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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LOUIS FIELDS,

Defendant and Appellant.

E051015

(Super.Ct.No. FSB 056720)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr. and Kyle Niki Shaffer, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant David Louis Fields guilty as charged of 16 counts of lewd acts on two children under age 14, namely, his daughters R. and K. (Pen. Code, § 288, subd. (a).)¹ In each count, the jury found that multiple victims were involved in the same case and that defendant had a 1977 conviction for violating section 288, subdivision (a). (§ 667.61, subds. (a), (c), (d).) The jury also found that the 1977 conviction was a prior strike. (§ 667, subds. (b)-(e).) Defendant was sentenced to 800 years to life, consisting of 25 years to life on counts 1 through 16, doubled to 50 years to life based on the prior strike, and with counts 2 through 16 consecutive to count 1.

Defendant appeals. He claims the trial court erroneously allowed the prosecution to present expert testimony on child sexual abuse accommodation syndrome (CSAAS). He argues the expert was unqualified; her testimony was irrelevant to rehabilitate the credibility of R. and K.; and her testimony intruded on the jury's function to determine the girls' credibility. We conclude the expert was qualified and her testimony was properly admitted.

Second, defendant claims the prosecutor engaged in prejudicial misconduct during jury voir dire by using a jigsaw puzzle analogy to illustrate the concept of proof beyond a reasonable doubt. Though we agree that the use of puzzle analogies risks misrepresenting the standard of proof beyond a reasonable doubt, we find no prejudicial misconduct in the prosecutor's use of the puzzle analogy in this particular case. The

¹ All further statutory references are to the Penal Code unless otherwise indicated.

prosecutor did not suggest that the jury could convict defendant based on only a few pieces of evidence. Nor did she suggest that the jury could quantify the evidence necessary to prove guilt beyond a reasonable doubt.

Defendant also claims: (1) he was erroneously sentenced to consecutive terms; (2) the court abused its discretion in refusing to strike his 1977 prior strike; and (3) his 800-year-to-life sentence constitutes cruel and unusual punishment under the state and federal Constitutions. We also find each of these claims without merit, and affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Overview*

R. and K. are defendant's biological daughters by different mothers. R. was born in 1985 and K. was born in 1989. The information alleged that defendant committed counts 1 through 6 against R. between 1995 and 1999, and committed counts 7 through 16 against K. between 1995 and 2003. R. testified that defendant molested her on at least six occasions when she was between the ages of 9 or 10 and 13. K. testified that defendant molested her on at least 10 occasions when she was between the ages of 5 or 6 and 13.

B. *R.'s Testimony (Counts 1-6)*

R. was age 25 when she testified at trial in April 2010. As a child, R. lived with her mother and visited defendant on weekends. Defendant began molesting R. when she was age 9 or 10, and the molestations stopped after R. stopped visiting defendant when she was age 14.

In 1995, when she was 10 years old, R visited defendant at a Travel Lodge Motel in Rialto. R. was lying on a bed in the motel room, watching television and wearing a nightgown and panties. Defendant approached R., slid his finger beneath her panties, and began to rub her vagina. He then removed R.'s panties and put his penis in her vagina. Afterward, defendant told R. to take a bath. While R. was in the bathtub, defendant asked her whether she was "going to tell" and told her that if she did he would get into trouble and they would not be able to see each other anymore. R. loved defendant and enjoyed visiting him, so she assured defendant she would not tell anyone what he had done. R. also testified that, shortly after defendant molested her on other occasions, he would tell her not to tell anyone because it would get him into trouble.

When R. was around 11 years old and in the sixth grade, and as defendant was taking R. back to her mother's home in Fontana, R. asked defendant to let her drive his blue truck. R. sat on defendant's lap and steered the truck, and defendant tried to anally penetrate her. R. recalled saying, "Ouch, that hurts," and defendant saying, "Well, just make sure you pay attention to the road." Defendant then put his penis in R.'s vagina.

On another occasion when R. was in the fifth or sixth grade, and before the incident in the blue truck occurred, she was visiting defendant at his house in Diamond Bar. Defendant came into R.'s room after she was asleep. He fondled her vagina, then put his penis in her vagina. On still another occasion when R. was visiting defendant at his house in Diamond Bar, defendant put R.'s hand on his penis and made her "rub it up

and down.” R. was “pretty sure” there were “other times” this occurred, but she had “blocked” it out.

When R. was 12 or 13 years old, she visited defendant at his home in Colton near Christmastime. At that time, R.’s younger sister K. lived in defendant’s Colton house along with defendant’s girlfriend L.M. and L.M.’s two younger daughters. As R. was getting ready for bed, defendant told her to leave her bedroom door unlocked. Later that night, defendant entered R.’s bedroom, fondled her vagina, then put his penis in her vagina. R. estimated that defendant inserted his penis into her vagina “[a]lmost every weekend” she visited him, and he did this at least 10 times while he lived in Colton.

On another occasion, when R. was 10 or 11 years old, defendant digitally penetrated her vagina. R. also recalled that defendant orally copulated her when she was 11 or 12 years old.

R. did not tell anyone about the molestations for years because she loved defendant and did not want him to get into trouble. When she was a freshman in high school, she told her boyfriend about the molestations. In 2006, when she was 20 or 21 years old, R. called her older brother L. in tears, and told him about the molestations after K. told R. that defendant had molested her. L. called the police.

C. K.’s Testimony (Counts 7-16)

K. was age 20 when she testified at trial. K. lived with defendant “full-time” from the time she was age 5 until she was age 14, when she moved to Las Vegas to live with her mother S.N.

The first time K. recalled defendant molesting her, she was five or six years old and living with defendant in Diamond Bar, and R. would often come over to visit. K. was lying in her bed when defendant reached under her panties and fondled her vagina with his fingers.

In 1995, when K. was six or seven years old, she moved with defendant to Colton. At that time, L.M. and L.M.'s two daughters were also living with defendant and K., and R. would visit. At the Colton home, defendant fondled K.'s vagina three or four times when L.M. was away from the home. Once when K. went with defendant to a house he was working on in Los Angeles, she fell asleep in the car and woke to find her pants unzipped and defendant moving his hands from her pants.

