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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN VALLI,

Defendant and Appellant.

G045415

(Super. Ct. No. 09NF0727)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed as modified.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Heidi T. Salerno, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Ruben Valli was convicted by a jury of nine counts of lewd acts performed upon a minor under age 14 (Pen. Code, § 288, subd. (a); all further statutory references are to this code unless otherwise stated), three counts of sexual intercourse or sodomy with a child under the age of 10 (§ 288.7, subd. (a)), and one count of attempted forcible oral copulation (§§ 288a, subd. (c)(2), 664). The jury also found that as to three of the nine counts of lewd acts, defendant engaged in substantial sexual conduct (§ 1203.066, subd. (a)(8)) and as to all nine of these counts and the forcible oral copulation count, defendant committed the offenses on more than one victim (§§ 1203.066, subd. (a)(7), 667.61, subs. (b), (c), (e)). The court sentenced him to 90 years to life.

Defendant appeals, contending the trial court erred in refusing to permit him to cross-examine one of the child victims about earlier allegations of sexual abuse. Defendant also contends his sentence constitutes cruel and unusual punishment and that the judgment must be modified to reflect 954, rather than 953 days of presentence custody credit. We agree with the latter contention and modify the judgment accordingly. But we affirm the judgment as so modified. The trial court did not err in excluding the evidence and defendant's sentence does not constitute cruel and unusual punishment.

## FACTS

While defendant was married to Leticia, her half sister Jasmine would visit the family and sleep on a sofa bed in the living room. When Jasmine was 13 years old, defendant came into the living room and touched her over her clothes; he touched her breasts, legs, and buttocks. The next time, he touched Jasmine under her clothes, touching her breasts, vagina, and buttocks. Although she told him to stop, he refused. Defendant inserted his finger into Jasmine's vagina at least twice but not more than four

times. Jasmine testified defendant touched her five times. On other occasions he kissed her from head to toe, including her breasts and her vagina. He licked her vagina. During Jasmine's last visit to her sister's, defendant inserted his penis into her; something wet came out defendant's penis. Jasmine went to the bathroom and saw blood.

Thereafter, Jasmine did not return to her sister's house and finally told one of her friends what had been happening. Her friend told Jasmine to tell her counselor, which she did, and then she told her mother. Her mother instructed her to go back to the counselor and tell her that it was not true. Jasmine followed her mother's instructions. Thereafter, she was interviewed by a social worker and Officer Rios. Rios told her to call defendant; Jasmine tried to make this call but her sister, Leticia, answered and "she got really mad and she didn't believe me."

Some years later, Leticia and defendant divorced. When Leticia told her daughter Isabel that defendant was not coming back, Isabel told her mother defendant had touched her and made her touch him. At that time Jasmine and Isabel had not mentioned defendant's inappropriate conduct to each other. After Isabel's therapist had contacted law enforcement, officers interviewed Isabel and Leticia to discuss the details of defendant's conduct. When they asked Isabel to draw defendant's penis, she did, and Leticia acknowledged that defendant's penis was curved at the end and that Isabel "described it to the T."

At the officer's suggestion, Leticia placed a call to defendant. During this telephone conversation, defendant initially denied having had sexual contact with Jasmine and Isabel. But later during the same conversation he said that he needed help and acknowledged that Isabel had not lied.

Isabel testified that when she was around nine years old, defendant walked in on her in the bedroom and shut the door. He then touched her vagina with his penis and entered her vagina. She told him it hurt and defendant told her not to tell anyone.

There were several other instances, including a time that defendant asked Isabel to touch his penis with her mouth and then pushed her head down to his penis.

## DISCUSSION

### *1. Exclusion of Evidence of Other Sexual Conduct*

Defendant contends the trial court committed reversible error in denying his offer of evidence that Isabel had made earlier allegations of abuse by her half-brother. Defendant refers to four pages of the reporter's transcript as his "offer of proof." This offer of proof leaves much to be desired. It apparently followed an off-the-record discussion where specific facts may have been described with more coherence. Much of the disputed evidence was recited by the prosecutor.

The court conducted a hearing under Evidence Code section 402 wherein Leticia testified. She described an incident when Isabel was three or four and Isaac was about seven. Leticia walked into the children's bedroom and saw them wrestling with their clothes on. Isabel told her mother she had learned this from Juan Guancho, the babysitter's son. Isabel used the words "sex" and "humping" and Leticia told her this was something done in private and that she should not know about it. Leticia also recited that Isabel told her Guancho would have kids in daycare lay on top of her with their clothes on. Defendant argued the prior sex acts should be admitted "for the knowledge of sex and then also for credibility."

