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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS CASTELLANOS,

Defendant and Appellant.

F069500

(Super. Ct. No. VCF257771)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Matthew H. Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Jesus Castellanos, then age 17, was arrested in September 2011 and charged by information with seven counts of lewd or lascivious acts with a child under the age of 14, in violation of Penal Code section 288, subdivision (a).<sup>1</sup> The charges arose from offenses defendant committed against three young girls his mother provided daycare for in his family home: K.R. (counts 1–3), Y.M. (counts 4 & 5), and L.A. (counts 6 & 7). The information also alleged defendant committed the acts against multiple victims (§§ 667.61, subd. (b) & 1203.066, subd. (a)(7); Welf. & Inst. Code, § 602, subd. (b) (counts 1–7)), had substantial sexual conduct with a victim under the age of 14 (§ 1203.066, subd. (a)(8) (counts 2–7)), and was 14 years or older (Welf. & Inst. Code, §§ 602, subd. (b) & 707, subd. (d)(2)(A) (counts 1–7)).

A jury convicted defendant of touching K.R.'s breast area (count 1) and vaginal area (count 2), causing K.R. to touch his penis (count 3), touching Y.M.'s vaginal area (count 4), placing his mouth on Y.M.'s vaginal area (count 5), touching L.A.'s vaginal area the first time (count 6), and touching L.A.'s vaginal area the last time (count 7). The jury also found true the special allegations against defendant. He was sentenced to 15 years to life for each count pursuant to section 667.61, subdivision (b), with the sentences for counts 2, 3, 5, 6 and 7 running concurrently with the sentence for count 1 and the sentence for count 4 running consecutively to count 1, for a total prison term of 30 years to life.

Defendant raises three challenges on appeal. He contends his sentence for count 4 should be stayed pursuant to section 654 because his two offenses against Y.M. were committed pursuant to a single intent; to wit, his touching of Y.M. was merely the means to facilitate the oral copulation. He also contends his sentence is disproportionate to his offenses, in violation of the federal and state Constitutions; and there is an error in the

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

abstract of judgment, which reflects convictions by plea rather than by jury verdict. We find defendant's sentence on count 5 does not violate section 654 and we find defendant's sentence is not unconstitutionally disproportionate. We remand this matter for the trial court to correct the clerical error in the abstract of judgment but otherwise affirm the judgment.

### **FACTUAL SUMMARY**

Defendant's mother provided childcare services out of her house in Earlimart, and victims K.R., Y.M. and L.A. were among the children entrusted to her care. In September 2011, K. R., who had just turned eight years old the previous month, told her mother a man at her babysitter's house touched her. Her mother informed someone at K.R.'s school and also drove by the house with K.R. Defendant was outside washing a car and K.R. told her mother he was the one who touched her. Defendant was subsequently taken into custody and admitted to inappropriately touching K.R. during the time his mother was babysitting her. He also identified three other girls he touched inappropriately: C.C., Y.M. and L.A.<sup>2</sup>

K.R., Y.M. and L.A. were interviewed by the Child Abuse Response Team (CART). During K.R.'s interview, she said defendant touched her "down there" and made her touch his "weenie."<sup>3</sup> During questioning by detectives, defendant identified K.R. as his second victim, and he admitted touching her vagina and having her touch his penis.<sup>4</sup> The trial was conducted in March 2014. K.R. was then 10 years old and, consistent with her CART interview, she testified defendant touched her "middle part"

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<sup>2</sup> Defendant was not charged with any crimes against C.C. in this case. He told detectives she was his first victim and he confessed to inappropriate sexual acts with her on two occasions, but C.C. apparently made no disclosures when she was interviewed by authorities.

<sup>3</sup> The victims' CART interviews were admitted into evidence at trial. (Evid. Code, § 1360.)

<sup>4</sup> Defendant's confession was admitted into evidence at trial.

with his hand when they were in the backyard of her babysitter's house. He also made her touch his "middle part" and told her not to tell anyone or she would go to jail.