In 1999 or 2000, K. was 11 or 12 years old and living with defendant and L.M. in Rialto. On one occasion, when L.M. was out of town with her oldest daughter, K. was sleeping in her bed when defendant came into the room and began to "play" with K. He touched K.'s vagina, pulled down her pants, and ran his penis up and down against her vagina. Earlier that day, defendant put some alcohol in a drink he had given K.

Thereafter, when K. was still 11 years old, defendant and L.M. had an argument, and defendant left the Rialto home for almost a year. While defendant was away, K. told L.M. that defendant had molested her. After defendant found out, he asked K. why she told L.M. about the molestations. Earlier, defendant told K. he would let her see her mother if she did not say anything. L.M. took K. to a doctor, who determined that K. was still a virgin. As a result, L.M. did not believe K.'s allegations. When defendant returned

to the Rialto home, he threatened K. and told her that if she “told on him” again he would prohibit her from seeing S.N. K. loved her mother and took defendant’s threat seriously.

Shortly after K. turned 12 years old and L.M. was away from the Rialto home during the daytime, defendant put his penis in K.’s vagina for the first time. Later that year, K. moved to Redlands with defendant, where the molestations continued. At the time, L.M. and her daughters were not living with them. There was only one bed in the Redlands home, and K. had to share it with defendant. K. and defendant lived in the Redlands home for two to three months. Around twice each week, defendant would touch K.’s vagina and rub his penis against her vagina.

When K. was still in the seventh grade, she and defendant were staying at another Redlands home with defendant’s friend N. and N.’s two children. In that home, defendant and K. slept together on the living room floor. Once, after N. and her children were asleep, K. was lying down wearing a pair of drawstring pants. When defendant tried to remove K.’s pants, she resisted and held on tight to the drawstring, but defendant overcame K.’s resistance and pulled the string out of her pants, leaving a burn or rub mark on K.’s arm. Afterwards, defendant put his penis in K.’s vagina as he told her to “shh” or be quiet. The incident at N.’s home, when K. was age 12 or 13, was the last time defendant molested K.

Later, when K. was in the middle of the seventh grade, she moved back to Rialto with L.M. At age 14, after graduating from the eighth grade, K. moved to Las Vegas to live with her mother S.N. When K. was still age 14, she told S.N. about the molestations

during an argument. S.N. contacted authorities. The next day, K. spoke to a police officer and later spoke to a child protective services worker. K. was upset that her mother reported the molestations because K. cared for defendant.

D. Additional Prosecution Evidence

K.'s mother S.N. met defendant in 1987 when she was 12 years old. S.N. first had sexual intercourse with defendant when she was age 13. Defendant took her to an alley, where they had sex in his car. S.N. gave birth to K. when she was age 15, and stayed in a relationship with defendant until she was age 19. K. first told S.N. that defendant had molested her in 2004, after K. came to Las Vegas to live with her, and S.N. contacted child protective services.

A.B. met defendant in 1975 or 1976 when she was 12 years old and defendant was around 30 years old. Defendant was a friend of A.B.'s family, and A.B. had a crush on defendant. When A.B. was age 13, defendant took her and her brothers to a hamburger stand. While the boys stayed behind with their food, defendant drove A.B. to an alley, "forced himself" on her, and had sexual intercourse with her. Defendant and A.B. had intercourse "[m]ultiple times" for around one year, when A.B. was 13 to 14 years old and in the eighth grade.

Defendant's oldest son, L., was one of seven or eight children defendant had fathered by different women. In the mid-1990's, L. saw defendant kiss a 13- or 14-year-old girl in an inappropriate manner. Once when R. was a small child, L. saw defendant hold R. on his lap against his penis while R. was not wearing any pants or underwear. L.

also saw defendant bathe R. and wash her between her legs when R. was old enough to bathe herself. L. had also seen defendant hold K. on his lap in an inappropriate manner. Several years before trial, L. immediately called the police after R. called him, in tears, saying defendant had molested her.

Lastly, the prosecution presented the expert testimony of Teresa Howard on CSAAS. Howard's qualifications and testimony are discussed below.

E. Defense Evidence

L.M. lived with defendant and K. in Rialto, and for a time also lived with R. and defendant in Colton. When K. was around 11 years old, she told L.M. that defendant was molesting her. Around the same time, K. told L.M.'s oldest daughter that defendant had molested her. L.M. told K. that if defendant had molested her she would "make sure we bury him," but K. then claimed nothing had happened. K. also told different versions of what had happened. L.M. took K. to a doctor, but "[n]othing came of it" and K. never mentioned the molestations again. Child protective services had been to L.M. and defendant's house "quite a few times" because K.'s mother "constantly called CPS." L.M. never saw any indication that defendant was behaving inappropriately with any of his children.

Morgan McDaniel was acquainted with K. and defendant because defendant used to manage her grandmother's apartment complex. In 2006, when McDaniel was 12 years old and K. was 17, K. was spending the night at McDaniel's grandmother's house. At

that time, McDaniel asked K. whether it was true that defendant had molested her. K. said the allegations were not true and her mother was making her tell the story.

III. DISCUSSION

A. *The Expert Testimony on CSAAS Was Properly Admitted*

For three reasons, defendant claims the trial court erroneously allowed Howard to testify as an expert on CSAAS: (1) she was not qualified as an expert on CSAAS; (2) her testimony was irrelevant to the credibility of R. and K.; and (3) her testimony intruded on the jury's function to assess the girls' credibility, violating his right to a fair trial. We reject these claims.

