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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.

JUAN CARLOS FRAGOSO,

Defendant and Appellant.

G050346

(Super. Ct. No. 13CF0674)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Rodger P. Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Juan Carlos Fragoso appeals from a judgment after a jury convicted him of numerous sexual offenses against multiple victims. Fragoso argues the following: (1) the trial court erred by denying his motion to continue; (2) the court erred in instructing the jury; and (3) the court erred in sentencing him. None of his contentions have merit, and we affirm the judgment.

FACTS

E.M. and Jose E. had four daughters, A.E., J.E., J., and V.E. E.M. and Jose E. separated in 2000. E.M. met Fragoso at work, and they became romantically involved. Two years later, E.M. gave birth to Fragoso's son, Jason. Around that time, Fragoso moved into E.M.'s studio apartment with E.M. and her girls. In 2005, the family moved into a two-bedroom apartment. E.M., Fragoso, and Jason slept in one bedroom, and the girls slept in the other bedroom. A.E., E.M.'s oldest daughter, moved out of the apartment in 2011. After Fragoso moved in with E.M., he acted as a father figure to the girls and cared for them when E.M. worked. Fragoso also disciplined the girls, grounding them, taking away their phones, or precluding them from playing outside. The girls saw Fragoso as their father figure and introduced him to their friends as their dad or stepdad.

In June 2012, A.E. called E.M. and told her Fragoso was abusing her sisters. E.M. asked J.E., who was in the car with her, if that was true. J.E. tearfully replied, "Yes, mom." When E.M. got home, J. and V.E. were waiting outside. E.M. asked the girls why they had not told her about the abuse previously. The girls said they were afraid she would not believe them. E.M. went inside the apartment and confronted Fragoso, who denied the allegations. E.M. told him to leave and never return. E.M. did not call the police.

Two months later, Fragoso returned to the apartment and begged E.M. to take him back. When the girls told him to leave, he refused and threatened to kill

himself. V.E., who was very afraid, had a panic attack, and E.M. called 911. When the paramedics arrived, E.M. asked them to remove Fragoso from her home.

In November 2012, V.E., who was doing poorly in school and exhibiting dangerous behavior at school and extremely self-destructive behavior at home, confided in school counselor, Socorro Fosado, that her stepfather had been touching her inappropriately. Fosado called Child Protective Services. Around February 2013, Orange County Social Services (OCSS) contacted E.M. and interviewed the girls. The social worker contacted the police because E.M. could not.

An amended information charged Fragoso with the following:

(1) V.E.-three counts of lewd act on a child under 14 (Pen. Code, § 288, subd. (a); all further statutory references are to the Pen. Code) (counts 1 (rub legs), 2 (kiss, lay on her), & 4 (victim touch Fragoso)), and one count of forcible lewd act on a child under 14 (§ 288, subd. (b)(1)) (count 3 (oral copulation)); (2) J.E.-three counts of lewd act on a child under 14 (§ 288, subd. (a) (counts 5 (touch breasts, lay on her), 6 (touch breasts), & 7 (touch vagina)), and one count of lewd act on a child (§ 288, subd. (c)(1)) (count 8 (oral copulation)); and (3) J.-two counts of lewd act on a child (§ 288, subd. (c)(1)) (counts 9 (touch breasts) & 10 (straddle her)). As to counts 1, 2, 3, 4, 6, and 7, the information alleged there were multiple victims (§ 667.61, subds. (b) & (e)(5)).

At a hearing in late April 2014 before trial began, defense counsel explained a defense witness, L.A., refused to come to court. Although a bench warrant had issued for his arrest, counsel did not know “when and if it will be served.” Counsel stated L.A. lived in the same apartment building as the victims. The court noted records indicated a bench warrant had been issued and held the previous month, and it had been faxed to the “central warrant repository.” The bailiff stated he would call the “warrant team” to have deputies arrest L.A.

The following week, on the day the jury was sworn, defense counsel again raised the issue, noting that L.A. had still not been arrested. The trial court indicated it would “carve [out] some time” to litigate the issue of whether he was unavailable.

At trial, E.M. testified to the facts described above. On cross-examination, E.M. admitted she told officers that a few days after Fragoso left, “the girls were out of control[.]” She stated V.E. was caught in a boy’s bedroom in an upstairs apartment.