Y.M., who was defendant's third victim, was five years old at the time. She stated "Chuy" put his fingers inside her "sapo" when she was on the sofa and it hurt a lot. She also stated he put his mouth there. Defendant described to detectives touching Y.M.'s vagina in his bedroom and then briefly orally copulating her.<sup>5</sup> He then "stood back," "showed her [his] penis," "put it away," and "started rubbing her vagina." He stopped rubbing her when she indicated he was hurting her. At trial, Y.M. testified defendant orally copulated her while she was in his room. She did not remember any other incidents, denied defendant digitally penetrated her during the incident in his room, and denied he hurt her when he touched her.

L.A., defendant's fourth victim, was six years old at the time of her CART interview. She stated "Chuy" touched her "pee part" when she was in the bathroom at her babysitter's house, and he told her not to tell.<sup>6</sup> She also stated he touched her there "[l]ots of times." Defendant told detectives he only touched her once, on her vagina, and stopped when she said "no, stop." At trial, L.A. testified defendant touched her "middle part" inside her clothes and made her promise not to tell. L.A. said she did not count how many times he touched her and she did not know how many times he touched her. She also testified he touched her in the bedroom and denied he followed her into the bathroom.

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<sup>5</sup> Y.M. and defendant both described his act as licking her vagina. We will refer to the act as oral copulation herein.

<sup>6</sup> "Chewy" in the reporter's transcript.

## DISCUSSION

### I. Failure to Stay Sentence for Count 4 Pursuant to Section 654

Defendant contends he may not be punished twice for a single act under section 654, and Y.M.'s trial testimony described "one discreet act" during which he touched her genitalia (count 4) in his bedroom only as a "prelude" to the oral copulation (count 5). Defendant acknowledges Y.M.'s CART interview described a separate act of touching on the couch, but argues there is no way to know on which version of events the jury based its verdict and if it was Y.M.'s trial testimony, the touching and oral copulation "were part of one 'indivisible,' 'single transaction.'" Therefore, his sentence on count 4 should be stayed. (§ 654.) The People fail to meaningfully address defendant's argument. They respond only that section 654 does not apply, and defendant was properly punished for each count because the trial court instructed the jury each count was based on a separate act and defendant was convicted on each count.

#### A. Standard of Review

Although no objection was made below, defendant's challenge to his sentence under section 654 is reviewable on appeal as an "unauthorized sentence." (*People v. Hester* (2000) 22 Cal.4th 290, 295; accord, *People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) The trial court has broad latitude to determine whether section 654 applies (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143), and its "express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence" (*People v. Brents, supra*, at p. 618; *People v. McCoy, supra*, at p. 1338). "We review the trial court's findings 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085; *People v. Lopez* (2011) 198 Cal.App.4th 698, 717.)

## **B. Applicability of Section 654**

Section 288, subdivision (a), provides: “Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.” “The crime of a lewd or lascivious act upon a child requires a touching of a child under the age of 14 with the specific intent ‘of arousing, appealing to, or gratifying the lust, passions, or sexual desires’ [citation] of the defendant or the child.” (*People v. Davis* (2009) 46 Cal.4th 539, 606.) Relevant to defendant’s section 654 challenge, he was convicted of violating section 288, subdivision (a), by touching Y.M.’s vaginal area and placing his mouth on her vaginal area sometime between November 21, 2010, and September 9, 2011.

Pursuant to section 654, subdivision (a), “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision....” “It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the ‘same act or omission.’ [Citation.] However, because the statute is intended to ensure that [the] defendant is punished ‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]

“It is [the] defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have

traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]

“If, on the other hand, [the] defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’” (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Hicks* (1993) 6 Cal.4th 784, 791.)

In this case, if defendant’s conviction for count 4 was based solely on evidence showing he touched Y.M. (count 4) to facilitate his oral copulation of her (count 5), his argument that section 654 precluded sentencing him for count 4 would have some force. This is because such touching was arguably “merely incidental to, or [was] the means of accomplishing or facilitating” the oral copulation. (*People v. Harrison, supra*, 48 Cal.3d at p. 335; *People v. Perez* (1979) 23 Cal.3d 545, 553–554.) However, the evidence was not so limited here and we are not confined to mere speculation regarding the basis for the jury’s verdict, as defendant suggests.