1. Background

Before trial, the defense moved to limit or preclude prosecution expert testimony on CSAAS by requiring the prosecution to "specifically identify any alleged 'myths' it intends to dispel by introducing expert testimony" on CSAAS. The court denied the defense motion, reasoning: "In this particular case I'm going to allow the evidence in. I believe it is proper under the assumption that the People's offer of proof is correct that the testimony would be about the 5 stages [of CSAAS]. I'm not aware of any authority that would require the People to introduce evidence of a sociological nature that would demonstrate that this is a widely held myth. I would say, if anything, that would go to weight. Some jurors may harbor such views and some may not, but I don't think it stretches any bounds of reason to observe the fairly mundane fact that many people harbor a view or could that a delayed disclosure, for example, of an event makes it less

likely to be true. It's a commonly held view in the culture, and it's proper to introduce evidence to rebut that commonly held view.

“If there are more specific objections regarding individual questions involving these victims, we'll take those up at the time, but given that the expert hasn't even met the victims, I don't see anything about it, about the case or the evidence, that would seem to [preclude] the testimony at this stage”

Howard then testified as an expert for the prosecution on CSAAS. Howard explained that she was a child forensic interview specialist with a master's degree in social work and 10 years of experience in child abuse investigations. During these investigations, she had interviewed over 500 children and had testified as an expert “in the area of child abuse.”

According to Howard, CSAAS is not a diagnostic tool to determine whether a child has been sexually abused, because not all sexually molested children display the five behaviors of the syndrome: secrecy, helplessness, entrapment, disclosure, and recantation. The syndrome can, however, help to explain the behavior of children who have been sexually molested.

Howard further testified that it is common for sexually abused children not to disclose the abuse, and the majority of sexually abused children do not disclose the abuse during the first year following the abuse. The younger the child and the closer the child's relationship with the abuser, the less likely the child will disclose the abuse. The child may also feel he or she is protecting the abuser or other family members if the abuser is a

family member. The child may feel loyalty and an attachment to the abuser. It is also common for child molestation victims not to resist the abuser because the child feels helpless.

Child molestation victims may also tell different stories at different times about the details of the abuse, because disclosure is a process. The child's story may change depending on the reactions of the child's audience, and the child may also recant if there have been negative consequences to the disclosure. The child may also forget details of the abuse because the abuse is a traumatic experience, and the child blocks it out.

The jury was given CALCRIM No. 1193, which instructed: "You have heard testimony from Teresa Howard regarding [CSAAS]. [¶] Teresa Howard's testimony about [CSAAS] is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [K.]'s or [R.]'s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

2. Howard Was Qualified to Testify as an Expert on CSAAS

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education on the subject sufficient to qualify him or her as an expert on the subject to which his or her testimony relates. (Evid. Code, § 720.) A trial court has considerable discretion in determining whether a person is qualified to testify as an expert. (*People v. Bloyd* (1987) 43 Cal.3d 333, 357.) The trial court's exercise of discretion will not be reversed on appeal except on a showing it was exercised

“““in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.””” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1122.)

Defendant argues that Howard was not qualified to testify as an expert on CSAAS because she lacked special knowledge, expertise, and formal education on the subject, and her qualifications were limited to “casual reading” on the subject. This argument understates Howard’s qualifications. In response to defense counsel’s voir dire questions concerning her qualifications to testify as an expert on CSAAS, Howard explained that she had “read literature ongoing about different syndromes and different aspects and dynamics of child sexual abuse.” Contrary to defendant’s claim, however, Howard’s expert qualifications were not limited to “casual reading” on CSAAS.

Indeed, Howard was a child forensic interview specialist with a master’s degree in social work, and had interviewed over 500 children in her 10 years of experience as a child forensic interviewer. Based on her education, training, and experience in the area of child sexual abuse *and* her familiarity with CSAAS, the trial court reasonably determined that Howard was qualified to testify as an expert on CSAAS. (*People v. Harlan* (1990) 222 Cal.App.3d 439, 447-448 [Fourth Dist., Div. Two] [court did not abuse discretion in permitting witness to testify as expert on “reactions of child molestation victims” when the expert had a master’s degree in social work, “specialized training” in the treatment of sexual abuse, and was familiar with current literature and research in the field of child sexual abuse].) Howard also explained that there was no advance degree or license to be obtained in CSAAS, and no specific level of study was

required to hold oneself out as an expert on CSAAS. Defendant has not explained what education or training Howard did not have that, in his view, would have qualified her to testify as an expert on CSAAS.

3. Howard's Testimony Was Admissible to Rehabilitate the Credibility of R. and K. and Did Not Intrude Upon the Jury's Function to Determine the Girls' Credibility

Defendant also claims that, even if Howard was qualified to testify as an expert on CSAAS, her testimony was erroneously admitted because it was irrelevant to the credibility of R. and K. and intruded on the jury's function to determine their credibility. We disagree.

Expert opinion testimony is generally admissible if it is “[r]elated to a subject that is sufficiently beyond common experience” and would assist the trier of fact. (Evid. Code, § 801, subd. (a).) “[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.)

California courts have established guidelines governing the proper use of expert testimony on CSAAS. “It is beyond dispute that CSAAS testimony is inadmissible to prove that a molestation actually occurred.” (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 (*Patino*)). Expert CSAAS testimony is admissible, however, to rehabilitate a child's credibility when the child's conduct after the molestation—e.g., the child's delay in reporting the abuse—is inconsistent with the child's testimony claiming the abuse occurred. (*People v. McAlpin, supra*, 53 Cal.3d at p. 1300; *People v. Bowker* (1988) 203

Cal.App.3d 385, 390-395.) In other words, the testimony is admissible “for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation.” (*Patino, supra*, at p. 1744.)

Courts have also recognized that CSAAS testimony “can be highly prejudicial if not properly handled by the trial court. It is unusual evidence in that it is expert testimony designed to explain the state of mind of a complaining witness. The particular aspects of CSAAS are as consistent with false testimony as with true testimony. For these reasons, the admissibility of such testimony must be handled carefully by the trial court.” (*Patino, supra*, 26 Cal.App.4th at p. 1744.)

