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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.

WILLIAM SIERRA,

Defendant and Appellant.

E051933

(Super.Ct.No. RIF148985)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge (retired judge of the Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Sylvia Koryn, 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, Bradley A. Weinreb and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant William Sierra of two counts of sexual intercourse or sodomy with a person 10 years or younger (Jane Doe—counts 1 & 2, Pen. Code § 288.7, subd. (a))<sup>1</sup>; oral copulation or sexual penetration with a person 10 years or younger; (Jane Doe—count 3, § 288.7, subd. (b)); sexual intercourse or sodomy with a person 10 years or younger, (John Doe—count 4, § 288.7, subd. (a)); a lewd and lascivious act on a child under 14 years (Jane Doe—count 5, § 288, subd. (a)); and a lewd and lascivious act on a child under 14 years (John Doe—count 6, § 288, subd. (a)). Additionally, the jury found true an allegation that in the commission of counts 5 and 6, defendant committed an offense against more than one victim within the meaning of section 667.61, subdivision (e)(5). The trial court sentenced defendant to an indeterminate term of 90 years to life.

On appeal defendant makes five arguments: (1) his conviction in counts 1 through 3 must be reversed because the evidence was susceptible to an interpretation that the alleged offenses occurred after Jane Doe had turned 10 years of age; (2) the court erred in instructing the jury with CALCRIM No. 330 because it improperly bolstered the testimony of the victims, thereby violating defendant’s constitutional rights; (3) the court erred in admitting expert evidence of Child Sexual Abuse Accommodation Syndrome (CSAAS); (4) the court erred in imposing a 90-years-to-life sentence, which violated defendant’s constitutional right to be free from cruel and unusual punishment; and (5) the court erred in ordering defendant tested for HIV/AIDS. We affirm the judgment.

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<sup>1</sup> All further statutory references are to the Penal Code unless indicated.

## FACTUAL AND PROCEDURAL HISTORY

Defendant is the paternal grandfather of Jane Doe (born August 1998), and John Doe (born November 1999). The mother of John and Jane (collectively “the victims”) testified that for the past seven or eight years—since 2002 or 2003—the victims would spend the weekends, from Friday until Sunday, at defendant’s home. The last time the victims spend the weekend at defendant’s home was Valentine’s Day weekend in 2009. On February 20, 2009, mother and the victims were travelling to attend the weekend visit, but John said he did not want to go because defendant was “gay”; John said defendant touched his butt. Their mother asked Jane if defendant had touched her too; Jane said he had; she said defendant “fingered her” and “penetrated” her. John told his mother defendant made him “suck his [penis].” The victims’ mother called the police; they went to the police station that day and made a report regarding what happened.

On February 24, 2009, RCAT (Riverside Child Assessment Team) interviews of the victims were separately conducted. Jane reported she and John took turns sleeping with defendant; whenever she slept with defendant inappropriate touching would occur. Defendant touched her on “inappropriate parts.” “He touched us everywhere.” Defendant would pull down her pajamas and underwear. Defendant touched her on the parts where she goes to the bathroom, both where she urinates and defecates. She said he touched her chest. She indicated he touched those parts with his hand, with his penis, and once with his mouth.

“Sometimes he puts his finger in my hole, like, you know, like the one from like the blood . . . . [¶] . . . [¶] . . . And to have a baby—that one.” Sometimes he put his

finger and his penis in her “butt.” “[S]ometimes it hurts.” It happened a lot. Defendant put his penis in her vagina. Liquid would come out of his penis when he would do that; it would get on her pajamas. “Sometimes he kisses me. [¶] . . . [¶] Sometimes he puts his tongue in my mouth. . . .” On occasion he would put his penis in her mouth; he wanted her to suck it; liquid would come out of it.

“He puts his mouth on my private part, too.” “Like he licks it—he licks . . . my private part. [¶] . . . [¶] Uh, [with] his tongue.” Defendant also licked and touched her chest several times.

Defendant told Jane if she did not tell anyone, he would give her anything she wanted. He bought her things. “He [bought] me stuff a lot.” She believed she was between six or eight years old when the incidents first occurred. She was 10 years old when the last molestation happened around Valentine’s Day.

John said defendant and his grandmother slept on separate couches; sometimes John slept with defendant and sometimes he slept with his grandmother. Regarding defendant, John said “every time I . . . sleep with him . . . he does the nasties with me. And . . . I don’t like it.” John reported defendant would put John’s foot inside defendant’s butt. Defendant would suck John’s penis. Defendant put his penis inside John’s butt; it hurt. Something wet and white would come out of defendant’s penis.

