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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.

E.L. et al.,

Defendants and Appellants.

E060556

(Super.Ct.No. RIF1201861)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant E.L.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant J.L.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants and appellants, J.L. and E.L., a married couple, were tried together before separate juries and convicted of committing sexual offenses against their daughter, Jane Doe, when Doe was six months to four and one-half years of age. J.L. was tried as the perpetrator and E.L. was tried as an aider and abettor to the crimes.

The juries found defendants guilty as charged of forcible sexual penetration (Pen. Code, §§ 269, subd. (a)(5), 289, subd. (a); count 1)¹ and four counts of sexual penetration or oral copulation (§§ 288.7, subd. (b), 289; counts 2-5). J.L. was also convicted of two counts of committing a forcible lewd act on Doe. (§ 288, subd. (b)(1); counts 6-7.) E.L. was not charged in the lewd act counts. E.L. was sentenced to 75 years to life; J.L. was sentenced to 87 years to life.²

Defendants appeal and join each other's claims. Together, they claim the trial court prejudicially erred in (1) admitting, pursuant to the "fresh-complaint" doctrine, extrajudicial statements Doe made to her great-aunt, M.B., that J.L. caused bruises on Doe's face, (2) instructing that evidence of a witness's pretrial statement could be used

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

² Defendants were each sentenced to five consecutive terms of 15 years to life in counts 1 through 5, and J.L. was additionally sentenced to two consecutive six-year terms on counts 6 and 7.

for its truth without excluding Doe’s hearsay statement to M.B., and (3) failing to instruct sua sponte on the lesser included offense of attempted sexual penetration in counts 2 through 5. Defendants also claim their respective 87 and 75 year-to-life sentences constituted cruel and/or unusual punishment. We reject these claims and affirm the judgments in all respects.

II. FACTUAL BACKGROUND

A. *Prosecution Evidence*

1. Overview

J.L. and E.L. are both hearing impaired, but neither is completely deaf. They met at the California School for the Deaf in Riverside where they received their high school diplomas; J.L. graduated in 1995 and E.L. in 1996. They married in 2000 and had three children, including twin boys. Jane Doe, their youngest child, was born in May 2007. E.L. did not work outside the home. The family lived in Riverside.

Around mid-March 2012, E.L. moved out of the family apartment, took the children with her, and moved into her aunt M.B.’s apartment for two or three weeks. E.L.’s mother, Myra, also lived in the apartment. Myra recalled that J.L. came to the apartment once while E.L. and the children were staying there.

On March 24, M.B. noticed Doe had bruises on her face and asked Doe how she got the bruises. Doe initially said her brothers had caused the bruises, but the next day she told M.B. that J.L. had caused them. On March 25, M.B. called the police and reported the bruises. Later that day, Detective Roberta Hopewell of the sexual assault

and child abuse unit at the Riverside County Sheriff's Department, went to M.B.'s apartment and began investigating the case.

2. E.L.'s Police Interview (Before E.L.'s Jury)

On March 25, E.L. agreed to be interviewed and spoke to Detective Hopewell at the police station with the aid of a sign language interpreter. The interview was audio and videotaped, and a videotape of the interview was played for E.L.'s jury. The record does not include a transcript or recording of the interview.

3. J.L.'s Interview Statements (Before J.L.'s Jury)

After she initially interviewed E.L., Detective Hopewell interviewed J.L. at the police station. After waiving his *Miranda*³ rights, J.L. confessed: "I've done terrible things when she was a baby and up to when she was about four years old" When asked specifically what he had done, J.L. responded, "molestations." He estimated he put his finger inside Doe's vagina "[m]aybe once a month . . . maybe less than that," beginning when Doe was six months old and continuing until she was four and one-half years old. On one occasion he tried to push his penis inside Doe's vagina, but he "couldn't get it in" because her vagina was "[t]oo small." He stopped molesting Doe because he was "ashamed for her and she said she didn't like it anymore."

J.L. said E.L. helped him molest Doe "probably more than five times," including on one occasion when E.L. held Doe's hands down and put her hand over Doe's mouth when J.L. attempted to insert his penis into Doe's vagina. On the other occasions, E.L.'s

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

main role was “just to help” Doe to “not worry about it.” J.L. once told E.L.

“everything” and E.L. agreed to allow him to molest Doe, saying it was “okay.”

When Detective Hopewell asked J.L. whether he had ever told Doe not to tell anyone about the molestations, J.L. replied: “Um [I] kinda did but I tried to promise her that I won’t do it again but I needed help.” J.L. denied threatening Doe in any way, saying he did not “like threatening things.”