Defendant argues Howard’s testimony was irrelevant to rehabilitate the credibility of R. and K. He maintains he did not attempt to show that the girls’ conduct following their alleged molestations was inconsistent with their testimony, and he did not seek to show that the girls “did not act like sexual abuse victims.” Instead, he argues, his defense counsel sought to show that R. and K. “were not testifying truthfully and motives for fabrication existed.” He also argues that Howard’s testimony was irrelevant because there was no indication the jurors “had any misconceptions about child sexual abuse.”

Contrary to defendant’s arguments, Howard’s expert testimony on CSAAS was relevant to rehabilitate the girls’ credibility.

First, defense counsel directly challenged the girls’ credibility by attempting to show their claims were fabricated based on, among other things, their delayed disclosures and inconsistent statements concerning the molestations. In cross-examining R., defense

counsel brought out that, during a 1997 investigation by child protective services, R. denied defendant had ever molested her. On redirect, R. explained she denied the molestations because defendant told her not to tell and she did not want him to get into trouble. Defense counsel also questioned K. about discrepancies between her testimony and what she told various police officers and child protective services workers about the molestations. This questioning placed the credibility of the girls' molestation claims squarely in issue.

Additionally, the credibility of the girl's claims was already in issue and Howard's testimony was admissible based solely on the girls' *direct* testimony. The defense does not have to challenge a child's credibility in order for expert testimony on CSAAS to be admissible; the testimony is admissible "if the issue of a specific misconception" is suggested by the child's testimony itself. (*Patino, supra*, 26 Cal.App.4th at p. 1745.) If the testimony were admissible only to rebut a defendant's claims of fabrication, "the defense would simply wait until closing argument before accentuating the jurors' misconceptions regarding the [child's] behavior." (*Ibid.*) The girls' direct testimony showed they had both delayed disclosing the molestations for years, and they both made inconsistent or questionable statements concerning the details of the molestations and whether they occurred. This was a sufficient basis to allow Howard to testify that the girls' behavior following their alleged molestations was consistent with the behavior of children who have been sexually abused.

Defendant also argues that Howard's testimony intruded on the jury's function to assess the girls' credibility, because Howard effectively offered an opinion that the girls were molested. Defendant reasons that because Howard testified that the girls' behavior was like those of other victims of child sexual abuse, the jury was being asked to infer that the girls "must be telling the truth and the alleged lewd acts did occur." Defendant maintains that, "[f]ar from adhering to generalities," several of the prosecutor's questions to Howard "closely mirrored the circumstances" described in the girls' testimony so that Howard's answers "would offer an opinion" that the girls were molested.

More specifically, defendant points out that the girls' testimony showed that at one point they lived in the same house with defendant, and defendant once molested K. while K. was in the same bed with her sisters. Based on this evidence, the prosecutor asked Howard: "If you have two victims in a house with the same perpetrator, is it unusual . . . for one victim to not know the other one is also being molested?" Howard responded that it was not unusual due to the secrecy surrounding abuse, and children most often will not disclose abuse to their siblings. Howard also agreed it was not uncommon for a child to be molested when other children are present in the same bed, in part because molestation is not a "thoughtful gesture" on the part of the abuser; it is compulsive.

We disagree that these portions of Howard's testimony improperly suggested that defendant molested the girls. Howard was responding to hypothetical questions based on the evidence, and the questions were designed to dispel any juror misconceptions that (1) the girls' testimony was unbelievable because they did not tell each other or their other

siblings about the abuse for years, and (2) K. must have been fabricating her story that defendant molested her while her sisters slept in the same bed, because that type of behavior is unlikely to occur between molester and victim. The questions were posed as hypotheticals and were not based on the specific evidence in the case. (Cf. *People v. Jeff* (1988) 204 Cal.App.3d 309, 337-338 [psychologist improperly testified that child's emotions, fears, and reactions were those of a child molestation victim].)

In sum, the prosecutor's questions did not elicit improper opinion testimony from Howard that the girls had been molested. In fact, Howard never opined that the girls had been molested. Instead, her testimony was properly limited to showing that the girls' behavior following the alleged molestations was consistent with the behavior of children who have been molested. (*Patino, supra*, 26 Cal.App.4th at p. 1744.) Howard confirmed that she had not interviewed or evaluated the girls, nor had she reviewed any police reports or documents in the case. CALCRIM No. 1193 also told the jury that Howard's testimony was not evidence that defendant molested the girls, and the jury could consider Howard's testimony "only in deciding whether [the girls'] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

Defendant's reliance on *People v. Bledsoe* (1984) 36 Cal.3d 236, *People v. Roscoe* (1985) 168 Cal.App.3d 1093, and *People v. Jeff, supra*, 204 Cal.Ap.3d 309 is off base. These cases hold that expert witnesses on CSAAS or rape trauma syndrome must base their opinions on the behaviors of victims as a class, and not on the expert's diagnosis of

the victim in the case at hand or on the specific behaviors of the victim. (*People v. Bledsoe, supra*, at pp. 247-248; *People v. Roscoe, supra*, at pp. 1099-1100; *People v. Jeff, supra*, at pp. 337-338.) Howard’s testimony did not run afoul of these rules. She never offered an opinion that the girls were in fact molested, and her opinion that the girls’ behavior was consistent with that of child molestation victims was based on the behavior of child molestation victims as a class, not on the girls’ particular behaviors following the alleged molestations. (*People v. Gray* (1986) 187 Cal.App.3d 213, 218-220 [expert CSAAS testimony properly admitted where expert did not opine that victim was molested and based his opinions on the behaviors of child molestation victims as a class].)

B. The Prosecutor Did Not Engage in Prejudicial Misconduct During Jury Voir Dire

Defendant claims the prosecutor prejudicially erred during jury voir dire by using a jigsaw puzzle analogy to illustrate the concept of proof beyond a reasonable doubt. Defendant argues that the prosecutor’s puzzle analogy improperly suggested to the jury that it could determine whether there was reasonable doubt based on a quantitative analysis of the evidence presented. (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268 (*Katzenberger*).) We find no prejudicial prosecutorial misconduct or error in the prosecutor’s use of the puzzle analogy, in view of the prosecutor’s remarks as a whole.