Defendant put John’s hand in defendant’s butt. Defendant manually stimulated John’s penis. Defendant pushed John’s mouth down onto defendant’s penis; John sucked it a little; white stuff came out. Defendant placed John’s hand on defendant’s penis several times. John believed he was six or seven years old the first time such an incident

occurred. He was afraid to tell anyone because he thought defendant might do something really mean.

Jane testified defendant touched his penis part to her vagina more than three times, and her bottom three times. When he did so, his penis would go inside her. She was eight years of age and older when the incidents occurred. Defendant also put his finger inside her vagina. Defendant touched his mouth to her vagina. Her mouth touched defendant's penis. Sometimes liquid came out of defendant's penis. The last time defendant touched her vagina, she was 10. She never told anyone because she was scared.

John testified he and his sister would take turns spending the night in their grandfather and grandmother's beds. Defendant would do bad things to John's body both in the bed and on the sofa on a weekly basis. Defendant put John's foot in defendant's butt many times. Defendant touched his penis to John's butt a lot; defendant put it inside John's butt five times. After defendant pulled his penis out of John's butt, John saw some liquid come out of defendant's penis. John believed the incidents started in 2005. He never told anyone because he was afraid he would get in trouble. In 2005, John started acting very aggressively, began wetting the bed, and commenced stuttering.

Dr. Susan Horowitz, a physician in the Child Abuse Unit of the Riverside County Regional Medical Hospital Center examined the victims on February 25, 2009. John's examination was normal, which is not unusual because even minor abrasions or tears in the anus incurred from penetration will generally heal within 24 hours. Dr. Horowitz testified, hypothetically, that onset bedwetting; beginning to act out aggressively with

peers and adults; and manifesting a pronounced stutter, is consistent with being a victim of sexual molestation.

Dr. Horowitz noted Jane's "labia majora were kind of hyperpigmented, which means they were a little darker than the rest of the coloration, which can be a reaction to rubbing, but it's not specific. I mean, it's something we see and I noted it, and that [sexual abuse is] one of the possible causes." Jane's anus was normal. Jane had a minor, normal hymeneal tear, which can be deemed consistent with sexual abuse, but could also be deemed normal. Dr. Horowitz testified a normal physical exam is inconclusive for sexual abuse. Most children who have been sexually abused have normal physical exams.

The victims' mother gave the police 14 pairs of Jane's underwear on March 3, 2009, which had been sitting in a laundry hamper for two weeks. A criminalist for the California Department of Justice Riverside Crime Lab tested all the underwear for seminal fluid. Two of the pairs tested "weak positive" for acid phosphate, one component of seminal fluid, which is also a component of other secretions, including vaginal and fecal matter. None of the other two components of seminal fluid were found present on the underwear.

Dr. Jody Ward, a clinical and forensic psychologist, testified as an expert witness regarding CSAAS. CSAAS "is a pattern of behaviors that many children exhibit who have been sexually abused." There are five components of CSAAS: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed unconvincing disclosure; and (5) recantation. One aspect of this syndrome is that children do not immediately

report sexual abuse; another is that they may later recant or deny the abuse. The expert further explained that children who do disclose abuse may not initially disclose all of the information, but may disclose more as time goes on.

Defendant had a string of witnesses testify on his behalf. Friends and family members testified they stayed over at the house and never observed any untoward behavior between defendant and the victims. They testified the victims appeared affectionate with defendant and did not wish to leave his home when it was time to go. Defendant and his wife both testified that defendant was impotent since at least 2000 and could not have performed the acts alleged against him. Defendant denied all the allegations against him.

## **DISCUSSION**

### A. TEN YEARS OF AGE OR YOUNGER

Defendant contends the statute under which he was convicted required the minor be 10 years of age or younger. Thus, since the evidence adduced at trial was at least susceptible to the interpretation that Jane was older than 10 years when defendant committed the offenses against her, i.e., 10 years and one day or more old, but not yet 11, the convictions in counts 1 through 3 must be reversed. We disagree.

“The principles of statutory construction are well established. ‘The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.’ [Citation.] In approaching this task, we ‘must first look at the plain and commonsense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose.’ [Citation.] ‘If there is no ambiguity

or uncertainty in the language, the Legislature is presumed to have meant what it said, and we need not resort to legislative history to determine the statute's true meaning.' [Citation.]" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.)

