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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. RITCHIE QUIROZ DUQUE, Defendant and Appellant.	E063524 (Super.Ct.No. RIF1312228) OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, 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 with directions.

Wallin & Klarich and Stephen D. Klarich for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ritchie Quiroz Duque is what has been called a resident child molester. He repeatedly sodomized his live-in girlfriend's little sister when she was in third grade;

on occasion, he also had her orally copulate him. The evidence against him included jailhouse phone calls between him and his girlfriend in which he made implicit or qualified admissions.

After a jury trial, defendant was found guilty of five counts of sodomy with a child aged 10 or younger (Pen. Code, § 288.7, subd. (a)) and two counts of oral copulation with a child aged 10 or younger (Pen. Code, § 288.7, subd. (b)). He was sentenced to a total of 155 years to life in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

In this appeal, defendant contends:

1. Defendant's statements in the jailhouse phone calls were inadmissible under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

2. Portions of the jailhouse phone calls should have been excluded as more prejudicial than probative.

3. The trial court erred by giving two different instructions regarding the testimony of a single witness.

4. The trial court erred by imposing consecutive sentences based in part on the victim's age.

5. The trial court erred by imposing consecutive sentences on both counts of oral copulation because there was insufficient evidence that they were committed on separate occasions.

6. The total sentence — effectively, defendant claims, life without the possibility of parole — constitutes cruel and unusual punishment.

7. The trial court violated ex post facto principles in calculating the restitution fines.

The People concede that the trial court erred in calculating the restitution fines. We will modify the judgment accordingly. Otherwise, we find no error. Hence, we will affirm the judgment as modified.

I

FACTUAL BACKGROUND

A. *Family Background*.

M.M., Jane Doe,[1] and R.H. were sisters. Around 2006 or 2007 — when M.M. was 15, Doe was three, and R.H. was two — their mother went to prison. M.M. took charge of raising the younger girls.

Thereafter, M.M. started dating defendant. In 2009, M.M. and the girls moved in with defendant and his mother in Riverside. In August 2012, defendant, M.M., and the girls moved into a house that M.M. bought on Fetlock Way, also in Riverside. Throughout this time, M.M. was the mother figure and defendant was the father figure for the girls.

In September 2013, M.M.'s mother got out of prison. Doe and R.H. moved back in with her. However, they continued to visit M.M. and defendant at the house on Fetlock on weekends.

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[1] The trial court ordered that the victim be identified by this fictitious name. (See Pen. Code, § 293.5.)

Also in September 2013, M.M. gave birth to defendant's son.

B. *Doe's Initial Disclosure*.

Doe's mother began to suspect "[t]hat something [sexual] was going on" with Doe. Doe told her that she was leaking urine. Doe also said "her butt hurt." Whenever Doe came back from visiting M.M., she seemed "very angry and upset."

Doe's mother told her made-up stories, the moral of which was that children who are being molested should tell someone. In one of these stories, a girl was being molested by her older sister's boyfriend; she was afraid to tell because she was afraid that her older sister either would get hurt or would get mad at her.

On October 24, 2013, Doe's mother, Doe, and R.H. went to a Walmart, where they saw posters about missing children. They talked about how children can go missing. When they got home, Doe went directly to her room, which was unusual for her. Her mother followed and found her sitting on the floor, crying. Doe asked her mother to promise that defendant would not hurt M.M. Doe then said that defendant was "putting his thing in her butt."

Doe's mother took her to a hospital; hospital personnel called the police. Doe's mother "lured" defendant to the hospital by telling him falsely that Doe had cut herself. The police arrested him at the hospital.

At the time, Doe was nine years old and in fourth grade. Defendant had just turned 22.

As of the date of Doe's disclosure, defendant and M.M. had been fighting for about a week; M.M. had gone to stay in a hotel. However, M.M. had announced that she was going back to defendant that night. Doe did not like this.

On October 25, 2013, a forensic pediatrician examined Doe. She testified that Doe's anus was normal, but that was common in children who have been sodomized, because the anus is designed to stretch, and because it heals rapidly, especially in children.

C. *Doe's Police Interview.*

Also on October 25, 2013, a police officer interviewed Doe.