1. Background

During jury voir dire, the prosecutor asked the venire: “Anyone ever do a jigsaw puzzle? [¶] . . . [¶] . . . One of those real big puzzles, get to the end, and you realize you

are missing pieces? Is that frustrating? Even though you are missing some pieces, can you see the picture? For example, if it's a big tree, you know it's a tree, but you are still missing a couple of pieces. That's what we are going to ask you to do here. Anyone have a problem with that? Okay. Any of you watch CSI? . . . What about Law [and] Order Special Victim's Unit? . . . All kinds of . . . really bad stuff happening and all kinds of really, really, good evidence; DNA, fingerprints, and things like that. You realize that doesn't necessarily happen in real life; right?"

The trial court overruled defense counsel's objection to the prosecutor's jigsaw puzzle question. Outside the presence of the venire, defense counsel told the court that a recent case had "frowned upon" the use of puzzle analogies to illustrate reasonable doubt. The court explained it overruled the objection because the prosecutor asked the prospective jurors whether they would be able follow the law as the court gave it, including the instructions on reasonable doubt. The following day, the prosecutor renewed his objection and directed the court's attention to *Katzenberger, supra*, 178 Cal.App.4th 1260. Again, the court overruled the objection, noting that, unlike the jigsaw puzzle analogy used in *Katzenberger*, the prosecutor's analogy did not suggest that proof beyond a reasonable doubt could be determined based on "a quantitative analysis."

After voir dire resumed, the prosecutor returned to the puzzle analogy: "I mentioned yesterday the jigsaw puzzle. Does anyone do a jigsaw and . . . find out pieces are missing?" In response to the prosecutor's question whether that was frustrating, a

prospective juror answered: “No, not if one or two pieces are missing.” Another juror also answered it was not frustrating because although “[y]ou would like to see the whole thing finished, at least it’s only a couple pieces” The same juror answered “right” when the prosecutor asked: “And you can tell what the picture is?” The prosecutor then told the venire: “There’s a jury instruction that neither side is required to produce all available evidence, kind of like the jigsaw puzzle. [¶] You may not have every piece out there, do you think . . . you can be okay with that and not speculate why other evidence was not brought in?” A prospective juror answered: “No, I would be okay with the evidence brought forward.” Another prospective juror agreed.

Later during voir dire, the prosecutor returned to the puzzle analogy and again asked the prospective jurors whether they would be able to refrain from speculating about evidence the prosecution did not present. When one prospective juror said the puzzle had to be at least 80 percent complete, the prosecutor said, “We can’t put a number on what we’re doing” and “We cannot say you have this much percentage.” The prospective juror agreed. The prosecutor told the panel, “You can decide in your gut whether or not you have reasonable doubt,” and asked two prospective jurors whether they could make that determination. The prospective jurors agreed they could. Finally, near the end of voir dire, the prosecutor again asked two prospective jurors whether they could focus on the evidence presented rather than, for example, DNA evidence that might not be presented, and determine whether the evidence presented proved guilt beyond a reasonable doubt.

The prospective jurors agreed that they could determine the case based on the evidence presented.

2. Analysis

The federal and state standards for prosecutorial misconduct are well established. A prosecutor violates the federal Constitution when he or she engages in a pattern of conduct “““““so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”””” [Citations.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 951.) Conduct that does not render a criminal trial fundamentally unfair is misconduct under state law if it involves ““deceptive or reprehensible methods”” to persuade the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 845.)

It is improper for a prosecutor to misstate the law. (*People v. Mendoza* (2007) 42 Cal.4th 686, 702.) In particular, it is misconduct for a prosecutor to attempt to absolve the prosecution from its obligation to prove all elements of a crime beyond a reasonable doubt. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215.)

Relying on *Katzenberger, supra*, 178 Cal.App.4th 1260, defendant claims the prosecutor’s use of the jigsaw puzzle analogy constituted prejudicial misconduct because it misrepresented or impermissibly lowered the prosecution’s burden of proving all elements of the charged crimes beyond a reasonable doubt. *Katzenberger* involved a prosecutor’s use, during closing argument, of a PowerPoint presentation consisting of eight puzzle pieces forming a picture of the Statue of Liberty. (*Id.* at pp. 1262, 1264.) The presentation began by showing six puzzle pieces coming onto the screen. (*Id.* at p.

1264.) Although the picture was missing two pieces, it was immediately recognizable as the Statute of Liberty. (*Ibid.*)

The prosecutor argued: ““We know [what] this picture is beyond a reasonable doubt without looking at all the pieces . . . we don’t need all the pieces And ladies and gentlemen, if we fill in the other two pieces [at this point, the prosecutor apparently clicks the computer mouse again, which triggers the [PowerPoint] program to add the [two missing pieces]] we see that it is, in fact, the [S]tatute of [L]iberty. And I will tell you in this case, your standard is to judge this case beyond a reasonable doubt.””

(*Katzenberger, supra*, 178 Cal.App.4th at p. 1265.)

Katzenberger concluded that the prosecutor engaged in misconduct by using the puzzle analogy, because it left “the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence. It invite[d] the jury to guess or jump to a conclusion, a process completely at odds with the jury’s serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.” (*Katzenberger, supra*, 178 Cal.App.4th at pp. 1266-1267, citing *People v. Wilds* (N.Y.App.Div. 1988) 141 A.D.2d 395, 397-398.)

The court found an additional problem with the puzzle analogy: it introduced “a quantitative component” to the reasonable doubt standard. (*Katzenberger, supra*, 178 Cal.App.4th at p. 1267, citing *U.S. v. Pungitore* (3d Cir. 1990) 910 F.2d 1084 [puzzle analogy improperly suggested quantitative measure of reasonable doubt], *Lord v. State* (1991) 107 Nev. 28 [806 P.2d 548] [same].) By arguing that six of eight puzzle pieces or

pieces of evidence was sufficient to prove the defendant guilty beyond a reasonable doubt, the prosecutor improperly suggested that “a specific quantitative measure” of evidence, namely, 75 percent, was sufficient to meet the standard of proof beyond a reasonable doubt. (*Katzenberger, supra*, at pp. 1267-1268.)