Section 288.7, subdivision (a) provides: "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." Section 288.7, subdivision (b) provides: "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."

The parties recognized in their briefs, and we recognized in our tentative opinion, that the precise issue raised here was on review in the California Supreme Court in *People v. Cornett* (2010) 190 Cal.App.4th 845. Since we issued our tentative opinion, the California Supreme Court has resolved the issue:

"We are persuaded here that our Legislature intended '10 years of age or younger' as used in section 288.7 to be another means of saying 'under 11 years of age' in accordance with the ordinary understanding of 'age.'" (*People v. Cornett* (2012) 53 Cal.4th 1261, \_\_\_\_.) Thus, where one has attained the age of 10, but is not yet 11, that person is still 10.

In other words, in the present case, the statute providing that Jane be 10 years of age or younger applied whether she was a victim before she attained the age of 10, on the

day she turned 10 years of age, or when she was 10 years and 364 days old. Therefore, the jury appropriately convicted defendant in counts 1 through 3.

B. CALCRIM NO. 330

Defendant contends the court erred in instructing the jury with CALCRIM No. 330 because it unconstitutionally bolstered the testimony of the victims. The People maintain defendant forfeited the issue by failing to object to the instruction below. Moreover, the People argue the instruction was proper. We agree with the People that defendant forfeited the issue by failing to object below. Nevertheless, addressing the merits of the issue, we conclude CALCRIM No. 330 is legally proper and the court acted appropriately in so instructing the jury.

“[W]e review independently the legal adequacy of a jury instruction.” (*People v. Cole* (2004) 33 Cal.4th 1158, 1211.) Failure to object below to an instruction correct in the law forfeits the claim on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.)

CALCRIM No. 330, as the court instructed the jury below, provides: “You have heard testimony from a child who is age ten or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony. In evaluating the child’s testimony, you should consider all of the factors surrounding that testimony, including the child’s age and level of cognitive development. When you evaluate the child’s cognitive development, consider the child’s ability to perceive, understand, remember, and communicate. [¶] *While a child and adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he is a*

*child.*” (Italics added.) Defendant contends the italicized portion of the instruction “unintentionally suggest that a child witness’s testimony should be treated differently than an adult’s testimony.”

In *People v. Dennis* (1998) 17 Cal.4th 468, 527, the defendant faulted his counsel for *not* requesting CALJIC No. 2.20.1, the then-functional equivalent of CALCRIM No. 330. (*Dennis*, at p. 527, fn. 12 [“Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.”].) The court noted defense counsel may not have requested the instruction for tactical reasons because defense counsel have repeatedly attacked the instruction on the “not so baseless and unreasonable” grounds that it invaded the jury’s function of assessing witness credibility, unduly inflated children’s testimony, decreased the government’s burden of proof, and impaired the right of confrontation by undermining impeachment based on the witness’s immature performance. (*Ibid.*, citing *People v. Harlan* (1990) 222 Cal.App.3d 439, 454-456 [Fourth Dist., Div. Two], *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574, *People v. Gilbert* (1992) 5 Cal.App.4th 1372 (*Gilbert*).) Nonetheless, the Supreme Court found the trial court’s standard instructions on credibility rendered the defendant’s trial fundamentally fair. (*Dennis*, at p. 527.) Yet, as defendant himself notes, in all those cases cited in *Dennis*, the appellate courts found the defendants’ contentions wanting.

In *People v. Harlan*, *supra*, 222 Cal.App.3d 439, amici counsel asserted the instruction was unconstitutional because it unduly inflated the testimony of minors and invaded the jury's province as the determiner of witness credibility. (*Id.* at p. 455.) We concluded that the instruction did not prohibit a jury from considering a minor's age or cognitive ability in determining their credibility, and simply advised the jury not to lend the testimony less credibility simply because the witness was a minor; in other words, it did not require the jury to give it greater weight than it would an adult's testimony. (*Id.* at pp. 455-456.) Thus, the instruction did not invade the jury's providence or artificially amplify a child's testimony. (*Id.* at pp. 455-457.)