Doe was "pretty sure" the molestation started when she was in third grade and living with defendant's parents. However, after they moved to M.M.'s house, "he started doing it . . . every chance he got when [they] were alone." She said "[i]t happened . . . every time that I went to spend the night with my sister."

Defendant would put his penis in her butt. He had done this more than five times. She "couldn't get away" because he was on top of her. He would also make Doe suck his penis. He had done this more than once, but less than five times. He did these things in R.H.'s room. M.M. and R.H. would be downstairs. The most recent molestation had been two weekends earlier. Doe had tried to tell R.H., but R.H. did not believe her.

Doe said that defendant's penis was "pink on the top" but the rest was dark. He had showed her a picture of his penis that was on his phone. The police found a photo of a penis on defendant's phone. At trial, M.M. confirmed that the tip of defendant's penis was pink and the shaft was a darker brown.

D. *Doe's Forensic Interview.*

On October 27, 2013, a certified forensic interviewer interviewed Doe again.

Doe said that defendant would have her take her pants off and bend over the bed. He would spit on her butt "to make it slippery." Then he would pull out his thing and put it in her butt. Once or twice, defendant made Doe suck his penis.

The molestation had happened more than once. It may have happened at defendant's mother's house when they used to live there, but Doe did not specifically recall. Otherwise, it always happened at M.M.'s house, in R.H.'s room.

Doe described three separate instances of sodomy — once when defendant asked her to get him a black shirt; once when defendant said he was going to take a shower, then called her upstairs, supposedly to bring him some water; and once when they were in the game room and defendant said, "I want some of that butthole." The most recent instance had been two weekends earlier.

Defendant told Doe not to tell anybody. She was scared of telling because she thought defendant would hurt M.M. Sometimes defendant hit M.M.; Doe saw bruises on her arms. Doe did try to tell R.H., but R.H. did not believe her.

E. *Doe's Testimony at Trial.*

Doe testified that her previous statements to the police and in the forensic interview were true.

The molestation started when she was living in M.M.'s house. She was in second or third grade. Defendant put his thing in her butt more than once. It continued to happen on weekend visits to M.M.'s house — not every time, but it happened a lot. It

happened once in Doe's bedroom, but usually it happened in R.H.'s bedroom. M.M. and R.H. would be downstairs watching television. Defendant also made her suck his penis a couple of times. The last time it happened, she was around nine.

Doe admitted knowing that, if somebody touched her inappropriately, she could tell a doctor or the police. One time, she saw a doctor about pain in her private parts, but she did not tell him about the molestation. She also never mentioned the molestation in her diary.

Doe tried to tell R.H. once, but R.H. did not believe her. Doe admitted that, at that time, she was making a lot of stuff up — "like, playful lies."

Doe was scared of defendant. She had seen him be violent to M.M. more than once. She admitted that she did not like defendant and she did not want M.M. to be with him. She also admitted that *Law & Order: SVU* was one of her favorite television shows.

F. *M.M.'s Statements to the Police.*

M.M. told the police that there had been several "red flag[s]." First, Doe and R.H. normally played together downstairs while defendant was upstairs. On occasion, however, when M.M. was looking for Doe, she would realize that Doe was upstairs. She would call Doe, but Doe would not come down. Second, defendant would call down to the girls to bring him water. However, Doe did not want to comply. Third, Doe stopped wanting to visit M.M. on weekends.

G. *Jailhouse Phone Calls.*

After defendant was arrested, he made a number of phone calls to M.M. from jail. Four of these phone calls were played at trial.

In the phone calls, M.M. was hostile and accusatory. In response, defendant repeatedly denied molesting Doe. He also complained that he could not speak freely. At times, other people's voices could be heard in the background.

However, defendant also made a number of statements that could be viewed as admissions, as follows.

Defendant said, "I understand the situation that happened, you know, is wrong." He also said, "There's things that are not right and — and some things that I will admit to." He admitted that he had "messed up." He said, "I made the biggest mistake in my life, all right, one that I will regret for the rest of my life." He added, "I understand it was so wrong." "I'm not denying to you."

When M.M. asked, "What about [our baby]? Were you worried about him when we were downstairs or you were upstairs?," defendant replied, "It never happened with the baby. It never happened when the baby was there."