During closing argument, the prosecutor argued that for count 4, the jury could “consider” the incident on the couch Y.M. described in her CART interview or her description of the touching that occurred as he initiated the oral copulation. Notwithstanding this argument, there was more evidence the jury—and the trial court—could consider in support of count 4. In her CART interview, Y.M. stated defendant touched her vaginal area on the couch in the “couch” room, penetrating her with his fingers and causing her pain. Additionally, she appears to have described him placing his mouth on her genitalia during the incident. At trial, she testified that defendant used his hands to part her vagina before orally copulating her in his room, but she did not

remember any other incidents and she specifically denied defendant digitally penetrated her during that incident or being hurt when he touched her.<sup>7</sup>

Defendant's inculpatory statements during interrogation and in a telephone call from jail were also admitted as evidence. He told detectives he touched Y.M. one time in his room. He described touching her vagina and then orally copulating her. After the oral copulation, he exposed his penis to her and then rubbed her vagina until she indicated he was hurting her. During a subsequent phone call from jail, he stated "it" happened only one time, in his room.

While there were some inconsistencies between the versions of events described by Y.M. and defendant, we determine only whether there was sufficient evidence in the record to support the trial court's implied determination that defendant's convictions on counts 4 and 5 supported separate punishments. (*People v. Brents, supra*, 53 Cal.4th at p. 618; *People v. McCoy, supra*, 208 Cal.App.4th at p. 1338; *People v. Green, supra*, 50 Cal.App.4th at p. 1085.)

We conclude the record contains substantial evidence that defendant touched Y.M.'s vaginal area not exclusively as a means of facilitating the oral copulation, but as a separate act with "the intent of arousing, appealing to, or gratifying" his own "lust, passions, or sexual desires." (§ 288, subd. (a); *People v. Harrison, supra*, 48 Cal.3d at pp. 336–338; *People v. Perez, supra*, 23 Cal.3d at pp. 553–554.) The jury may have credited Y.M.'s CART interview statements, which were made in closer temporal proximity to the crime than her statements at trial, and concluded defendant digitally penetrated her vagina on the couch. Even if they did not, however, defendant's admission of what he did to Y.M. in his room provides sufficient evidence he harbored multiple criminal objectives when he touched her prior to the oral copulation and then

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<sup>7</sup> This specific testimony forms the basis for defendant's argument he had only a singular intent when he touched Y.M. with his hands and then his mouth.

again touched her after he ceased the copulation and exposed himself to her. We therefore reject defendant's argument the trial court erred in failing to stay his sentence on count 4 under section 654.

## **II. Unconstitutionally Disproportionate Sentence**

Defendant argues that the trial court should have run all of his sentences concurrently, resulting in a sentence of 15 years to life rather than 30 years to life. Defendant contends that notwithstanding the fact the trial court considered his age and "imposed [the] term with the idea that [defendant] would in fact have some reasonable opportunity of being paroled," his sentence of 30 years to life "is still grossly disproportionate to the crimes committed." The People respond that the trial court took the appropriate factors into consideration and, while lengthy, defendant's sentence is not unconstitutional under either state or federal law.