In *Gilbert*, *supra*, 5 Cal.App.4th 1372 the defendant argued the instruction denied him due process and equal protection. (*Id.* at p. 1392.) The *Gilbert* court noted the instruction was based on section 1127f, which the California Supreme Court found in *People v. Jones* (1990) 51 Cal.3d 294, 315 counterbalanced the previous traditional assumption that children lacked credibility; thus, the instruction ensured, rather than denied, the likelihood of a fair result. (*Gilbert*, at p. 1393.) Likewise, the instruction did not create a distinction between adults and children, but merely sought to "ameliorate [a] perceived negative impact upon the integrity of the factfinding process." (*Id.* at p. 1394.) Thus, the instruction survived constitutional scrutiny. (*Ibid.*)

Furthermore, in *Gilbert* the defendant requested that we reconsider our decision in *People v. Harlan*, *supra*, focusing primarily on a perceived unfairness in the use of the word "perform" in the instruction read to the jury. Here, the word "perform" was not used. Ultimately, we concluded the instruction did "not remove the issue of credibility

from the jury; in fact, it presupposes that the jury must make a determination of credibility, but only after considering all the factors related to a child's testimony, including his demeanor, i.e., how he or she testifies on the stand, which encompasses the manner of speaking." (*People v. Jones, supra*, 10 Cal.App.4th 1566, at p. 1574.) Thus, the instruction was constitutionally sound.

Finally *People v. McCoy* (2005) 133 Cal.App.4th 974, 979 through 980, addressed the constitutional propriety of the current version of the instruction, CALCRIM No. 330. The court rejected the defendant's challenge to the newly minted instruction "[i]n express reliance on the holdings in *Harlan, Jones, and Gilbert . . .*" (*Id.* at p. 980.) We find the above discussed authorities persuasive. CALCRIM No. 330 does not impermissibly bolster a minor witness's credibility, but simply informs the jury it should not discount the credibility of such a witness based upon his or her age *alone*. In other words, the jury is not forbidden from considering the minor witness's demeanor in determining his or her credibility. Thus, the court did not err in instructing the jury with CALCRIM No. 330.

### C. CSAAS

Defendant contends CSAAS evidence is violative of defendant's constitutional rights to due process and a fair trial. He broadly asks us to hold that CSAAS testimony is inadmissible for any purpose. We decline to do so.

"A trial court's decision to admit expert testimony is reviewed for abuse of discretion. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

First, we conclude defendant forfeited this argument by failing to object to the testimony at trial. Contrary to defendant's contention, his request that the jury be given a

limiting instruction and that the expert be instructed not to give an opinion regarding whether the victims in this case were molested cannot be construed as an objection to the CSAAS evidence in its entirety. In the absence of an objection, we conclude defendant may not, for the first time on appeal, argue the evidence was not admissible. (See *People v. Geier* (2007) 41 Cal.4th 555, 609; *People v. Partida* (2005) 37 Cal.4th 428, 433-435; cf. *People v. Rouse* (2012) 203 Cal.App.4th 1246, 1272 [not forfeited because the defendant objected that the evidence was irrelevant].)

Nonetheless, as to the merits of defendant's contention, we note that in *People v. McAlpin* (1991) 53 Cal.3d 1289, the Supreme Court approved of the decisions of Courts of Appeal that have held such testimony is admissible for some purposes. (*Id.* at p. 1300.) *McAlpin* was followed in *People v. Brown* (2004) 33 Cal.4th 892, which upheld the use of expert testimony concerning battered women's syndrome. (*Id.* at pp. 905-907.) We are bound by the court's reasoning in these cases. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also *People v. Perez* (2010) 182 Cal.App.4th 231, 245.) Courts of Appeal have upheld such testimony when used "for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation" (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744), or "to rehabilitate [the molestation victim's] credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.]' [Citation.]" (*People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001-1002, quoting *McAlpin*, at pp. 1300-1301; see also *People v. Bowker* (1988) 203 Cal.App.3d 385, 394.)

CSAAS expert testimony is no more or no less admissible than other expert testimony. “Like other evidence, [CSAAS] expert testimony must be relevant and competent on a material issue, subject to exclusion, however, if unduly prejudicial. [Citation.]” (*People v. Bowker, supra*, 203 Cal.App.3d at p. 390; cf. *People v. Gomez* (1999) 72 Cal.App.4th 405, 415, [“Whether expert testimony regarding battered women’s syndrome is admissible in a particular case initially depends on whether that evidence is relevant.”] disapproved on another point in *People v. Brown, supra*, 33 Cal.4th at p. 908.) Therefore, the admissibility of CSAAS testimony must generally be evaluated on a case-by-case basis.