There was also this exchange:

"[M.M.]: How do I know you won't do it to [our baby]?

"[DEFENDANT]: Shit, 'cuz there's no way.

"[M.M.]: There's no way? Well why [Doe]?

"[DEFENDANT]: I don't know how I got to that situation."

And there was this exchange:

"[M.M.]: Ritchie, rape is when they don't want it. Do you think she wanted that?

"[DEFENDANT]: Well, I mean I didn't did it on force . . . ."

After M.M. asked defendant repeatedly to tell her how many times "this" happened, defendant said, "There was only one time it occurred."

II

ISSUES REGARDING THE JAILHOUSE PHONE CALLS

A. *Violation of* Miranda.

Defendant contends that his statements in the jailhouse phone calls were inadmissible under *Miranda*.

1. *Additional procedural background*.

Defendant filed a motion in limine to suppress the jailhouse phone calls. He argued that they violated *Miranda* because he was in custody at the time, because he had already asked to speak to a lawyer, and because M.M. was acting as a police agent.

The trial court denied the motion. It explained, in part: "The officer was not . . . trying to recruit an agent because of [defendant's] invocation . . . of his rights. [¶] It is clear that Mr. Duque was the initiator in the conversations. He called [M.M.] voluntarily . . . . [¶] . . . The defendant knew the phone calls were being tape-recorded, and he voluntarily made these phone calls to her."

2. *Discussion*.

"The Fifth Amendment provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' [Citations.] To safeguard a suspect's Fifth Amendment privilege against self-incrimination from the 'inherently compelling pressures' of custodial interrogation [citation], the high court adopted a set of prophylactic measures requiring law enforcement officers to advise an accused of his

right to remain silent and to have counsel present prior to any custodial interrogation [citation]. '[I]f at any point in the interview [a defendant] invokes the right to remain silent or the right to counsel, "the interrogation must cease."' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 339.) "A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in a criminal case. [Citation.]" (*Ibid.*)

"In reviewing the trial court's ruling on a claimed *Miranda* violation, '"we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from [those facts] whether the challenged statement was illegally obtained."' [Citation.]" (*People v. Elizalde* (2015) 61 Cal.4th 523, 530.)

Illinois v. Perkins (1990) 496 U.S. 292 requires us to reject defendant's contention. In *Perkins*, the defendant was in jail for battery, but the police suspected him of an unrelated murder. They had him placed in a cell with an undercover agent and a cooperative fellow inmate (*id.* at pp. 294-295), who "were instructed to engage [the defendant] in casual conversation and report anything he said about the . . . murder." (*Id.* at p. 295.) One of them asked the defendant if he had ever "done" anybody. The defendant "proceeded to describe at length the events of the . . . murder." (*Ibid.*) Needless to say, the defendant had not been given any *Miranda* warnings. (*Ibid.*)

The Supreme Court held: "We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent." (*Illinois v. Perkins*, *supra*, 496 U.S. at

p. 297.) "Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." (*Id*. at p. 296.) "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." (*Id*. at p. 297.) The court concluded that the defendant "spoke at his own peril." (*Id*. at p. 298.)

Pursuant to *Perkins*, the California Supreme Court has repeatedly held that *Miranda* does not require the suppression of a defendant's voluntary statements to a person who is surreptitiously assisting the police. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 284; *People v. Tate* (2010) 49 Cal.4th 635, 685-687; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 758-759 [defendant's father was not a police agent, but even if he was, defendant's statements to him while in custody and after requesting an attorney were admissible], disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

People v. Webb (1993) 6 Cal.4th 494 is almost on all fours with this case. There, unbeknownst to the defendant, while he was in jail, his girlfriend agreed with the police "to tape-record her telephone conversations with [the] defendant and to elicit information about the crimes." (*Id*. at p. 525.) Citing *Perkins*, the Supreme Court rejected the defendant's claim that this violated *Miranda*: "From defendant's perspective, he was talking with a friend and lover. . . . Under the circumstances, defendant's tape-recorded statements were completely voluntary and compulsion-free." (*Id*. at p. 526.)

