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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.

GEORGE VELARDE,

Defendant and Appellant.

E052415

(Super.Ct.No. FSB901460)

OPINION

APPEAL from the Superior Court of San Bernardino County. Harold T. Wilson, Jr., Judge. Affirmed

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant George Velarde of three counts of sexual penetration with a foreign object, of a child under the age of 14 and more than 10 years younger than defendant (counts 1-3—Pen. Code § 289, subd. (j)),¹ one count of sexual penetration with a child under the age of 10 (count 6—§ 288.7, subd. (b)), and two counts of oral penetration with a child under the age of 10 (counts 7 & 8—§ 288.7, subd. (b)).² The court sentenced defendant to an aggregate indeterminate term of 45 years to life consisting of the following: the upper term of eight years on count 1; one-third the midterm of six years on counts 2 and 3 consecutive; 15 years to life consecutive on each of counts 6 through 8; and imposition of sentence on counts 1 through 3 stayed pursuant to section 654.

On appeal, defendant contends the court prejudicially erred in giving the jury instruction for *general* intent crimes when all the offenses with which the People charged defendant were *specific* intent crimes. Defendant additionally maintains his 45-years-to-life sentence is constitutionally violative of federal and state constitutional prohibitions against cruel and/or unusual punishment. We affirm the judgment.

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

² The language of the verdicts on counts 7 and 8 with regard to the penetration being *oral* appears to be a typographical error as the evidence adduced at trial dealt solely with *digital* penetration. Thus, it appears the verdicts for counts 7 and 8 should have read *sexual* penetration, rather than *oral* penetration, mirroring that of count 6.

FACTUAL AND PROCEDURAL HISTORY

The victim and her older brother both testified that one day in April 2009, while they were playing in their backyard, defendant, their next-door neighbor, looked over the fence and told the victim to come over to his house so he could “check [her] muscles.” The victim told her brother not to go over to defendant’s house when he requested a “muscle check,” because what he was actually doing was putting his finger in her vagina, which the victim called her “Cola.” The victim’s brother testified she told him that defendant would pull her pants down and put his finger where she peed. The victim’s brother took her inside the house and told their mother what the victim had told him; the victim confirmed defendant had pulled down her pants and put his finger inside her; their mother called the police. On April 9, 2009, San Bernardino Police Officer Jose Castro was called in to interpret for the victim. He conducted an in-field lineup during which the victim identified defendant as her abuser.

Theresa Howard, an interviewer with the Child Assessment Center, interviewed the victim on May 5, 2009. The People played a video recording of the interview to the jury; they also distributed transcripts of the interview, which was verified as a true and correct interpretation of the interview. During the interview, the victim reported defendant did something to her that he should not have done. “Like he would tell me to go to his house to get a candy. He . . . only said he would check my muscles but he . . . pulled down my pants and . . . my panties and then he touched where I pee.”

She reported that defendant did it “[m]ore than one time.” It always happened inside his house: “One day he did it in the kitchen and almost every day he did it in the

living room” Defendant “[g]ot his finger and he touched me and he poked me.” He would poke her inside where she peed and then smell his finger. It hurt. The victim said that her butt and the location where she “makes pee” were the same. The last time defendant touched her was before she turned six years old. On various occasions she would tell her mother her genitals hurt, but not explain why; her mother would tell her to put Vaseline on it.

At trial, the victim, then age seven, testified defendant first asked her to come over to her house for some candies when she was five years old. He told her he wanted to check her muscles; however, instead, he put his finger inside her Cola. He did it on several occasions, perhaps more than 10 times. He did it every time she went over to his house. Defendant did it sometimes in the living room and sometimes in his bedroom. Defendant would pull down her pants and underwear while she was standing. Sometimes he would be standing; sometimes he would be sitting. Sometimes they would be face-to-face; sometimes he would be behind her. Sometimes it hurt. Afterward, he would wash his hands and give her candy.

The victim testified when her Cola hurt after the incidents, she would ask her mother for Vaseline. She would tell her mother that her Cola hurt. She never told her mother what defendant was doing because she was afraid her mother would scold her.

The victim’s mother testified that in 2008, the victim had asked for Vaseline many times because she was in pain and “pink” where she peed. She asked for Vaseline approximately every week or two. The victim’s mother assumed the victim was “pink” because she was not drying herself sufficiently well after using the restroom. Prior to

2008, the victim never complained of being “pink.” Mother noted that the victim never asked for Vaseline during the entire month of July 2008, when they were vacationing in Mexico. When they came back from vacation, however, the victim started asking for Vaseline once again. Since the incidents were reported to the police, the victim had not asked for Vaseline. Mother testified that when the victim recounted defendant’s abuse, she also reported that he masturbated in front of her.

