**

As this court noted in *Johnson*, "[t]he Eighth Amendment to the federal Constitution contains a 'narrow proportionality principle' that applies to noncapital sentences by which a court determines whether a sentence constitutes cruel and unusual punishment. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [*Harmelin*] (Kennedy, J., conc. in part & conc. in judgment))." "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it *forbids only extreme sentences that are 'grossly disproportionate' to the crime.*" [Citation.] (*Ewing v. California* (2003) 538 U.S. 11, 23.) To apply this principle, courts compare the gravity of the offense with the magnitude of the penalty. [Citation.]" (*Johnson, supra*, 183 Cal.App.4th at p. 296.)

Defendant relies heavily on *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*), which includes a test he maintains still has vitality after *Harmelin*, where the high court concluded the defendant's life without the possibility of parole sentence for possession of one and a half pounds of cocaine was not grossly disproportionate to his crime and did not violate the Eighth Amendment prohibition against cruel and unusual punishment. Defendant spills much ink to make this point--a point that does not help him here.

In *Solem*, the high court utilized an analysis similar to that which we apply for claims of cruel and unusual punishment under California's Constitution. The *Solem* majority wrote, "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and

(iii) the sentences imposed for commission of the same crime in other jurisdictions.”  
(*Solem, supra*, 463 U.S. at p. 292.) We have engaged in a similar analysis in connection with defendant’s state constitutional claim and concluded that defendant’s sentence is not grossly disproportionate to his crimes. As for defendant’s federal constitutional claim, our conclusion is the same.

### **III. Error in the Abstract of Judgment**

Our review of the record discloses a minor error on the abstract of judgment. Defendant was found guilty by the jury, but the abstract erroneously states that his convictions on the six determinate counts were by plea. We shall direct the trial court to correct the abstract accordingly.

### **DISPOSITION**

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect that defendant was found guilty on all counts by jury and to forward a certified copy to the Department of Corrections and Rehabilitation.

MURRAY, J.

We concur:

BUTZ, Acting P. J.

DUARTE, J.