Indeed, this case presents an even stronger argument for admissibility than did *Webb*. There, the defendant thought he could trust his girlfriend and did not know that she was recording their conversations; thus, he was tricked into making inculpatory statements to her. Here, by contrast, M.M. had taken sides with her little sister and was openly hostile to defendant. Moreover, defendant knew that their conversations were being recorded automatically. Thus, he knew that any inculpatory statements that he made could and very likely would be used against him.

B. *Unduly Prejudicial Portions of the Jailhouse Phone Calls*.

Defendant contends that portions of the jailhouse phone calls were more prejudicial than probative under Evidence Code section 352.

1. *Additional factual background*.

Defendant lists the following 12 portions of the jailhouse phone calls as unduly prejudicial:

1. "[M.M.]: Put yourself in [Doe's] fuckin' shoes."

2. "[M.M.]: And what if we would have had a daughter . . .

"[DEFENDANT]: . . . my . . .

"[M.M.]: . . . you would have done that to her?"

3. "[M.M.]: What a – what about [our baby]? What about him? Were you worried about him when we were downstairs or you were upstairs?"

4. "[M.M.]: . . . [T]he only person you better contact is God."

5. "[M.M.]: The second I walked into that fucking room, and seen her face, and heard her tell me the things she fucking tells me, you died."

6. “[M.M.]: You know how many fucking issues kids have that they — when they go through this shit? Did you think about her fucking future? You didn’t think about her at all. You thought about yourself and your fucking dick. You thought with your dick.”

7. “[M.M.]: You said it was one time. You admitted it was one time. And now you’re fucked.”

8. “[M.M.]: And I don’t want how you see things ’cause it’s all jail ta— fuckin’ talk and talk.”

9. “[M.M.]: . . . But there’s no defending yourself ’cuz there’s way [*sic*] that she would lie, or understand, or know that type — she don’t know that type of stuff.”

10. “[M.M.]: So she’s gonna know what it is for you to fucking put it in her butt. For . . .

“[DEFENDANT]: [M.M.] . . .

“[M.M.]: . . . for you to spit on her butt so it can go in? You think she’s gonna know that? Did she watch porn?

“[DEFENDANT]: [M.M.] . . .

“[M.M.]: How the fuck is she going to know?

“[DEFENDANT]: [M.M.] . . .

“[M.M.]: There’s no way she’s going to make it up . . . .”

11. “[M.M.]: [She] do[es]n’t even know how a fucking baby is made and you’re gonna tell she knows what it is to be fucking (unintelligible) through the butt?”

12. "[M.M.]: . . . I already know what a fucking liar and den[i]er you are."[2]

2. *Discussion*.

Under Evidence Code section 352, a trial court can exclude otherwise relevant evidence if it would "create substantial danger of undue prejudice . . . ."

Defendant argues that the admission of the cited statements violated Evidence Code section 352. His trial counsel forfeited this argument by failing to object on this ground at trial. (Evid. Code, § 353, subd. (a).) Defendant argues that the trial court has a sua sponte duty to exclude evidence under Evidence Code section 352; he cites cases stating that "the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value . . . ." (*People v. Green* (1980) 27 Cal.3d 1, 25, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 233-237 and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) However, this is true only if there has been an objection on this ground. (*Ibid*.)

Accordingly, defendant also argues that his trial counsel's failure to object constituted ineffective assistance. """'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine

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[2] We limit our consideration of this contention to these cited portions. (See Cal. Rules of Court, rule 8.204(a)(1)(C).)

confidence in the outcome. [Citations.]"'' [Citations.]" (*People v. Johnson* (2016) 62 Cal.4th 600, 653.)

The evidence, however, was not unduly prejudicial. M.M. argued that Doe, being a child, would not have been able to fabricate the details of a sex act. She also argued that defendant had admitted molesting Doe at least once. These were just matters of common sense; the prosecutor even brought them up in closing argument. They would have been clear to the jury, even if it had not heard them from M.M.

M.M. also castigated defendant for "think[ing] . . . with [his] dick" and lacking concern for Doe and for their baby. She added that he was a "liar and den[i]er." Again, however, these were obvious inferences from the evidence. Moreover, the jury knew that the police had told M.M. to try to get defendant to discuss the allegations against him. It would have understood that she was trying to provoke him.