Shortly before J.L. was interviewed, Riverside Police Officer Kyle Wilder was waiting with him outside M.B.’s apartment when Myra approached. J.L. asked Myra “what was going on,” and Myra told him: “You know what’s going on . . . you touched your daughter.”⁴ J.L. responded: “I guess it’s out,” “I had touched my daughter, but that was years ago,” and “I stopped because I didn’t want her growing up like that.”

4. Doe’s Interview Statements and Trial Testimony (Before Both Juries)

(a) *Doe’s Forensic Interview*

On March 26, 2012, forensic interviewer Denise Moore interviewed Doe, and a DVD of the interview was played for the juries. Doe was four years 10 months old at the time of the interview.

During the interview, Doe said J.L. would place his penis in her mouth, place his fingers in her vagina, and once tried to insert his penis into her vagina. The incidents occurred in either her brothers’ room or her parents’ room. The digital penetrations made

⁴ At trial, Reeves did not recall saying this to J.L. outside the apartment, but did recall saying it to J.L. on the telephone.

her cry, and the oral copulations made her feel “really bad.” J.L. told her not to tell anyone about the molestations because he would get angry, and when he gets angry he “throws the pillow at me.” On one occasion, E.L. held Doe’s arms down and forced her to lie on her back on her parents’ bed while J.L. attempted to insert his penis into her vagina. Doe explained that E.L. held her still so she could not move because E.L. did not want her to get off the bed while J.L. was “putting [his] pee pee in.” Doe was crying when this occurred.

(b) *Doe’s Trial Testimony*

Doe was six years old at the time of trial in November 2013. She was found competent to testify. When asked what had happened to her when she lived with her parents, she said it was “hard to say it out loud.” She said “the cops took [her] family away” because “they hurt [her].”

When asked about “one thing that your family did to hurt you,” Doe said, “[m]y mom put my hands down.” She explained that this happened when she was four years old and while she was lying on her back in her parents’ room. When asked whether anybody else did anything while her mother was holding her hands down, she said her father was touching her private part. When asked whether there were “other bad touchings,” she said her father touched her private part with his private part “about nine times” when she was four years old. The incidents occurred in either her parents’ room or her brothers’ room.

5. Medical Evidence (Before Both Juries)

Immediately after Doe's March 26 forensic interview, Dr. Susan Horowitz of the Riverside County Regional Medical Center's Child Abuse Unit conducted a medical examination of Doe. Dr. Horowitz observed three "little abrasions" around Doe's clitoris. The bottom edge of Doe's hymenal tissue was more of an angular V-shape than usual, suggesting there was initially a small tear that was in the healing stage.

Four months later, Dr. Horowitz again examined Doe and observed that her clitoral abrasions were gone and her hymen had more of a regular U-shape, indicating she had likely sustained a tear before the first examination. Dr. Horowitz concluded that her findings were consistent with digital penetration of the vagina and attempted penile penetration of the vagina.

6. J.L.'s Jailhouse Calls (Before Both Juries)

In late March and early April 2012, while J.L. was in local custody, he made two recorded calls to C. and K. Griggs. C. is J.L.'s mother, and K. is married to C. During the first call, J.L. told C. and K. that he had been arrested for molesting Doe. During the second call, K. told J.L. he was "really disappointed" that J.L. had "take[n] advantage of [Doe] like that," and in response J.L. said he was "very, very sorry," he "was just sick in [his] mind," and he "really need[ed] help."

When J.L. forced E.L. to hold Doe's hands down, J.L. was trying to put his penis in Doe's vagina. J.L. tried to put his penis in Doe's vagina a total of eight times over the course of two days. Doe was four years old when these incidents occurred.

B. Defense Evidence (E.L.'s Testimony Before Her Jury)

E.L. testified before her own jury that she agreed to be interviewed by the police because she wanted to tell them what J.L. had done to Doe. She claimed that on March 12, 2012, J.L. “forced” her to hold Doe’s arms down by threatening to kill her with a knife. After the incident, she moved out of the family apartment and took the children with her. On cross-examination, E.L. admitted she knew that J.L. had been molesting Doe since Doe was six months old. He would rub his penis on Doe’s vagina and put his fingers into her vagina. J.L. did not testify in his own defense.

