

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS JOSE BONNET,

Defendant and Appellant.

E052924

(Super.Ct.No. BAF006173)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge.
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Michael T. Murphy and James D.
Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Luis Jose Bonnet guilty of sodomy of a child 10 years of age or younger by a person 18 years old or older. (Pen. Code, § 288.7, subd. (a).)¹ Defendant was subsequently sentenced to an indeterminate term of 25 years to life in state prison with credit for time served.

On appeal, defendant contends: (1) his sentence constitutes cruel and unusual punishment under the state and federal Constitutions; and (2) the section 290.3 fine of \$500 should be reduced to \$300. We agree with the parties that the section 290.3 fine should be amended, but reject defendant's remaining contention.

I

FACTUAL BACKGROUND

In July 2008, defendant lived in a three bedroom house with his girlfriend and her family, including her five-year-old granddaughter (the victim), the victim's mother, S.M., and the victim's two uncles D. and S.F. Defendant, then age 39, had been living with the family for about four years. The victim was in special education classes at school for her speech delays and comprehension issues.

On July 19, 2008, numerous people were at the house drinking. Between five people, more than a 30-pack of beer had been consumed. Some of them, including defendant, were intoxicated. When defendant began to get too inebriated, D. took defendant inside the house to go to sleep.

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

Meanwhile, the victim and other children were in their bedroom having been asleep for about two to three hours. Defendant's girlfriend was also asleep in the bedroom she shared with defendant.

Sometime between 11:00 p.m. and 12:00 a.m., S.F. went inside the house and into his bedroom. The lights of his bedroom were on, even though they had been off when he had left his bedroom earlier. As S.F. entered his bedroom, he saw defendant completely naked, standing behind the victim, who had her pants around her ankles and was bent over, leaning against the bed, in front of defendant. It appeared to S.F. that defendant was having sex with the victim. S.F. did not see if defendant's penis was inside of the victim or if it was erect.

S.F. immediately pulled defendant off of the victim, threw him to the ground, and began hitting him. When S.M. heard her daughter screaming and S.F. yelling, she went into the bedroom. She saw S.F. beating up defendant, who was still naked, and heard S.F. say that defendant was raping the victim. S.M. began beating defendant as well. Defendant was eventually dragged outside where he continued to be pummeled until he went into convulsions. Defendant's girlfriend told S.M. to call 911 before he died.

S.F.'s then-girlfriend M.H., who had also been at the house on the night of the incident, saw the victim run out of S.F.'s room, crying "pretty bad." M.H. went into the victim's bedroom, sat down with her on her bed, and asked her if defendant hurt her. The victim nodded in the affirmative. When M.H. asked the victim where, she pointed downward. When M.H. asked the victim if it had happened more than once, she said, "Yes."

When paramedics arrived at the residence, the victim was sitting on her mother's lap, crying, and saying, "It hurts down there." S.M. examined the victim's lower body that night and found no bleeding, only redness.

Later that evening, S.M. took the victim to a hospital where she was examined by a sexual assault nurse. The victim informed the nurse that defendant touched her and it hurt.² The nurse found her genital area to be normal; however, found a small tear on her anal verge. The tear was consistent with recent blunt force penetration and could have been caused by a penis. The nurse suspected the tear was caused by sexual abuse that had occurred within 24 hours of the examination; however, she noted it as "nonspecific" because she could not say with certainty it was caused by sexual abuse.

Beaumont City Police Officers Brieda and Walter investigated the sexual assault. When Officer Brieda arrived at the residence, he noted that defendant was naked and beaten up. Officer Brieda also observed an appearance of seminal fluid, white in color, coming out of defendant's penis. Officer Walter interviewed defendant.³ Defendant stated that he was drinking and could not remember much of what happened. He denied touching the victim.

² At trial, the victim testified that defendant came into her room and took her to S.F.'s room. Defendant then pulled her pants and underwear down. He then touched her, which was scary, but it did not hurt.

³ The interview was played for the jury at the time of trial.

The parties stipulated that at the time of the incident, defendant’s blood-alcohol level was above 0.20 percent and that a doctor would testify that defendant “suffered a traumatic right subarachnoid hemorrhage at or near the time of the . . . incident.”