Defendant argues that M.M.'s reference to "jail ta[lk]" implied that he had been arrested before. We disagree. When she was talking to him, he was in jail. The most reasonable interpretation — indeed, in our view, the *only* reasonable interpretation — was that she was accusing him of saying whatever he had to say to get out of jail; or, in short, again, she was accusing him of lying.

Defendant also argues that the phone calls were "unreliable," because he needed M.M.'s help to get bail and because he was in a cell with other inmates and did not feel free to talk. Both of these facts, however, were clear from the phone calls themselves. Defense counsel was free to argue to the jury that the phone calls were unreliable, and he did in fact do so.

M.M.'s statements were probative because they served to place defendant's inculpatory responses in context. Because they were not unduly prejudicial, defense counsel's failure to object did not fall below an objective standard of reasonableness. For the same reason, defendant cannot show that the failure to object was prejudicial.

III

INSTRUCTIONS ON THE TESTIMONY OF A SINGLE WITNESS

Defendant contends that the trial court erred by giving two different instructions regarding the jury's consideration of the testimony of a single witness.

A. *Additional Factual and Procedural Background*.

CALCRIM No. 301, as given in this case, provides: "The testimony of only one witness can prove any fact. Before you conclude the testimony of one witness proves a fact, you should carefully review all of the evidence."

CALCRIM No. 1190, also as given in this case, provides: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone."

The prosecution requested both CALCRIM No. 301 and CALCRIM No. 1190. During an instructions conference, there was this discussion:

"[THE COURT:] And then single witness testimony, we have two. We have 301, which is the generic, followed by 1190, which is sexual assault specific. I'll give both of those.

"[DEFENSE COUNSEL]: And I understand there is case law with regards to it is permissible for the Court to give both. I do object to giving both. It's duplicative and calls attention to the issue. It's unnecessary for the jury to do its job.

"THE COURT: The record will reflect [defense counsel]'s objection, and I will give both."

B. *Discussion*.

Defendant argues that the two instructions, taken together, incorrectly implied that the jury did not need to scrutinize the testimony of the complaining witness as closely as that of any other witness. As he concedes, however, the Supreme Court rejected essentially the identical contention in *People v. Gammage* (1992) 2 Cal.4th 693. He indicates that he is raising this contention "to ensure that it is properly preserved for later review if required." That is his privilege. However, *Gammage* requires us to reject it.

In *Gammage*, the trial court instructed the jury with both CALJIC No. 2.27 and No. 10.21 — the predecessors of CALCRIM No. 301 and No. 1190, respectively. (*People v. Gammage*, *supra*, 2 Cal.4th at pp. 696-697.) The Supreme Court stated, "Although the two instructions overlap to some extent, each has a different focus." (*Id*. at p. 700.) "Because of this difference in focus . . . , we disagree . . . that, in combination, the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference. The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other. . . . 'There was no singling out of the testimony of the prosecuting witness with a view of giving it undue prominence before the jury.' [Citation.] Nor do the instructions 'dilute[] the "beyond a reasonable doubt" standard.' [Citation.] The

instructions in combination are no less correct, and no less fair to both sides, than either is individually." (*Id*. at p. 701.)

We therefore conclude that the trial court here did not err by giving both instructions.

IV

SENTENCING ISSUES

A. *Additional Factual and Procedural Background*.

The probation report recommended consecutive sentencing on all counts.

At the sentencing hearing, defense counsel stated:

"I would object to the proposed sentence as described in the probation officer's report, which I believe is consistent with the law, as cruel and unusual punishment . . . .

"As to the sentencing, while 667.61 divests this Court of discretion for concurrent sentencing . . . , it is our position that the People have failed to prove that . . . counts . . . 6 and 7[] occurred on separate occasions, which would not be a consecutive sentence on those two."

The prosecutor argued that it was a reasonable inference that the two oral copulation counts were committed on different dates, and even if not, they were "separate instances," so the trial court should run those sentences consecutively.