The court found that the misconduct was not prejudicial, however. The evidence against defendant was strong; the jury quickly reached its verdict; defense counsel vigorously argued that the puzzle analogy did not represent reasonable doubt at all; and the trial court “clarified” the puzzle analogy by correctly instructing the jury on the definition of reasonable doubt. (*Katzenberger, supra*, 178 Cal.App.4th at pp. 1268-1269.) Further, it was the prosecutor who misrepresented the standard of proof beyond a reasonable doubt in closing argument; the trial court did not misinstruct the jury on the standard under the cloak of its authority. (*Id.* at p. 1268 [distinguishing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-282 & *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986, as involving the courts’ misdescriptions of the standard of proof beyond a reasonable doubt, which constitutes structural error and is reversible per se].)

Based on *Katzenberger*, defendant argues the prosecutor engaged in misconduct by suggesting to the jury during voir dire that defendant could be found guilty beyond a reasonable doubt if only 80 or 90 percent of the evidence was presented—an improper quantitative measure of the evidence. For their part, the People argue that *Katzenberger* was wrongly decided, and even if it was correctly decided it is distinguishable because

here the prosecutor's puzzle analogy "did not suffer from the same problems" as the puzzle analogy used in *Katzenberger*.

As *Katzenberger* illustrates, a prosecutor's use of a puzzle analogy to illustrate the standard of proof beyond a reasonable doubt risks misrepresenting or diluting the standard, and if that occurs, the prosecutor will have engaged in misconduct or committed error. (See generally *People v. Gonzalez, supra*, 51 Cal.3d at pp. 1214-1215.) Here, however, in view of the prosecutor's remarks as a whole, we conclude that the prosecutor's use of the puzzle analogy did not amount to misconduct or error.

We agree with the People that *Katzenberger* is distinguishable. The prosecutor there suggested that the jury could find the defendant guilty beyond a reasonable doubt based on a quantitative measure of the evidence, specifically 75 percent of the available evidence, or six of eight pieces of the puzzle. Here, by contrast, the prosecutor did not suggest that the reasonable doubt standard could be met based on a few pieces of evidence, or by a quantitative measure of the evidence. *Katzenberger* also involved the use of a small, eight-piece puzzle with a well-known iconic image that was immediately and easily recognizable, even with a quarter of its pieces missing. Here, the prosecutor described a "real big" jigsaw puzzle with a few pieces missing to illustrate her point that the prosecution was not required to present all imaginable evidence, such as DNA or fingerprint evidence, in order to meet its burden of proving defendant guilty beyond a reasonable doubt. And in response to a prospective juror's question attempting to quantify the measure of evidence required for proof beyond a reasonable doubt, the

prosecutor told the jury, “We can’t put a number on what we’re doing” and “We cannot say you have this much percentage.”

In sum, the prosecutor’s use of the puzzle analogy and her remarks as a whole did not suggest that the jury could find defendant guilty based on a few pieces of evidence. Nor did they suggest that the jury could use any quantitative measure of all imaginable or potential evidence to find him guilty beyond a reasonable doubt. Thus we find no misconduct in the prosecutor’s use of the puzzle analogy. The prosecutor’s remarks did not render the trial fundamentally unfair and were not a deceptive or reprehensible means of persuading the jury. (*People v. Stanley, supra*, 39 Cal.4th at p. 951.) Indeed, there is no reasonable likelihood that the jury construed or applied the prosecutor’s remarks in an objectionable fashion, or as lowering the prosecution’s burden of proof. (*People v. Booker* (2011) 51 Cal.4th 141, 184-185.)

Lastly, even if the prosecutor committed misconduct in using the jigsaw puzzle analogy, the error was not prejudicial even under a standard of beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The jury was correctly instructed on the prosecution’s burden of proof beyond a reasonable doubt with CALCRIM No. 220, both before and after the presentation of the evidence. The jury was also given CALCRIM No. 222, which instructed it that statements of counsel were not evidence. We ordinarily presume the jury followed the instructions and disregarded the prosecutor’s remarks to the extent they were inconsistent with the instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Defendant has not shown that the instructions

were inadequate to prevent any possible prejudice from the prosecutor's alleged misconduct. (*People v. Smith* (2007) 40 Cal.4th 483, 518.) Nor do we discern any reasonable possibility that the instructions were inadequate to cure any error.

C. Defendant Was Properly Sentenced to Consecutive Terms on Counts 2 Through 16

Defendant was found guilty as charged in counts 1 through 16 of violating section 288, subdivision (a). The jury also found he had a 1977 conviction for violating section 288, subdivision (a), and that the 1977 conviction was a prior strike conviction. Accordingly, defendant was sentenced to 800 years to life under the "One Strike" law and the "Three Strikes" law. (§§ 667.61, 667, subs. (b)-(i).)

The One Strike law mandates an indeterminate sentence of 25 years to life for specified felony sex offenses, including violations of section 288, subdivision (a), when the jury has found the defendant was previously convicted of one or more specified felony sex crimes, including violations of section 288, subdivision (a). (§ 667.61, subs. (a), (c), (d); see *People v. Anderson* (2009) 47 Cal.4th 92, 102.) Thus here, defendant was sentenced to 25 years to life on counts 1 through 16. These terms were then doubled to 50 years to life under the Three Strikes law, because defendant's 1977 conviction for violating section 288, subdivision (a) also qualified as a prior strike. (§§ 667, subs. (b)-(e), 1192.7, subd. (c)(6).) Finally, the court ran the terms on counts 2 through 16 consecutive to the term on count 1, resulting in an aggregate sentence of 800 years to life.

Defendant claims the consecutive terms were erroneously imposed based on the *current* mandatory sentencing provisions of the One Strike law, namely, subdivision (i)

of section 667.61, which was added to section 667.61 on November 28, 2006. (Stats. 2006, ch. 337, § 33, pp. 2163-2165 (S.B. 1128).) Section 667.61, subdivision (i) states: “For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.”