III. DISCUSSION

A. The Trial Court Properly Admitted Doe’s Extrajudicial Statement to M.B. Under the Fresh-complaint Doctrine, and Any Error Was Harmless

Over E.L.’s hearsay objection, the court allowed E.L.’s aunt, M.B., to testify that she noticed bruises in the form of a handprint on Doe’s face and, when she asked Doe how she got the bruises, Doe initially said her brothers caused them, but eventually said J.L. caused them. This prompted M.B. to call the police, which led to the discovery of the molestations.

The court admitted Doe’s extrajudicial statements to M.B. pursuant to the “fresh-complaint” doctrine—that is, not for the truth of Doe’s statement that J.L. caused the bruises on her face, but solely for the nonhearsay purpose of showing that “a complaint [was] made” by Doe. At the request of E.L.’s counsel, the court gave a limiting instruction, telling the juries that Doe’s statement was not to be considered for its truth

but only to show that “a complaint [was] made” by Doe. The court repeated the limiting instruction to both juries before the close of evidence.⁵

Defendants claim Doe’s extrajudicial statement was erroneously admitted under the fresh-complaint doctrine, because the doctrine is limited to complaints of sexual abuse, and Doe was not reporting sexual abuse; she was reporting that J.L. bruised her face, and the bruises were never linked to any sexual abuse by defendants. Defendants also claim the statement was unduly prejudicial and therefore should have been excluded under Evidence Code section 352.

We conclude Doe’s statement to M.B. was properly admitted under the fresh-complaint doctrine, because it was critical in explaining how defendants’ sexual abuse of Doe finally came to light and was discovered by the police. We also conclude the statement was not unduly prejudicial. (Evid. Code, § 352.) Alternatively, any error in admitting the statement was harmless.

1. Doe’s Statement Was Properly Admitted Under the Fresh-complaint Doctrine

Under the fresh-complaint doctrine: “[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim’s disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the

⁵ The court repeated the limiting instruction a third time in instructing J.L.’s jury following the close of evidence, but did not repeat it a third time in so instructing E.L.’s jury.

trier of fact's determination as to whether the offense occurred.” (*People v. Brown* (1994) 8 Cal.4th 746, 749-750 (*Brown*), italics added.)

As explained in *Brown*: “The fresh-complaint doctrine originated with the 13th-century rule of ‘hue and cry,’ which required victims of rape and other violent crimes to alert the community immediately following the commission of the crime. Under this ancient rule, a victim’s extrajudicial ‘complaint’ was a necessary element of, and therefore admissible as part of, the prosecution’s case-in-chief. [Citations.]” (*Brown, supra*, 8 Cal.4th at p. 754.) Following the 18th-century development of the hearsay rule, the doctrine supported the admission of an extrajudicial complaint by the victim of an alleged sexual offense, not to prove that the offense occurred, but to show that the victim promptly made a complaint. (*Id.* at pp. 754-755.)

Under case law preceding *Brown*, the extrajudicial complaint had to be “fresh” or made within a short time following the sexual assault in order to be admissible under the fresh-complaint doctrine. (*Brown, supra*, 8 Cal.4th at p. 756.) But in *Brown*, the court recognized that the historic rationale for the doctrine—that it was “natural” for a victim of sexual abuse to promptly disclose the abuse to others—had been largely discredited. (*Id.* at p. 759.) But it did not follow “from this recognition” that evidence of a victim’s extrajudicial disclosure of an alleged sexual offense, and the circumstances surrounding the disclosure, should always be excluded from the jury’s consideration. (*Ibid.*)

As currently applied in California, the fresh-complaint doctrine is governed solely by the rules of evidence. (*Brown, supra*, 8 Cal.4th at pp. 762-763.) That is, evidence of

an extrajudicial complaint or disclosure of sexual abuse is admissible “for nonhearsay purposes under generally applicable evidentiary principles,” provided the evidence is relevant to an issue in the case and is not subject to exclusion under Evidence Code section 352. (*Brown, supra*, at p. 763.) *Brown* emphasized that “[t]he specific relevance of the extrajudicial-complaint evidence . . . must be shown in every case.” (*Ibid.*)

Broadly speaking, we review a trial court’s rulings on the admissibility of evidence for an abuse of discretion, including relevancy determinations. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Here, the court implicitly and reasonably concluded that Doe’s statement to M.B. was relevant to the credibility of Doe’s interview statements and her trial testimony that defendants molested her.