The trial court proceeded to pronounce sentence, running all of the terms consecutively. Defense counsel then said, "I believe I misspoke. . . . I believe the Court does have jurisdiction . . . to impose concurrent sentences." The trial court replied: "Based upon the nature of the case, based on the tender age of the victim and the

relationship that she had with the defendant, I believe that consecutive sentences are warranted . . . ."

B. *Dual Use of the Victim's Age*.

Defendant contends that the trial court erred by imposing consecutive sentences based on the "tender age of the victim," because the age of the victim was an element of the offense.

Preliminarily, the People contend that defendant's trial counsel forfeited this contention by failing to raise it below.

"[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) This includes a complaint of erroneous use of an element of the offense as a sentencing factor. (*People v. de Soto* (1997) 54 Cal.App.4th 1, 8.) Here, after the trial court stated that it was imposing consecutive sentences based, in part, on the victim's "tender age," defense counsel did not object.

Defendant argues that he did not have an opportunity to object. In *People v. Scott*, *supra*, 9 Cal.4th 331, the Supreme Court observed, "there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision. This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*Id*. at p. 356.)

The trial court made it clear that it intended to sentence consecutively. It then further made it clear that it was doing so based, in part, on the victim's age. At that point, defense counsel had a meaningful opportunity to object. Although the trial court had started to pronounce judgment, it had not finished doing so. It did allow defense counsel to argue that it had discretion to sentence concurrently; it then rejected that argument. It is clear that, if defense counsel had stated a further objection that the trial court found convincing, it could and would have changed the sentence.

We therefore conclude that trial counsel forfeited defendant's present contention.

C. *Consecutive Sentences for Oral Copulation*.

Defendant contends that the trial court erred by sentencing him consecutively on both counts of oral copulation. He cites both Penal Code section 667.6 and 667.61.

Penal Code section 667.61 requires consecutive sentencing for specified sex crimes "if the crimes involve separate victims or involve the same victim on separate occasions . . . ." (Pen. Code, § 667.61, subd. (i).) However, the specified sex crimes do not include sodomy or oral copulation of a child aged 10 or younger. (*Id*., citing Pen. Code, § 667.61, subds. (c)(1)-(7) & (n)(1)-(6), in turn citing, *inter alia*, Pen. Code, §§ 286, subds. (c)(2) [sodomy by force or fear], (c)(3) [sodomy by threat of retaliation], & (d) [sodomy in concert by force, fear, or threat of retaliation], 288a, subds. (c)(2) [oral copulation by force or fear], (c)(3) [oral copulation by threat of retaliation], & (d) [oral copulation in concert by force, fear, threat of retaliation or where victim is incapacitated].) Thus, Penal Code section 667.61 did not apply here.

Similarly, Penal Code section 667.6 requires consecutive sentencing for specified sex crimes "if the crimes involve separate victims or involve the same victim on separate occasions . . . ." (Pen. Code, § 667.6, subd. (d).) Again, however, the specified sex crimes do not include sodomy or oral copulation of a child aged 10 or younger. (*Id*., citing Pen. Code, § 667.6, subd. (e), in turn citing, *inter alia*, Pen. Code, §§ 286, subds. (c)(2) [sodomy by force or fear], (c)(3) [sodomy by threat of retaliation], (d) [sodomy in concert by force, fear, or threat of retaliation], & (k) [sodomy by threat of arrest], 288a, subds. (c)(2) [oral copulation by force or fear], (c)(3) [oral copulation by threat of retaliation], (d) [oral copulation in concert by force, fear, threat of retaliation or where victim is incapacitated], & (k) [oral copulation by threat of arrest].) Thus, Penal Code section 667.6 also did not apply.

Because Penal Code sections 667 and 667.61 did not apply, the trial court was not *required* to sentence consecutively; however, it did have *discretion* to sentence consecutively. (Pen. Code, § 669, subd. (a).) Indeed, even if these sections did apply, and even if the two oral copulation counts were not committed on separate occasions, the trial court would *still* have *discretion* to sentence consecutively. (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 214.) Defendant has not shown any abuse of discretion.

Finally, even if Penal Code sections 667 and 667.61 did apply, there was sufficient evidence of oral copulation on two separate occasions. In the forensic interview, Doe said that, after oral copulation, defendant would sodomize her. She then clarified that sometimes after the oral copulation, "we would stop and we would be done but other times we wouldn't." Thus, there were at least two distinct occasions.