II

DISCUSSION

A. *Cruel and/or Unusual Punishment*

Defendant contends that his mandatory sentence of 25 years to life under the facts of this case constitutes cruel and/or unusual punishment under both the federal and state Constitutions. 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.’” (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136 (*Cartwright*), quoting *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*)). 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 mandatory imposition of a 25-year-to-life sentence is “constitutionally infirm from the outset.” But California sentencing statutes “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 (*Martinez*).

In determining whether a sentence constitutes cruel or unusual punishment, we first consider the nature of the offense and the offender. (*Martinez, supra*, 76 Cal.App.4th at p. 494.) “An examination of the nature of the offense and of the offender, “with particular regard to the degree of danger both present to society” is particularly relevant in determining this issue. [Citation.] In assessing the nature of the offense, a court should consider the circumstance of the particular offense such as the defendant’s motive, the way the crime was committed, the extent of his involvement and the consequences of his acts.” (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000.) “The nature of the offense is viewed both in the abstract and in the totality of the circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant’s individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind.” (*Martinez, supra*, 76 Cal.App.4th at p. 494.) However, this “inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in

the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.]” (*Ibid.*)

Defendant focuses on the above-noted factor and compares himself favorably to the young defendant in *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), a case in which the California Supreme Court determined that an indeterminate life sentence for first degree felony murder was excessive, under the facts of the case, and reduced the crime to second degree murder. (*Id.* at p. 489.) The analogy is inapt.

In *Dillon*, a 17-year-old boy entered a marijuana farm with some of his friends, intending to steal some of the crop. Hearing shots, the boy believed that his friends might have been shot. Then, when he was approached by an armed man who was guarding the marijuana, the boy believed that he was about to be shot, panicked and fatally shot the man. (*Dillon, supra*, 34 Cal.3d at pp. 451-452, 482-483.) The uncontradicted evidence showed that the boy was unusually immature and childlike and that because of his immaturity, he neither foresaw the risk he was creating nor was he able to extricate himself without panicking. (*Id.* at p. 488.) In addition, he had no prior criminal record. (*Ibid.*) Both the jury and the trial court expressed concern that the sentence was excessive in relation to the boy’s moral culpability. (*Id.* at p. 487.) Moreover, none of the boy’s compatriots received a prison term. (*Id.* at p. 488.)

Here, defendant sodomized a helpless, learning-disabled, five-year-old girl when he was almost 40 years old, while he was living with the victim’s grandmother in the same house as the victim for four years. We view the evidence in the light most favorable to the judgment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.)

Defendant went into the bedroom where the victim had been sleeping for about two to three hours, brought her into another bedroom, and pulled down her clothing. He then bent her over a bed and thrust his erect penis toward her buttocks, causing a small tear on her anal verge. Although at trial, about 20 months after the incident, the victim testified that it did not hurt, she had informed M.H. and the examining nurse on the night of the incident that defendant did hurt her. Specifically, M.H. testified that she saw the victim running out of the bedroom crying and, when she asked her if defendant had hurt her, the victim nodded in the affirmative. When M.H. asked her where, the victim pointed downward. The victim also informed M.H. that it had happened more than once.

Furthermore, defendant had convictions for misdemeanor shoplifting, failure to appear, second degree burglary, and receiving stolen property. His performance on probation was poor, and he had violated his grants of probation at least three times. In fact, defendant was on probation when he committed the instant offense. Even if his criminal record were insignificant, this factor is substantially outweighed by the seriousness of his crime and the circumstances of its commission. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 17.)

Additionally, although the elements of the offense do not require proof of violence, threat of violence, or the intentional infliction of serious bodily injury, as defendant argues, defendant's conduct was the cause of lasting emotional and psychological harm to the victim. S.M. informed the probation officer that, after the incident, the victim hesitated to return home, had nightmares, and often "clung to her

mother's side." The victim also needed to be in classes with female teachers at school because it was difficult for her to be around men.

Defendant also attempts to mitigate his conduct by describing himself as "extremely drunk" at the time of the incident. However, unlike the immature young defendant in *Dillon*, defendant foresaw the risk he was creating by becoming highly inebriated, and there is no evidence to suggest he was unusually immature.