As defendants point out, Doe did not complain to M.B. that J.L. had sexually abused her. She only told M.B. that J.L. had caused the bruises on her face, and the bruises were never linked to any sexual abuse by defendants. But Doe’s statement that J.L. caused the bruises on her face was an important link in a chain of evidence which explained how defendants’ sexual abuse of Doe was finally revealed, and the circumstances of Doe’s disclosure were relevant to whether Doe’s subsequent reports of the abuse were credible. M.B. testified that she called police after Doe told her J.L. had caused the bruises; the police then interviewed E.L., J.L., and Doe, and each of them disclosed the sexual abuse. As *Brown* recognized: “[S]o long as the evidence [of the extrajudicial statement] is admitted for the *nonhearsay* purpose of establishing the circumstances under which the victim reported the offense to others, such evidence

ordinarily would be relevant *under generally applicable rules of evidence*, and therefore admissible, so long as its probative value outweighs its prejudicial effect. (Evid. Code, § 352.)” (*Brown, supra*, 8 Cal.4th at pp. 759-760.)

2. Evidence Code Section 352

Defendants have forfeited their claim that Doe’s statement was unduly prejudicial and therefore should have been excluded under Evidence Code section 352.⁶ They did not object to the statement on the ground its probative value was substantially outweighed by the risk it would create undue prejudice; nor did they otherwise object to the statement on Evidence Code section 352 grounds. (*People v. Anderson* (1990) 52 Cal.3d 453, 477.) In any event, the claim lacks merit. The probative value of Doe’s statement to M.B. in explaining how defendants’ sexual abuse of Doe was discovered outweighed any risk of undue prejudice the statement posed for either defendant. It was important for the prosecution to explain how the sexual abuse of Doe finally came to light after four years. Otherwise, the juries may have questioned the credibility of Doe’s interview statements and trial testimony, based on the prosecution’s failure to explain how the sexual abuse was discovered.

Further, any risk of undue prejudice was slight to nonexistent. “‘Prejudice’ in the context of Evidence Code section 352 is not synonymous with ‘damaging’: it refers to

⁶ Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome.” (*People v. Booker* (2011) 51 Cal.4th 141, 188.) To be sure, Doe’s statement indicated that J.L. bruised Doe’s face, and the bruises were never linked to any sexual abuse of Doe by defendants. But the juries were repeatedly instructed not to consider Doe’s statement for its truth, or whether J.L. caused the bruises, but only for determining whether Doe made “a complaint.” The limiting instructions minimized any risk of undue prejudice to defendants. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 [jurors are presumed to have understood and followed instructions].) And, in light of the far more egregious evidence of sexual abuse, the juries were unlikely to punish either defendant simply because J.L. may have bruised Doe’s face.

3. Harmless Error

Lastly, any error in admitting Doe’s statement to M.B. was not prejudicial to either defendant. In view of Doe’s interview statements and trial testimony, defendants’ confessions, and the medical evidence, it is not reasonably probable either defendant would have realized a more favorable result if Doe’s statement to M.B. had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Manning* (2008) 165 Cal.App.4th 870, 880 [Fourth Dist., Div. Two] [applying reasonable probability standard of *Watson* to any error in failing to give a limiting instruction on fresh-complaint evidence]; *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526 [applying reasonable probability standard to erroneous admission of fresh-complaint hearsay evidence for hearsay purposes].)

B. Any Error in Failing to Modify CALCRIM No. 318 Was Also Harmless

Defendants next claim the trial court erroneously instructed the jury pursuant to CALCRIM No. 318 that it could use evidence of a witness's pretrial statements as evidence that the information in the statements was true—without modifying the instruction *sua sponte* to accept Doe's hearsay statement to M.B. that J.L. caused the bruises on Doe's face.⁷ Thus, defendants argue, the jury was allowed to use Doe's statement to M.B. as evidence that J.L. caused the bruises on Doe's face, and this requires reversal of the judgments.

We first note that defendants did not object to CALCRIM No. 318 in the trial court. Nor did they ask the court to modify the instruction to exclude Doe's hearsay statement to M.B. But defendants alternatively claim their trial counsel were ineffective in failing to ask the court to modify the instruction. It is unnecessary to determine whether the court had a duty to *modify* CALCRIM No. 318 *sua sponte*,⁸ or whether trial counsel were ineffective in failing to request the modification. For the reasons discussed, any error *in admitting* Doe's hearsay statement to M.B. that J.L. caused the bruises on Doe's face was not prejudicial to either defendant. For the same reasons, any error *in*

⁷ CALCRIM No. 318 (Prior Statements as Evidence) told the jury: "You have heard evidence of statements that a witness made before trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; [¶] AND [¶] 2. As evidence that the information in those earlier statements is true."