D. *Cruel and Unusual Punishment*.

Defendant contends that his aggregate sentence amounts to life without any realistic possibility of parole and therefore constitutes cruel and unusual punishment.

A juvenile offender cannot be sentenced to life without parole for any crime other than homicide. (*Graham v. Florida* (2010) 560 U.S. 48, 74; *People v. Caballero* (2012) 55 Cal.4th 262, 267-268.) For an adult offender, however, there is no such per se bar. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 396-401, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.)

"[A]ppellate courts have held that lengthy sentences for multiple sex crimes do not constitute cruel or unusual punishment." (*People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531.) Recently, *People v. Reyes* (2016) 246 Cal.App.4th 62 held that a sentence of life without the possibility of parole for two sexual offenses, involving a single victim in a single incident, was not cruel and unusual punishment under either the federal or state constitution. (*Id*. at pp. 82-90.) It relied on three key facts: (1) The victim was 14 years old; (2) the defendant's entry into the victim's apartment constituted residential burglary; and (3) the sexual offenses involved force (which consisted of holding the victim's arms, *id*. at pp. 69-70), although the court conceded that the defendant "did not use violence or physically injure" the victim. (*Id*. at pp. 85-86, 88-89.)

Here, defendant's conduct was equally blameworthy, if not more so. His victim was much younger — indeed, prepubescent. He lived with the victim and was a surrogate father to her. He committed more offenses, over a longer period of time. After

the family moved to the house on Fetlock, he committed sexual offenses "every chance he got"; basically, he forced the victim to live in constant sexual subjection to him.

In enacting Penal Code section 288.7, the Legislature determined that certain sex acts with a child aged 10 or younger are extreme offenses that deserves extreme punishment. "[R]eviewing courts 'should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types of limits of punishments for crimes . . . .' [Citation.]" (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.) However, the Legislature did not provide the ultimate possible punishment — life without the possibility of parole. Instead, it provided for the possibility of parole after either 15 or 25 years. It was defendant who deprived himself of any reasonable possibility of parole, by committing the same sexual offenses over and over again, until the parole periods added up to more than his natural life.

Defendant argues that he was "roughly 19 or 20" when he committed the crimes. Nevertheless, he was a legal adult, past the point at which "a sentencer [must] have the ability to consider the 'mitigating qualities of youth.' [Citation.]" (*Miller v. Alabama* (2012) ___ U.S. ___, ___ [132 S.Ct. 2455, 2467]; see also *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.) Also, even at his young age, he had assembled a criminal record, including a juvenile adjudication for forgery (Pen. Code, § 476, subd. (a)) and two adult convictions for disturbing the peace (Pen. Code, § 415). Thus, this factor does not make the sentence disproportionate.

Defendant also notes that he "received a score of 2, or 'low-moderate' risk of re-offense" on the STATIC-99R. The STATIC-99R is a tool for actuarial risk assessment

of sex offenders. It sorts sex offenders into four risk categories: Low, Low-Moderate, Moderate-High, and High. (see Static-99R Coding Form, <http://www.static99.org/pdfdocs/static-99rcodingform.pdf>, as of Nov. 2, 2016.) Thus, defendant is squarely under the chubby middle of the bell curve, albeit on the left side rather than the right side of the bell. "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citation.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) As a matter of statistical definition, this is not such a case.[3]

We therefore conclude that the sentence was not unconstitutionally cruel and unusual.

E. *Ex Post Facto Violation in the Calculation of the Restitution Fines*.

Defendant contends that the trial court erred by calculating the restitution fine and the parole revocation restitution fine based on the law in effect at the time of sentencing, rather than at the time of the crimes. The People concede the error; although they contend that it was forfeited, they also appear to concede that any forfeiture constituted ineffective assistance of counsel.

The trial court was required to impose both a restitution fine (Pen. Code, § 1202.4) and a parole revocation restitution fine — each in the same amount (Pen. Code,

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[3] Defendant also argues that he had "a young child and the child's mother to support . . . ." We disregard this claim because there is no evidence that defendant was supporting M.M. Certainly he cites none. To the contrary, she testified that she was the family breadwinner.