### **A. Legal Standard**

Over the past decade, approximately, the United States Supreme Court and the California Supreme Court have recognized a distinction between juvenile offenders and adult offenders. (*Miller v. Alabama* (2012) 567 U.S. \_\_ [132 S.Ct. 2455] (*Miller*); *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*); *Roper v. Simmons* (2005) 543 U.S. 551; *People v. Franklin* (2016) 63 Cal.4th 261; *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*)). The decisions reflect the understanding that "because juveniles have lessened culpability they are less deserving of the most severe punishments." (*Graham, supra*, at p. 68.) While "[a] juvenile is not absolved of responsibility for his actions, ... his transgression 'is not as morally reprehensible as that of an adult.'" (*Ibid.*) Thus, the Eighth and Fourteenth Amendments of the United States Constitution prohibit juvenile offenders from being sentenced to death for their crimes (*Roper v. Simmons, supra*, at p. 578) and, in homicide cases, mandatory sentences of life without the possibility of parole (LWOP) (*Miller, supra*, at p. \_\_ [132 S.Ct. at p. 2460]), or the functional equivalent (*People v. Franklin, supra*, at p. 276), are prohibited for juveniles. In nonhomicide cases,

juveniles may not receive an LWOP sentence or a “[s]entence that amounts to the functional equivalent of a life without parole sentence ....” (*Caballero, supra*, at p. 268.) “A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.” (*Graham, supra*, at p. 82.)

A sentence need not be LWOP or its functional equivalent to raise disproportionality concerns, however. (*People v. Perez* (2013) 214 Cal.App.4th 49, 59–60.) ““The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution prohibits the imposition of a penalty that is disproportionate to the defendant’s ‘personal responsibility and moral guilt.’ [Citations.] Article I, section 17 of the California Constitution separately and independently lays down the same prohibition.” [Citations.] To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant’s involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant’s acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is ‘grossly disproportionate to the defendant’s individual culpability’ [citation], so that the punishment ““shocks the conscience and offends fundamental notions of human dignity”” [citation], the court must invalidate the sentence as unconstitutional.” (*People v. Lucero* (2000) 23 Cal.4th 692, 739–740; *People v. Boyce* (2014) 59 Cal.4th 672, 718–719.)

“Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations.]” (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82–83; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1218.)

## **B. Sentence of 30 Years to Life**

Although defendant's sentence is lengthy, this case does not involve an LWOP sentence or its functional equivalent; defendant will be in his late 40's, approximately, when eligible for parole.<sup>8</sup> (*Caballero, supra*, 55 Cal.4th at pp. 267–268; *People v. Perez, supra*, 214 Cal.App.4th at pp. 57–58.) Defendant does not argue otherwise but, citing *People v. Dillon* (1983) 34 Cal.3d 441 and *In re Lynch* (1972) 8 Cal.3d 410, and focusing on his age, learning difficulties and psychological issues, he urges that his sentence of 30 years to life is nonetheless disproportionate to his crime. We disagree.

As noted, defendant's sentence was controlled by the one strike law. (§ 667.61, subs. (b), (c)(4), (i); *People v. Perez, supra*, 214 Cal.App.4th at pp. 58–60.) The trial court considered the probation report and the parties' sentencing statements, all of which addressed the issue of juvenile offenders and lengthy prison sentences. The court also heard oral argument during the sentencing hearing. Defendant requested the imposition of a 15-year-to-life sentence, while the prosecutor sought 45 years to life.<sup>9</sup> The probation report recommended 30 years to life, a term that was arrived at after taking "into account [the] wide array of youth-related mitigating factors," as discussed in the *Miller-Graham-Roper-Franklin-Caballero* line of cases. (*Franklin, supra*, 63 Cal.4th at p. 275.) The

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<sup>8</sup> Although defendant was a minor at the time he committed the offenses against K.R., Y.M. and L.A., he was charged as an adult pursuant to Welfare and Institutions Code sections 602, subdivision (b)(2)(D), and 707, subdivision (d)(2)(A), because he was 14 years or older and accused of committing a qualifying offense. Defendant's subsequent convictions for violating section 288, subdivision (a), subjected him to Penal Code section 667.61, known as the one strike law, which "is an alternative sentencing scheme [that] applies only to certain felony sex offenses." (*People v. Anderson* (2009) 47 Cal.4th 92, 102.) The one strike law "mandates an indeterminate sentence of 15 or 25 years to life in prison when the jury has convicted the defendant of a specified felony sex crime (§ 667.61 [listing applicable crimes]) and has also found certain factual allegations to be true (§ 667.61, subs. (d), (e))." (*Ibid.*) In this case, defendant's commission of the offenses against multiple victims mandated application of the one strike law. (§ 667.61, subd. (e)(4).)