As defendant points out, the information alleged and the evidence showed that his lewd acts against R. and K. were committed between 1995 and 2003, before the 2006 enactment of the mandatory sentencing provisions of section 667.61, subdivision (i). (See *People v. Hiscox* (2006) 136 Cal.App.4th 253, 256-257, 260 [retroactive application of One Strike law to crimes committed before the law’s enactment violates ex post facto clauses of state and federal Constitutions].) Additionally, the jury did not find and could not have found that any of defendant’s current crimes were committed after the 2006 enactment of section 667.61, subdivision (i). (§ 667.61, subd. (j).)

Indeed, the People agree that the mandatory sentencing provisions of subdivision (i) of section 667.61 did not apply to defendant’s current lewd act convictions—for an additional reason. By its terms, subdivision (i) only applies to offenses specified in paragraphs (1) through (7), inclusive, of subdivision (c). (§ 667.61, subd. (i).) A lewd or lascivious act in violation of section 288, subdivision (a) is an offense specified in subdivision (c)(8) of section 667.61. Thus the mandatory sentencing provisions of

subdivision (i) do not apply to lewd act convictions, the only crimes defendant was convicted of committing in the present case.

Still, the People maintain that the consecutive terms were mandated or required to be imposed under the Three Strikes law. (§ 667, subs. (c)(7), (e); *People v. Casper* (2004) 33 Cal.4th 38, 42.) We agree.

Under the Three Strikes law: “If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count” (§ 667, subd. (c)(6).) In addition: “If there is a current conviction for more than one serious or violent felony as described in [subdivision (c)(6)], the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.” (§ 667, subd. (c)(7); *People v. Byrd* (2011) 194 Cal.App.4th 88, 103-104.)²

Thus, when a defendant has multiple current felony convictions *not* committed on the same occasion *and not* arising from the same set of operative facts, subdivision (c)(6) and (7) of the Three Strikes law requires the court to impose consecutive terms on the current convictions. (*People v. Lawrence, supra*, 24 Cal.4th at p. 233; § 667, subd. (c)(6), (7).) For purposes of the Three Strikes law, two or more felonies are committed

² Defendant’s three strikes sentence was governed by section 667, subdivision (c)(7) because his current lewd act convictions are serious felonies within the meaning of section 1192.7, subdivision (c)(6). (See *People v. Lawrence* (2000) 24 Cal.4th 219, 223 & fn. 2.)

““on the same occasion”” “when there is close ‘temporal and spatial proximity between the acts underlying the current convictions.’” (*People v. Byrd, supra*, 194 Cal.App.4th at p. 104; *People v. Deloza* (1998) 18 Cal.4th 585, 595.)

Two or more felonies ““aris[e] from the same set of operative facts”” “depending on ‘the extent to which common acts and elements of such offenses unfold together or overlap, and the extent to which the elements of one offense have been satisfied, rendering that offense completed in the eyes of the law before the commission of further criminal acts constituting additional and separately chargeable crimes.’” (*People v. Byrd, supra*, 198 Cal.App.4th at p. 104; *People v. Lawrence, supra*, 24 Cal.4th at p. 233.) Conversely, if multiple felonies are committed on the same occasion *or* arise from the same set of operative facts, consecutive sentencing is discretionary under the Three Strikes law. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512-513.)

In imposing consecutive terms on counts 1 through 16, the court implicitly found that each crime was committed on a separate occasion, and that none of the crimes arose from the same set of operative facts. Substantial evidence supports these findings. First, the crimes involved two victims, R. and K. Counts 1 through 6 pertained to defendant’s molestations of R., and counts 7 through 16 pertained to his molestations of K. The girls testified that they were each molested multiple times by defendant over a span of several years, and they were never molested together or on the same occasion. Substantial evidence showed that R. was molested between the ages of 9 or 10 and 13 on *at least* six

separate occasions. K. was molested between the ages of 5 or 6 and 13 on *at least* 10 separate occasions.

Because the court was required to impose consecutive terms on counts 1 through 16 under the Three Strikes law, it had no discretion to impose any of the terms concurrently under the One Strike law. (*People v. Acosta* (2002) 29 Cal.4th 105, 118-128 [One Strike law does not apply to the exclusion of Three Strikes law]; § 667, subd. (f)(1) [Three Strikes law applies “[n]otwithstanding any other law”].) Additionally, the court was not required to state its reasons for running the terms consecutive. (See, e.g., *People v. Black* (2005) 35 Cal.4th 1238, 1261-1262, fn. 17 [“No reason need be stated on the record for directing that indeterminate terms run consecutively to one another”], disapproved on other grounds in *Cunningham v. California* (2007) 549 U.S. 270, 293; *People v. Arviso* (1988) 201 Cal.App.3d 1055, 1058 [same].)

Defendant also claims the trial court erroneously imposed consecutive terms based on findings not made by the jury. Under the Three Strikes law, however, defendant was not entitled to a jury trial on whether his crimes were committed on separate occasions or involved the same set of operative facts. (§ 667, subds. (c)(6), (7), (e); see *People v. Lawrence, supra*, 24 Cal.4th at pp. 223, 233-234 [court determines whether crimes were committed on separate occasions and involved same set of operative facts].) And though, under *Apprendi*, the Sixth Amendment protects a criminal defendant’s right to have a jury determine the facts supporting an increased sentence (*Apprendi v. New Jersey* (2000) 530 U.S. 466), the rule of *Apprendi* does not govern the decision to impose concurrent or

consecutive sentences (*Oregon v. Ice* (2009) 555 U.S. 160, 169; *Porter v. Superior Court* (2009) 47 Cal.4th 125, 137).

D. The Trial Court Did Not Abuse Its Discretion in Refusing to Dismiss Defendant's 1977 Prior Strike Conviction

Defendant claims the trial court abused its discretion in refusing to strike his 1977 prior strike conviction for violating section 288, subdivision (a) in the interests of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530; § 1385.) We find no abuse of discretion.