Defendant’s ex-wife and daughter testified that child molestation was not in his character. Defendant testified that he never offered children candy, and never molested or touched the victim in any way. He testified that on several occasions he had witnessed the victim and her older brother behave in inappropriately sexual ways, though he never reported the behavior to anyone but his mother.

Dr. Mark Massi, a forensic pediatrician, examined the victim on April 13, 2009. The results reflected a normal anogenital examination. There was no unusual discharge, scar, or evidence of injury. The victim’s hymen remained intact. However, Massi noted that a normal examination does not rule out sexual abuse. He testified that even teenage girls who have become pregnant from sexual abuse can have normal exams. Even assuming deep penetration, one would not always expect to see a physical finding. Dr. Massi concluded it would be very unlikely to see any type of injury or physical finding on a six-year-old girl who had been digitally penetrated.

DISCUSSION

A. JURY INSTRUCTION

Defendant contends the trial court prejudicially erred in giving the instruction on general intent (CALCRIM No. 250) instead of the instruction on specific intent (CALCRIM No. 251). He argues that all the offenses for which he was convicted were specific intent crimes; therefore, the court's purported failure to instruct on specific intent requires reversal of his convictions. The People counter that the offenses for which the jury convicted defendant were general intent crimes; thus, the court committed no error in its instruction. We hold that regardless of whether the court erred in its instruction, any error was harmless beyond a reasonable doubt.

The People charged defendant by information with five counts of sexual penetration with a foreign object, of a person under the age of 14 and 10 or more years younger than the perpetrator (counts 1-5—§ 289, subd. (j)), five counts of oral copulation or sexual penetration with a child under 10 (counts 5-10—§ 288.7, subd. (b)), and one count of continuous sexual abuse (count 11—§ 288.5, subd. (a)).³ Section 289 defines “[s]exual penetration” as “the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening *for the purpose of sexual arousal, gratification, or abuse* by any foreign object, substance, instrument, or device, or by any

³ The trial court dismissed count 11 on the People's motion prior to trial. The jury acquitted defendant of counts 4, 5, 9, and 10.

unknown object.”⁴ (§ 289, subd. (k)(1), italics added.) Section 288.7, subdivision (b) proscribes “sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger” by a person 18 years or older.

The court instructed the jury: “The Defendant is charged in Counts One through Five with sexual penetration with a person who was under the age of fourteen and at least ten years younger than the Defendant. [¶] To prove that the Defendant is guilty of this crime, the People must prove that: [¶] Number one. The Defendant participated in an act of sexual penetration with another person; and [¶] Two. The penetration was accomplished by using . . . a foreign object; [¶] AND [¶] Three. At the time of the act, the other person was under the age of fourteen . . . and was at least ten years younger than the Defendant. [¶] Sexual penetration means penetration, however slight, of the genital or anal openings of another person *for the purpose of sexual abuse, arousal, or gratification*. [¶] A foreign object, substance, instrument, or device includes any part of the body except a sexual organ. [¶] *Penetration for sexual abuse means penetration for the purpose of causing pain, injury, or discomfort*. [¶] It is not a defense that the other person may have consented to the act. [¶] Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.” (CALCRIM No. 1100, italics added.)

⁴ A “[f]oreign object” includes “any part of the body, except a sexual organ.” (§ 289, subd. (k)(2).) A finger is a foreign object. (*People v. Wilcox* (1986) 177 Cal.App.3d 715, 717.)

The court also instructed the jury: “The Defendant is charged in Counts Six through Ten with engaging in sexual penetration with a child under ten years of age or younger in violation of Penal Code section 288.7 subsection (b). [¶] To prove that the Defendant is guilty of this crime, the People must prove that: [¶] Number one. The Defendant engaged in an act of sexual penetration with Jane Doe; [¶] Two. When the Defendant did so, Jane Doe was ten years of age or younger; and [¶] Three. At the time of the act, the Defendant was at least eighteen years old. [¶] Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun. [¶] Sexual penetration means penetration, however slight, of the genital or anal opening of the person by any foreign object, substance, instrument, device, or any unknown object *for the purpose . . . of sexual abuse, arousal, or gratification.* [¶] *Penetration for sexual abuse means penetration for the purpose of causing pain, injury, or discomfort.* [¶] A foreign object, substance, instrument, or device includes any part of the body except a sexual organ.” (CALCRIM No. 1128, italics added.) Defendant contends the italicized language in the statute and instructions requires a specific intent.