Jasmine also testified to incidents involving a man at her father's house. As to Jasmine, the trial court ruled that, although it believed the evidence had some marginal relevance, "the prejudicial value [outweighs] the probative value. And also, it is just a time-consuming process. [¶] There is no indication that she is a liar." The appeal does not contend refusal to admit the Jasmine evidence was error.

The court also stated, apparently referring to both the Jasmine evidence and the Isabel evidence, “[b]asically we would be trying . . . two more cases.” And, “if there is something that the court believes . . . impacts their credibility, I would let it in, but I just don’t see it.”

In the first instance, we are not persuaded that evidence of the childhood sex play would have tended to show that Isabel was lying when she described defendant’s inappropriate conduct. More importantly, we are not persuaded the trial court abused its discretion by ruling under Evidence Code section 352 that the consumption of time involved in presenting evidence of other sexual abuse cases and the prejudice to the two victims outweighed the probative value of the evidence.

“A trial court’s ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion. [Citation.]” (*People v. Chandler* (1997) 56 Cal.App.4th 703, 711.) As the Attorney General points out, citing *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386, “[t]he trial court’s limitation of a defendant’s examination of defense witnesses ‘does not implicate or infringe a defendant’s federal constitutional right to confront the witnesses against him, unless the prohibited cross-examination might reasonably have produced a significantly different impression of the witness’s credibility. [Citations.]’” The excluded evidence does not impeach the victim’s credibility.

Defendant relies on a federal case, *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091, for the proposition that under federal law precluding this impeaching evidence is a violation of defendant’s confrontation clause rights and that erroneous preclusion of such cross-examination may not be deemed harmless. But, as the Attorney General also points out, the facts in *Holley* may be clearly distinguished from those here. In *Holley* the excluded evidence would have shown that the child victim had been bragging to other children “that she had done ‘weird stuff’ in a closet with her boyfriend, a term she also used to describe what Holley had done in rubbing her legs and breasts;

that a neighborhood boy wanted to ‘hump her brains out’; and that her brother Matthew had once tried to have sex with her.” (*Id.* at pp. 1096-1097.) The *Holley* court concluded this evidence “[d]iscrediting the accuracy and reliability of [the victim’s] testimony could have shown a tendency to exaggerate or overstate, if not outright fabricate. [Citations.]” (*Id.* at p. 1099.) Here there is nothing to show the victim either bragged about or exaggerated the facts relating to earlier contacts of a sexual nature.

*LaJoie v. Thompson* (9th Cir. 2000) 217 F.3d 663, which defendant also cites, again represented a different scenario. There the prosecution relied upon evidence of injury to the victim’s hymen, “thus inviting the inference that LaJoie must have caused those injuries.” (*Id.* at p. 671.) The excluded evidence related to earlier rapes suffered by the victim, which would have provided an alternative cause for her damaged hymen.

Defendant also relies on *People v. Franklin* (1994) 25 Cal.App.4th 328, for the proposition that “under California law, prior false accusations are admissible to show that a witness has fabricated or fantasized an incident.” But here there was no evidence the testimony of earlier sexual conduct was fabricated or based on fantasy.

## 2. *No Cruel or Unusual Punishment*

Defendant contends that his 90-years-to-life sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Defendant did not object to his sentence in the trial court. Both sides acknowledge cases hold a claim that a sentence is cruel or unusual is forfeited on appeal if it is not raised in the trial court because the issue requires a “fact bound inquiry.” (See also *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) However, to avoid an ineffective assistance of counsel argument, we have nevertheless attempted to address the issue. But we were stymied by appellate counsel’s failure to provide us with the kind of comparisons case law demands.

A sentence may constitute cruel or unusual punishment under the state Constitution if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*People v. Murray* (2012) 203 Cal.App.4th 277, 285.) Appellant contends “[t]he idea of someone serving three consecutive 25 years to life sentences and a consecutive 15 years to life sentence before ever being eligible for parole for conduct which involved no loss of life does shock the conscience.” But case law has provided direction as to how to evaluate such a claim. Our review under this test includes an examination of the nature of the crime and the character of the defendant, and comparisons of the penalties in this state for more serious crimes and those imposed in other states for the same crime. (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.)

We do know the “nature of the crime” and it constitutes a dreadful course of conduct involving two children. But appellant has given us no information concerning the other factors we are to consider: comparisons of the penalties in this state for more serious crimes and those imposed in other states for the same crime. Absent such an analysis, we cannot conclude that the penalty imposed violates constitutional limitations.

### *3. Additional Credit*

As explained in the opening brief, the court miscalculated the number of days defendant spent in presentence confinement. Defendant is entitled to 830 rather than 829 days of actual credit for a total of 954 days rather than 953 days. The abstract should be amended accordingly.

## DISPOSITION

The matter is remanded and the superior court is directed to amend the abstract of judgment to grant defendant one additional day of presentence custody credit

and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.