Under the present facts, there is indicia of the evidence’s relevancy. There was evidence the victims delayed disclosure for as long as four or more years. Both victims initially disclosed a small number of sexual touchings to their mother. At their respective RCAT interviews, the victims disclosed a host of sexual incidents occurring repeatedly over a four year period. Yet, during their testimonies, the respective victims could be seen as recanting most of the incidents they reported in their RCAT interviews, testifying that far fewer incidents occurred. ““““Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior. . . .” [Citation.]”” [Citation.]” (*People v. Rouse, supra*, 203 Cal.App.4th at p. 1272.) The court acted within its discretion in admitting the CSAAS evidence.

D. CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant contends his 90-years-to-life sentence is violative of both the federal and state constitutional prohibitions against cruel and unusual punishment. We disagree.

First, we note defendant forfeited the contention by failing to raise it below. (*People v. Em* (2009) 171 Cal.App.4th 964, 972, fn. 5; *People v. Norman* (2003) 109 Cal.App.4th 221, 229.) Second, we find the merits of defendant's argument wanting. The Eighth Amendment "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." (*Rummel v. Estelle* (1980) 445 U.S. 263, 271 (*Rummel*)). But "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." (*Id.* at p. 272.)

"A punishment may violate the California Constitution . . . if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136 (*Cartwright*), quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) The court, in applying this standard, examines the offense and the offender, and it compares the punishment with the penalties for other California offenses and crimes in other jurisdictions. (*Cartwright*, at p. 1136; *Lynch*, at pp. 425-427.)

1. *CALIFORNIA CONSTITUTION*

Defendant contends the imposition of a 90-years-to-life sentence in this instance is cruel and/or unusual punishment. California sentencing statutes, however, "have long withstood constitutional challenge." (*Cartwright, supra*, 39 Cal.App.4th at p. 1137.)

"Only in the rarest of cases could a court declare that the length of a sentence mandated

by the Legislature is unconstitutionally excessive.” (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Here, defendant’s sentence is not disproportionate when compared to other crimes that do not result in death but result in substantial sentences. (See *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1093-1094 [15 years to life for a defendant convicted of a single lewd act with a 12 year old who became pregnant not cruel and 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 did not constitute cruel and/or unusual punishment]; *People v. Retanana* (2007) 154 Cal.App.4th 1219, 1231 [135 years to life for conviction of 17 sexual offenses against a minor not cruel and/or unusual].)

Additionally, other jurisdictions have upheld substantial or greater sentences for crimes less serious, or at least of similar seriousness, in comparison to multiple sexual offenses with a child 10 years or younger. (*People v. Cisneros* (Colo. 1993) 855 P.2d 822, 830 [life without the possibility of parole for 40 years not cruel and unusual punishment for possession and sale of drugs with priors of sales of narcotics, menacing with a knife, and violation of bail conditions]; *Edwards v. Butler* (5th Cir. 1989) 882 F.2d 160, 167 [sentence of life without the possibility of parole for one aggravated rape does not violate Eighth Amendment]; *Land v. Commonwealth* (Ky. 1999) 986 S.W.2d 440, 441 [life sentence without possibility of parole for rape not cruel and unusual]; *Gibson v. State* (Fla. 1998) 721 So.2d 363, 369-370 [mandatory life sentence without possibility of parole for sexual battery of minor where defendant had no prior record was not cruel or unusual]; *State v. Foley* (La. 1984) 456 So.2d 979, 984 [life sentence without possibility

of parole for juvenile defendant convicted of aggravated rape is constitutional]; *State v. Green* (N.C. 1998) 348 N.C. 588, 612 [mandatory life sentence for 13-year-old defendant for sex offense not cruel and unusual punishment].)

Even if California statutes impose the longest sentence in the nation for sexual offenses against a child under 10 years of age, it does not mean defendant's punishment is cruel and unusual. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.) California is not required to conform its Penal Code to either the majority rule or "the least common denominator of penalties nationwide." [Citation.]" (*Ibid.*)

Based on the totality of circumstances here, we are persuaded that the extreme seriousness associated with the offenses negates defendant's claim of cruel and unusual punishment. Defendant committed multiple acts of sexual molestation against his grandson and granddaughter beginning, apparently, when they were respectively, approximately five and six years old. Defendant took advantage of a position of trust as their grandfather, telling Jane not to tell anyone and buying her gifts in exchange for her silence. Defendant engaged in multiple acts of oral copulation, sodomy, and vaginal intercourse during which he apparently ejaculated into and onto his grandchildren. The Legislature implemented precisely this statutory regimen of punishment to protect young children from those, such as defendant, who would prey upon them. We conclude defendant's sentence is not so disproportionate "as to shock the conscience and offend fundamental notions of human dignity." [Citation.]" (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1338 [Fourth Dist., Div. Two].)