Nevertheless, the court instructed the jury with the general intent instruction as follows: “The crimes charged in this case require proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crimes of sexual penetration as charged in Counts One through Ten that person must not only commit the prohibited act, but must also do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act, however, it is not required that he or she intend to break the law. The act required is explained in the . . . instructions for

that crime.” (CALCRIM No. 250.) Defendant maintains the court should have instructed the jury with CALCRIM No. 251 reading, in pertinent part: “For you to find a person guilty of the crimes [of sexual penetration as charged in Counts 1 through 10], that person must not only intentionally commit the prohibited act . . ., but must do so with a specific (intent/[and/or]mental state). The act and the specific (intent/[and/or]mental state) required are explained in the instruction for that crime.”

“In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case.’ [Citation.]” (*People v. Anderson* (2011) 51 Cal.4th 989, 996.) “The duty to instruct sua sponte always extends to certain fundamentals: elements of the charged offense, any required specific intent, the prosecution’s burden of proof. [Citation.]” (*People v. Prettyman* (1996) 14 Cal.4th 248, 285.)⁵ Nevertheless, a trial court’s mistaken instruction of a jury that a crime required only a general intent, rather than a specific intent, is subject “to harmless error analysis [when] it appears beyond a reasonable doubt that the error did not contribute to [the] jury’s verdict.” (*People v. Haley* (2004) 34 Cal.4th 283, 314, quoting *People v. Flood* (1998) 18 Cal.4th 470, 504.)

⁵ Nothing in the record reflects that defense counsel below ever requested the specific intent instruction.

Here, assuming *arguendo* the court erred in instructing the jury with CALCRIM No. 250 rather than No. 251, we find any error harmless beyond a reasonable doubt.⁶ First, a reasonable juror reviewing CALCRIM Nos. 1100 and 1128, as instructed, would conclude that unless defendant acted to gratify or abuse, he could not be guilty of the charged offenses. (See *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1379.) Thus, when viewed in context with the instructions as a whole, the jurors would necessarily have concluded that defendant acted *for the purpose of sexual abuse, arousal, or gratification*, in convicting defendant.

Second, the evidence was simply unsusceptible to any other determination than that defendant acted *for the purpose of sexual abuse, arousal, or gratification* in committing the offenses. Defendant denied any contact, let alone sexual contact, with the victim. Therefore, the jury obviously disbelieved defendant's testimony and credited the victim's. Defendant, a man in his sixties, lured the victim over to his house under the false pretense of giving her candy. He told her he intended to check her muscles, but, according to the victim, he never did so. Instead, he inserted his finger inside her genitals. There simply could be no other explanation for defendant's multiple digital insertions into the victim's genitals than for the purpose of sexual arousal or abuse. No

⁶ Defendant cites *People v. Senior* (1992) 3 Cal.App.4th 765, 776, for the proposition that the offense of penetration with a foreign object under section 289 requires the specific intent of sexual arousal, gratification, or abuse. He additionally cites *People v. Whitman* (1995) 38 Cal.App.4th 1282, 1289, for the same proposition. Contrariwise, the People cite *People v. Dillon, supra*, 174 Cal.App.4th at page 1380, for the proposition that "forcible sexual penetration is a general intent crime." However, none of these cases squarely address the issue raised here; thus, all are, at best, dicta.

testimony was adduced that defendant was a caretaker or medical professional such that his actions would be required for anything other than sexual arousal or abuse. Thus, we conclude beyond a reasonable doubt that any error did not contribute to the defendant's convictions.

B. CRUEL AND UNUSUAL PUNISHMENT

Defendant contends the imposition of three consecutive sentences of 15 years to life under section 288.7, subdivision (b) constitutes cruel and/or unusual punishment under the Eighth Amendment of the Federal Constitution and Article I, Section 17 of the California Constitution. We disagree.

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, 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 that the imposition of a 45-year-to-life sentence in this instance is cruel and/or unusual punishment. California sentencing statutes, however, “have long withstood constitutional challenge.” (*People v. 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 or even greater sentences than his. (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 that 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." (*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 a vulnerable five-year-old girl with the seemingly innocuous but clichéd lure of candy, and the equally harmless pseudonymous offer to "check her muscles." 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.]” (*People v. 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*, 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. (*Harmelin*, 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 one of the most vulnerable members of our society fully supports the lengthy sentence that was imposed. Defendant cites no persuasive authority to support his claim that 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.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.