<sup>9</sup> The prosecutor sought 60 years to life in the sentencing statement, but lowered the request to 45 years to life at the hearing.

probation report deemed a 15-year sentence too lenient given the predatory nature of the offenses and defendant's abuse of a position of trust and a 45-year sentence too harsh because he lacked a criminal record and his offenses were not forcible sexual offenses.<sup>10</sup>

In this case, defendant was 17 years old, and possibly 16 when Y.M. was molested.<sup>11</sup> At the time he committed the offenses, he had no prior criminal record, no known involvement with gangs, did not use drugs or alcohol, and was scored at low to moderate risk for reoffending. Defendant also argues he had learning difficulties and psychological problems, but we note he had—as appropriate for his age—begun his senior year of high school at the time of his arrest and his reported psychological difficulties began after he was arrested and placed in juvenile detention.<sup>12-13</sup>

Defendant's behavior giving rise to the charges against him was clearly predatory: he repeatedly sexually abused young girls left in his mother's care. The girls were particularly vulnerable due to their young age—five, six and eight years old—and because defendant had extended access to them in his own home, a place their parents undoubtedly believed they would be safe. Each victim was abused more than once and although defendant knew it was wrong, he was unable to control his inappropriate sexual impulses toward them. As recognized recently by another Court of Appeal addressing a proportionality challenge in a case child molestation case, “[a]ny one act in isolation was

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<sup>10</sup> The report recognized a 60-year sentence would be prohibited because it would be the equivalent of a life sentence.

<sup>11</sup> The conduct charged in counts 1 through 3 occurred between March 1, 2011, and September 9, 2011, at which time defendant was 17 years old. The conduct charged in counts 4 and 5 occurred between November 1, 2010, and September 9, 2011, during which time defendant turned 17 years old. The conduct charged in counts 6 and 7 occurred between February 19, 2011, and September 9, 2011, at which time defendant was 17 years old.

<sup>12</sup> Defendant stated he was 10 credits behind and staying after school to make up credits.

<sup>13</sup> Defendant also reported he had been sexually abused.

a serious offense. Cumulatively, without a doubt, [the] offenses were grave.” (*People v. Christensen* (2014) 229 Cal.App.4th 781, 806.)

The trial court, and the underlying probation report, appropriately considered the circumstances of the offenses and the offender, including his status as a juvenile without a prior criminal record. The decision to sentence defendant to 30 years to life was a reasoned one. Defendant will still be in the middle years of his life when eligible for parole and, therefore, his sentence does not deprive him of “a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’” (*Caballero, supra*, 55 Cal.4th at p. 266.) “‘It is a rare case that violates the prohibition against cruel and/or unusual punishment.’ [Citation.] This is not that rare case.” (*People v. Abundio, supra*, 221 Cal.App.4th at p. 1221; *People v. Perez, supra*, 214 Cal.App.4th at p. 60 [“Successful challenges based on the traditional *Lynch-Dillon* line are extremely rare.”].) We conclude that, while lengthy, defendant’s sentence is not unconstitutionally disproportionate to the offenses he committed.

### **III. Error in Abstract of Judgment**

Finally, the abstract of judgment erroneously reflects that defendant was convicted by plea. The People concede the error, as there is no dispute defendant was convicted by jury.

Clerical errors in records may be corrected at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, this matter is remanded to the trial court for the limited purpose of amending the abstract of judgment to reflect defendant was convicted by jury. (*Ibid.*)

**DISPOSITION**

This matter is remanded to the trial court to amend the abstract of judgment to reflect defendant was convicted by jury and not by plea. The amended abstract of judgment shall be forwarded to the appropriate authorities. The judgment is affirmed.

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KANE, J.

WE CONCUR:

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LEVY, Acting P.J.

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POOCHIGIAN, J.