A court's refusal to dismiss a prior strike conviction is reviewed for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) The court will abuse its discretion only if its refusal to dismiss the prior strike "is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) The defendant has the burden of demonstrating that the court's decision was irrational or arbitrary. (*Id.* at p. 376.)

As explained in *Romero*, "the Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders." (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 528.) The trial court's discretion to strike a qualifying strike is therefore guided by "established stringent standards" designed to preserve the legislative intent behind the Three Strikes law. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377.) "[T]he court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and

prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The victim in the 1977 case was then 13-year-old A.B., who testified at trial. A.B. and defendant had intercourse "[m]ultiple times" when she was 13 to 14 years old and defendant was around 30 years old. In 1987, defendant had intercourse with K.'s mother S.N. when S.N. was only 13 years old. S.N. gave birth to defendant's daughter K. when S.N. was only 15 years old. Then, between 1995 and 1999, defendant molested R. on at least six occasions when R. was between 9 or 10 and 13 years old. He molested K. on at least 10 occasions between 1995 and 2003, when K. was between 5 or 6 and 13 years of age.

Based on defendant's lengthy history of molesting young girls, including two of his own daughters, the trial court reasonably refused to strike the 1977 prior strike. The court explained: "I am going to deny the motion to dismiss the strike, based on [defendant's] criminal history and the nature of the current offense. I cannot see a basis to conclude that [defendant] falls outside the spirit of the recidivism[] laws. He has a long history of that sort of activit[y], a long history. [¶] It's striking to the Court that one of the victims in this case was a girl who was born out of a relationship with a mother who was, herself, under age at the time the child was conceived with the defendant. That's in addition to the other prior victims who testified."

Defendant argues that the trial court failed to “properly balance relevant factors” in refusing to strike the 1977 conviction. He emphasizes that his current offenses were not violent and no one was injured or killed. He also points out that the 1977 prior strike was old, and his other prior offenses were not violent. He had a 1962 conviction for taking a vehicle without the owners’ consent (Veh. Code, § 10851), a 1995 conviction for grand theft of a vehicle (Pen. Code, § 487.1), and submitting a false financial statement (Pen. Code, § 532a.). In 2000, he was convicted of conspiracy to commit mail fraud and mail fraud, and was sentenced to 20 months in federal prison. He was released in December 2001. In 2004, he was convicted of failing to register as a felony sex offender. (Pen. Code, § 290, subd. (g)(2).)

Although defendant’s 1977 prior strike was old and his other prior convictions were not violent, the trial court did not abuse its discretion in refusing to strike his 1977 prior strike. A court may not strike a prior strike simply because it is old—without regard to the defendant’s conduct since the time of the prior strike. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) Defendant’s pattern of molesting young girls had become even more aggravated by the time he committed his current offenses against R. and K. between 1995 and 2003. The girls were his own daughters, and he took advantage of their vulnerability and dependence on him in molesting them over a period of years.

E. Defendant's Sentence Does Not Constitute Cruel or Unusual Punishment

Lastly, defendant claims his 800-year-to-life sentence constitutes cruel and/or unusual punishment under the state and federal Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) We disagree.

Both the federal and state Constitutions require that the punishment fit the crime. Under the prevailing view, the Eighth Amendment of the federal Constitution is violated when a sentence is “grossly disproportionate” to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Similarly, article I, section 17 of the California Constitution is violated when the punishment “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.)

In determining whether a sentence constitutes cruel or unusual punishment under the state Constitution, we generally apply a three-pronged test. (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 702.) We (1) examine the nature of the offense and offender, (2) compare the punishment with the penalty for more serious crimes in the same jurisdiction, and (3) measure the punishment to the penalty for the same offense in different jurisdictions. (*In re Lynch, supra*, 8 Cal.3d at pp. 425-427.)

Regarding the first prong, the nature of the offense and the offender, we evaluate the circumstances of the current offenses, including motive, the extent of the defendant's involvement, the manner in which the crime was committed, and the consequences of the defendant's acts. (*People v. Lucero* (2000) 23 Cal.4th 692, 739.) We also examine the

defendant's personal characteristics, including his or her age, prior criminality, and mental capabilities. (*Ibid.*)

Defendant's indeterminate 800-year-to-life sentence is not cruel or unusual given his 16 current convictions for committing lewd acts against his two young daughters, coupled with his 1977 lewd act conviction and history of repeatedly molesting vulnerable young girls. (See *People v. Dillon* (1983) 34 Cal.3d 441, 479; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 954.) Defendant's sentence was imposed under the One Strike and Three Strikes laws, based on his 1977 lewd act conviction and recidivism. "Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent offenses." (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) In view of his failure to learn from his past offenses, defendant's indeterminate life sentence is not disproportionate to his personal responsibility. Nor does the sentence shock the conscious or offend fundamental notions of human dignity. (*People v. Lucero, supra*, 23 Cal.4th at p. 740.)

The second prong of the *Lynch* analysis "involves a comparison of the 'challenged punishment with the punishment prescribed for more serious crimes in the same jurisdiction.' [Citation.]" (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433 [Fourth Dist., Div. Two].) The third prong calls for a comparison of California punishment with punishment for the same crimes in other states. (*Ibid.*) Defendant has not met his burden of proof on either of these prongs. (*Ibid.* [second prong inapposite to three strikes

sentencing; third prong not satisfied merely because California’s sentencing scheme is harsher than others].)

Indeed, defendant’s sentence is not disproportionate to his culpability under the state or federal Constitutions. (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 73-74 [two consecutive terms of 25 years to life for third strike conviction involving two thefts of videotapes not cruel and unusual punishment]; *Ewing v. California* (2003) 538 U.S. 11, 21 [25-year-to-life sentence for theft of three golf clubs for habitual criminal not violative of the Eighth Amendment].) Defendant’s current offenses and criminal history are no less egregious than the defendants’ cases in *Andrade* or *Ewing*. Thus, as the law currently stands, defendant’s 800-year-to-life sentence does not constitute cruel or unusual punishment under the federal or state Constitutions.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.