§ 1202.45). The minimum amount of these fines was $200 in 2010 and 2011, $240 in 2012, $280 in 2013, and $300 in 2014 and 2015. (Pen. Code, § 1202.4, subd. (b)(1); Pen. Code, former § 1202.4, subd. (b)(1), Stats. 2010, ch. 351, § 9, p. 1811; Pen. Code, former § 1202.4, subd. (b)(1), Stats. 2009, ch. 454, § 1, p. 2483.)

At sentencing — which was in 2015 — the trial court noted that the "[s]tatutory minimum" was $300. It then set the amount of each fine at $300 per count, for a total of $2,100.

Under ex post facto principles, the trial court must calculate a restitution fine based on the law that was in effect at the time of the crime. (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189.) It violates ex post facto principles to use the incorrect statutory minimum, even if the resulting fine is less than the correct statutory maximum. (*Ibid.*)

Defendant notes that the information alleged that the crimes were committed between 2010 and 2013; he argues that the People are bound by the earliest of these alleged dates. However, he relies on cases dealing with the statute of limitations. (*People v. Angel* (1999) 70 Cal.App.4th 1141, 1145-1147; *Gasaway v. Superior Court* (1977) 70 Cal.App.3d 545, 551.) Here, where the issue is the ex post facto effect of a statute, these cases are not on point.

Rather, the controlling case is *People v. Hiscox* (2006) 136 Cal.App.4th 253. According to *Hiscox*, "it is the prosecution's responsibility to prove to the jury that the charged offenses occurred on or after the effective date of the statute providing for the defendant's punishment." (*Id*. at p. 256.) An "ex post facto claim . . . must be resolved

on the basis of the trial record. Any failure to establish whether [the] offenses occurred before or after the effective date of [the relevant statute] c[an]not be cured at the sentencing hearing, either in the first instance or on remand from this court." (*Id*. at p. 259.) If "the jury was not asked to make findings on the time frame within which the offenses were committed, the verdicts cannot be deemed sufficient to establish the date of the offenses unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after [the effective date]. [Citation.]" (*Id*. at p. 261.)

Here, the evidence showed, beyond a reasonable doubt, that the charged crimes occurred at the house on Fetlock. Admittedly, when Doe was first interviewed, she was "pretty sure" that defendant started molesting her before they moved there; however, she could never recall any specific instances of this, and at trial and in the forensic interview, she stated that all of the molestations took place in the house on Fetlock. Moreover, Doe stated that, after they moved to the house on Fetlock, "he started doing it . . . every chance he got when [they] were alone." Thus, even assuming the molestations started earlier, at least five instances of sodomy and two instances of oral copulation took place at the house on Fetlock. This established a time frame no earlier than 2012. In addition, Doe repeatedly stated that the last instance of sodomy occurred two weekends before her disclosure, which was on October 24, 2013.

Accordingly, as to six of the seven counts, the trial court was bound by the statutory maximum of $240 that was in effect in 2012; as to one sodomy count, it was bound by the statutory maximum of $280 that was in effect in 2013.

The trial court did not simply impose the minimum fine; rather, it imposed the minimum fine once per count. Defendant does not contend that this was error. Nevertheless, the People proactively concede that it was. Their concession is unwarranted; we decline to accept it. Penal Code section 1202.4, subdivision (b)(2) expressly provides that "[i]n setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine . . . multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Here, the trial court disregarded the number of years of imprisonment (presumably because defendant was sentenced to indeterminate terms). However, it did not err by multiplying the minimum fine by the number of counts.

It is clear what the trial court intended to do; it simply used the wrong number for the minimum fine. Accordingly, we will modify the judgment so as to reduce the restitution fine and the parole revocation restitution fines to $1,480 (i.e., $240 for each of six counts and $280 for the seventh count).

V

DISPOSITION

The judgment is modified by reducing both the restitution fine and the parole revocation restitution fine from $2,100 to $1,480. (See part IV.E, *ante*.) The judgment as thus modified is affirmed. The clerk of the superior court is directed to prepare an amended sentencing minute order and an amended abstract of judgment and to forward a

certified copy of the amended abstract to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, subd. (a), 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.