## 2. FEDERAL CONSTITUTION

Defendant fares no better under the federal standard. The hurdles defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *People v. Cooper* (1996) 43 Cal.App.4th 815, 819-824, and cases cited.) Strict proportionality between crime and punishment is not required. “Rather, [the Eighth Amendment] forbids only extreme sentences that are “grossly disproportionate” to the crime.’ [Citation.]” (*Cartwright, supra*, 39 Cal.App.4th at p. 1135; see also *Harmelin v. Mich.* (1991) 501 U.S. 957, 1001.)

In *Rummel, supra*, 445 U.S. 263, the United States Supreme Court rejected an Eighth Amendment challenge to a life sentence based on the defendant’s conviction for credit card fraud of \$80, passing a \$28.36 forged check, and obtaining \$120.75 by false pretenses. (*Rummel, supra*, at pp. 265, 266, 268-286.) Additionally, in *Harmelin v. Michigan, supra*, 501 U.S. 957, the high court ruled that a mandatory sentence of life without the possibility of parole for possession of 672 grams of cocaine did not violate the Eighth Amendment. (*Id.* at pp. 961, 995.) By contrast, what defendant did was far worse than all the crimes committed by *Rummel* and *Harmelin* combined.

In addition, the United States Supreme Court has upheld statutory schemes that result in life imprisonment for recidivists upon a third conviction for a nonviolent felony, in the face of challenges that such sentences violate the federal constitutional prohibition against cruel and unusual punishment. (See *Ewing v. California* (2003) 538 U.S. 11, 18, 30-31 [25-year-to-life sentence under “Three Strikes” law for theft of three golf clubs

worth \$399 apiece]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 82-83 [two consecutive 25-year-to-life terms for two separate thefts of less than \$100 worth of videotapes].)

The protection afforded by the Eighth Amendment is narrow. It applies only in the ““exceedingly rare”” and ““extreme”” case. (*Ewing v. California, supra*, 538 U.S. at p. 21.) We are not convinced this is such a case. Defendant’s sexual conduct against the most vulnerable members of our society fully supports the lengthy sentence imposed. Defendant cites no persuasive authority to support his claim this is one of those rare cases in which a sentence is so grossly disproportionate to the gravity of the offense that it violates the Eighth Amendment’s proscription against cruel and unusual punishment. Accordingly, we conclude this is not the exceedingly rare and extreme case that violates the federal Constitution.

E. HIV/AIDS TEST

Defendant contends the court erred in ordering he submit to an HIV/AIDS test because it never made a finding there was probable cause to believe that semen or any other bodily fluid capable of transmitting HIV had been transferred from defendant to the victims. Regardless, we find substantial evidence in the record to support the court’s order for HIV/AIDS testing.

Section 1202.1, subdivision (a) provides: “the court shall order every person who is convicted of . . . a sexual offense listed in subdivision (e) . . . to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction. Each person tested under this section shall be informed of the results of the

blood or oral mucosal transudate saliva test.” “Lewd or lascivious conduct with a child in violation of Section 288” (§ 1202.1, subd. (e)(6)(A)(iii)) is listed as one of the offenses requiring the court order such a test if the court “finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” (§ 1202.1, subd. (e)(6)(A).)

In *People v. Caird* (1998) 63 Cal.App.4th 578, the *appellate court* made its determination of probable cause from *its* review of the record. It did not mandate that the trial court make a specific, express probable cause finding: “The statute requires only ‘probable cause’ to believe there was a transfer of bodily fluid. That evidentiary standard was met here.” (*Id.* at p. 590.) Whether there is probable cause of a transfer of bodily fluid is subject to the sufficiency of the evidence standard of review. (*Ibid.*)

Here, there was overwhelming evidence adduced at trial that semen or other bodily fluids capable of transmitting HIV had been transferred from defendant to the victims. John testified that when defendant put his penis into John’s butt, “slimy things” would come out of defendant’s penis. During his RCAT interview, John stated something white and wet would come out of defendant’s penis when he put it in John’s butt. When defendant pushed John’s mouth down on his penis, white stuff came out. Jane testified sometimes liquid came out of defendant’s penis. During her RCAT interview, she reported “liquid stuff” would come out of defendant’s penis when he would put it in her mouth. Thus, substantial evidence supports a probable cause determination that bodily fluids were transferred between defendant and the victims.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

RAMIREZ  
P. J.

RICHLI  
J.