Defendant informed the probation officer that he was an alcoholic who consumed a 12-pack of beer daily. He also stated that he began drinking at the age of 15. Hence, defendant's level of intoxication does not mitigate his conduct, but enhances a showing that he is a danger to society when he drinks. In addition, defendant took no responsibility for his actions and appeared to show no remorse. He informed the probation officer that there were several lies in the police report and that the police lied about what he was accused of. He claimed that he was in the room by himself; that he had taken all his clothes off to take a shower; and that "the police officer saw semen on his penis because he had just had sexual intercourse with his girlfriend."

The record contradicts defendant's attempt to downplay the seriousness of this crime and his personal responsibility for his sexual assault against a five-year-old, vulnerable girl. Having reviewed the nature of the offense and the offender, and considered defendant's arguments, we cannot say a sentence of 25 years to life "is so disproportionate to the crime . . . that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch, supra*, 8 Cal.3d at p. 424.)

Moreover, defendant's sentence is not disproportionate when compared to other crimes that do not result in death but have sentences that are substantial or even greater than his. (See *People v. Crooks* (1997) 55 Cal.App.4th 797, 807-808 [comparing penalty for burglary with intent to commit rape to penalties for kidnapping for ransom (§ 209, subd. (a)) and train wrecking, which provide for life without the possibility of parole (§ 218)].) Appellate courts have upheld the constitutionality of mandatory sentences ranging from 25 years to life to life without the possibility of parole for offenses that do not result in death. (*In re Maston* (1973) 33 Cal.App.3d 559, 565 [life without the possibility of parole for aggravated kidnapping where the victim was injured but not killed is not cruel and unusual punishment]; *Crooks*, at p. 808 [25-year-to-life sentence for aggravated rape, with no prior felonies and no great bodily injury, was not disproportionate to other serious crimes]; *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1281-1282 [25-year-to-life sentence under § 667.61 for one forcible rape during a burglary, without use of a weapon and with no prior felonies, was not cruel and unusual punishment].)

Additionally, other jurisdictions have upheld sentences equal to or greater than defendant's term for crimes less serious than sex 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 the 8th Amend.]; *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) 502 S.E.2d 819, 834 [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 the offense of sex with a child under 10 years or younger, that 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 offense negates defendant's claim of cruel and unusual punishment. Defendant sexually attacked a vulnerable, learning-disabled, five-year-old girl, who was his girlfriend's granddaughter. The Legislature implemented these types of statutes to protect young children from people who engage in sexual acts with such young victims. (See *People v. Alvarado* (2001) 87 Cal.App.4th 178, 200 [callous and opportunistic sexual assault against a vulnerable victim is "precisely the sort of sexual offense that warrants harsh punishment"].)

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 Standard

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.'" (*Cartwright, supra*, 39 Cal.App.4th at p. 1135; see also *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (*Harmelin*).)

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 of credit card fraud of \$80, passing a \$28.36 forged check, and obtaining \$120.75 by false pretenses. (*Rummel*, at pp. 268-286.) Additionally, in *Harmelin, 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 p. 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 [two consecutive 25-year-to-life terms for two separate thefts of approximately \$150 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. The mandatory 25-year-to-life sentence imposed is noteworthy. However, defendant’s crime is also noteworthy. He took advantage of a position of trust to sexually assault a five-year-old girl, who was his girlfriend’s granddaughter, and who had been asleep for about two to three hours prior to the assault. Defendant’s sexual assault 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.

B. *Section 290.3 Sex Offender Fine*

Defendant contends and, the People correctly concede, that the section 290.3 sex offender registration fine of \$500 should be reduced to \$300 because this was defendant's first qualifying sexual offense conviction. We also agree.

At the time defendant was sentenced, section 290.3, subdivision (a), provided in relevant part: "Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." The qualifying offenses specified in section 290, subdivision (c), include defendant's current crime of violating section 288.7.

At the time of sentencing, the trial court ordered defendant to pay a fine of \$500 pursuant to section 290.3. However, the record shows that defendant has never previously suffered a qualifying offense specified in section 290, subdivision (c). The section 290.3 fine should therefore be reduced to \$300. The abstract of judgment should be modified accordingly.

III

DISPOSITION

The judgment is modified to reduce the section 290.3 sex offender registration fine to \$300. The superior court clerk is directed to amend the abstract of judgment and to produce a minute order that indicates this modification. Further, the clerk is directed to forward a certified copy of the amended abstract of judgment and the modified minute order to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

RICHLI

J.

KING

J.