⁸ A trial court does not have a duty to give CALCRIM NO. 318 *sua sponte*. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1026 [former CALJIC No. 2.13].)

failing to modify CALCRIM No. 318 to exclude Doe’s statement to M.B. was also harmless.

C. Insufficient Evidence Supported Instructions on the Lesser Included Offense of Attempted Sexual Penetration in Counts 2 Through 5, and Any Error Was Harmless

“We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, “that is, evidence that a reasonable jury could find persuasive” [citation], which, if accepted, “would absolve [the] defendant from guilt of the greater offense” [citation] *but not the lesser*’ [citation].” (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.)

As noted, the juries found defendants guilty as charged in counts 2 through 5 of sexual penetration or oral copulation of a child under the age of 10 years. (§ 288.7, subd. (b).) Defendants claim the trial court prejudicially erred in failing to instruct the juries, sua sponte, on *attempted sexual penetration* as lesser included offenses in counts 2 through 5.⁹ The People argue there was no error because there was insufficient evidence that defendants attempted, but did not complete, the charged offenses in counts 2 through 5. We agree with the People.

The attempted sexual penetration or oral copulation of a child under the age of 10 years by a person 18 years of age or older is a lesser included offense to the completed

⁹ E.L.’s jury was instructed on simple assault and battery as lesser included offenses in counts 2 through 5. J.L.’s jury was not instructed on any lesser included offenses in counts 2 through 5.

offense. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 157.) The attempted and completed offenses each require “the specific intent to gain sexual arousal or gratification or to inflict abuse on the victim.” (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538 [completed offense of forcible sexual penetration, in violation of § 289, is a specific crime]; *People v. Ngo, supra*, at p. 157 [attempt to commit nonforcible sexual penetration, in violation of § 288.7, subd. (b), is a specific intent crime].) The attempted offense is distinguished from the completed offense, “only by the failure to complete the actus reus” of sexual penetration or oral copulation. (*People v. Ngo, supra*, at p. 157.)

For purposes of section 288.7, subdivision (b), “sexual penetration” is defined in section 289: “‘Sexual penetration’ is 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 unknown object.*” (§ 289, subd. (k)(1), italics added.) “‘Foreign object, substance, instrument, or device’ shall include any part of the body, *except a sexual organ.*” (§ 289, subd. (k)(2), italics added.) Thus, for purposes of sections 288.7 and 289, “sexual penetration” does not include the penetration of a genital or anal opening by a penis. The juries were instructed accordingly.

In arguing the evidence supported instructions on the lesser included offense of *attempted sexual penetration* in counts 2 through 5, defendants point to the evidence that J.L. attempted to place his penis into E.L.’s vagina on multiple occasions. But as the

People argue, the evidence that J.L. attempted, but failed, to penetrate E.L. with his penis on multiple occasions had nothing to do with counts 2 through 5.

In her closing argument to J.L.'s jury, the prosecutor made it clear that count 1, the forcible sexual penetration charge, was based on the single incident in which E.L. held Doe's arms down while J.L. attempted to penetrate Doe's vagina with his penis. The prosecutor distinguished counts 2 through 5 as based on J.L.'s acts of digitally penetrating or orally copulating Doe on at least four occasions. Finally, the forcible lewd act charges in counts 6 and 7 were based on at least two incidents in which J.L. attempted to place his penis inside Doe's vagina, *other than* the incident in which E.L. held Doe's arms down.

In her closing argument to E.L.'s jury, the prosecutor said count 1 was based on the last incident Doe testified to, in which E.L. held Doe's hands above her head, and counts 2 through 5 were based on E.L.'s acts of aiding and abetting J.L. in digitally penetrating or orally copulating Doe, *without force*, that is, when E.L. was not holding Doe's hands. E.L.'s jury was also instructed that it had to unanimously agree on which acts violated each charge.

In a noncapital case, any error in failing to instruct on a lesser included offense "is, at most, an error of California law alone, and is thus subject only to state standards of reversibility." (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) Reversal is not required unless "it appears reasonably probable that a result more favorable to the

defendant would have been reached absent the error.” (*People v. Lee* (1999) 20 Cal.4th 47, 62, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)

There was no reasonable probability that either defendant would have realized a more favorable result, or been convicted of the lesser included offenses of attempted oral copulation or sexual penetration in counts 2 through 5, had the juries been instructed on the lesser included offenses. Indeed, there was *no evidence* that J.L. tried but failed to digitally penetrate or orally copulate Doe. There was only evidence that J.L., aided and abetted by E.L., committed these completed crimes on at least four occasions. Thus, it is not reasonably probable that defendants would have been found guilty of the lesser included offenses of attempted sexual penetration in counts 2 through 5, had the juries been instructed on the lesser offenses. (Cf. *People v. Ngo, supra*, 225 Cal.App.4th at pp. 158-159 [failure to instruct on attempted sexual penetration prejudicial because victim made contradictory statements whether defendant digitally penetrated her].)

D. No Cruel or Unusual Punishment

Lastly, J.L. claims his 87 year-to-life sentence constitutes cruel and/or unusual punishment under the California and federal Constitutions because he cannot complete the sentence in his lifetime. E.L., who was sentenced to 75 years to life, joins this claim without additional argument. We conclude the claim is without merit as applied to either defendant.

1. Forfeiture

Neither defendant raised a claim of cruel and/or unusual punishment at or before sentencing. Some courts have held that such claim is forfeited on appeal unless raised below. (E.g., *People v. Em* (2009) 171 Cal.App.4th 964, 971, fn. 5; *People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

There are good reasons to apply the forfeiture rule: Often, if not always, the claim turns on the specific facts of the case, including the particular characteristics of the offender and the particular circumstances of the offense. (See *People v. DeJesus, supra*, at p. 27.)

And, in reviewing the claim on appeal, we are required to view any conflicting or disputed evidence in the light most favorable to the judgment. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) Thus, requiring a claim of cruel and/or unusual punishment to be raised in the trial court, as a condition of appellate review, decreases the risk of error and facilitates appellate review. (See *People v. Scott* (1994) 9 Cal.4th 331, 348-356 [waiver or forfeiture rule applies to trial court's discretionary sentencing choices].) Nevertheless, here we exercise our discretion to address the claims on their merits, because defendants assert that their substantial rights were violated (*People v. Espiritu* (2011) 199 Cal.App.4th 718, 725; § 1259) and in order to forestall a claim that defendants' trial counsel were ineffective in failing to raise the claim below (*People v. Norman, supra*, at p. 230).

2. The Claims Lack Merit

The Eighth Amendment of the federal Constitution, which prohibits cruel *and* unusual punishment, is violated when the sentence is ““grossly disproportionate to the severity of the crime.”” (*Ewing v. California* (2003) 538 U.S. 11, 21.) The California Constitution bars cruel *or* unusual punishment (Cal. Const., art. I, § 17) and is violated if the sentence “is so disproportionate to the crime . . . that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) “The main technique of analysis [in determining whether a sentence is disproportionate] under California law is to consider the nature of the offense and of the offender.” (*People v. Martinez, supra*, 76 Cal.App.4th at p. 494, citing *People v. Dillon* (1983) 34 Cal.3d 441, 479.) “The nature of the offense is viewed both in the abstract and in the totality of 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.” (*People v. Martinez, supra*, at p. 494; *People v. Dillon, supra*, at p. 479.) The proportionality analysis is largely similar under the federal Constitution. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

In support of their claim that their sentences constituted cruel and/or unusual punishment, defendants rely solely on dissenting and concurring opinions by the late California Supreme Court Justice Stanley Mosk, who opined that a sentence that cannot

be completed within the defendant's lifetime "serves no rational legislative purpose" (*People v. Deloza* (1998) 18 Cal.4th 585, 600-602 (conc. opn. of Mosk, J.)), "makes a mockery of the law" (*People v. Hicks* (1993) 6 Cal.4th 784, 797 (dis. opn. of Mosk, J.)), and violates the state and federal constitutional bans on cruel and/or unusual punishment. Neither the California Supreme Court nor the United States Supreme Court have adopted this view, however, and it is not binding on this court. (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383 ["no opinion has value as a precedent on points as to which there is no agreement of a majority of the court."].)

Further, "[f]ixing 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." (*People v. Martinez, supra*, 76 Cal.App.4th at p. 494, citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 998 (conc. opn. of Kennedy, J.)) "Because it is the Legislature which determines the appropriate penalty for criminal offenses, [a] defendant must overcome a 'considerable burden' in convincing us his [or her] sentence was disproportionate to his [or her] level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) Defendants have not overcome this burden; they do not claim their sentences were disproportionate to the particular crimes they committed or to their individual levels of culpability. "[W]e need not consider on appeal mere contentions of error unaccompanied by legal argument. [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 884.)

IV. DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
Acting P.J.

We concur:

MILLER
J.

CODRINGTON
J.