J.E. was 19 years old at the time of trial. J.E. testified Fragoso lived with her family from age seven until she was 17 years old. He disciplined her by taking away her cell phone and telling her she could not go outside to play. J.E. was about eight years old the first time Fragoso sexually abused her. She remembered him touching her breasts over her clothes while she was watching television. He would tell her, “I’m not going to do nothing bad to you. This is not wrong.” Every time her mother was at work and her sisters were outside, he would touch her breasts. When J.E. was about 10 years old, Fragoso would tell her to get something from his room and he would follow her. When she entered the room, he would rub her vagina over her clothes. She would push him away and tell him to leave her alone. This happened more than once.

When J.E. was about 12 years old and in sixth grade, she would be home alone with Fragoso after school for about 30 minutes before her sisters got home. During that time, Fragoso would touch her. He would tell her to change out of her school uniform into regular clothes and ask her to watch television with him. He would tell her to get something from his room and follow her there. He would lay her down on the bed, get on top of her with his face towards hers, and rub his penis against her vagina. His penis felt hard. This happened a few times during the sixth grade. When J.E. was in the seventh grade, Fragoso started rubbing her vaginal area over her clothing. This would happen after school while her sisters were at the store, “a lot.” When Fragoso told her

sisters to go to the store, J.E. knew Fragoso was going to touch her. Fragoso also continued to get on top of her and rub himself on her.

When J.E. was 15 years old and near the end of ninth grade, Fragoso started touching her underneath her clothes. He took her into his room, pulled down her shorts and underwear, and put his hand on her vagina. He then started licking her vagina. The first time occurred after school, when Fragoso sent her sisters to the store. However, he did this more than once that year. That year he also used his hand to touch her vagina over her clothes more than once. When J.E. was in 10th grade, Fragoso put his hand and mouth on her vagina. He also did those things when she was in 11th grade. There were times when he would grab J.E.'s hand and force her to touch his erect penis over his clothes. In sixth grade, J.E. realized that what Fragoso was doing was wrong. She did not tell anyone about the abuse because Fragoso told her that her mother would never survive without him.

V.E. was 15 years old and in ninth grade at the time of trial. V.E. testified she was two or three years old when her mother began dating Fragoso. Near the beginning of her seventh grade school year, when she was 12 or 13 years old, Fragoso started saying "nasty stuff," and touching her shoulders and legs in a way that made her feel uncomfortable. During seventh grade, V.E. would walk home from school. Fragoso and her brother were home when she got there. Fragoso would touch her in her private places and tickle her. Fragoso would also put her on the floor, get on top of her, and rub his private part on her private part. His penis felt hard. He would also kiss her around her neck. He did this "a lot" when she was in the seventh grade. Near the end of seventh grade, V.E. came home from school one day and changed. Fragoso took her into her mother's room, laid her on the bed, and pulled down her pants and underwear to her knees. He unzipped his pants and took out his penis, which was hard. He told her that it was going to "feel good." She kept telling him, "No." He grabbed her hand and put it on his penis. He also put his lips on her vagina for about 30 to 45 seconds. During this

incident, V.E.'s sisters came home, so he stopped. That was the last time Fragoso touched her. During the seventh or eighth grade, V.E. cut herself on her wrists to relieve stress. She was also suicidal during that time.

J. was 17 years old and in 11th grade at the time of trial. J. testified she considered Fragoso her father. Although she initially liked him, her relationship with him changed when she turned 14 years old because it became "awkward and unspeakable." J. described the first time Fragoso touched her when she was in seventh grade. Fragoso picked her up early from school because she did not feel well. When they got home, J. went to bed and Fragoso came into her room and asked if she wanted something to eat. After she told him no, he put his hand on top of her stomach and started moving it up towards her breasts. He initially touched her breasts over her clothing but then moved his hand underneath her shirt and touched her breasts. A few weeks later, Fragoso told J.E. and V.E. to get food. While Jason had his headphones on, Fragoso got on top of J., who was lying on the couch watching television, with his face towards hers. He moved his penis on top of her vagina; his penis felt hard.

On another occasion, J. and her sisters were playing around in Fragoso's room. Fragoso got on top of J. and pretended to be "play fighting" with her. She felt his penis against her vaginal area and it felt hard. Fragoso touched her breasts two or three times and rubbed his penis over her vaginal area around five or six times all of which occurred after she turned 14 years old. J. did not tell anyone because she was afraid Fragoso would punish her or he would leave and take Jason. The first people J. told about the abuse were her sisters, V.E. and J.E. V.E. and J.E. said Fragoso had done similar to things to them. After that conversation, they called A.E. The prosecutor rested her case.

Fragoso offered the testimony of numerous witnesses. Jose Espinoza, the victims' biological father, testified he did not have much contact with his daughters as they were growing up. In 2013, he began a reunification process and was allowed to visit

with the girls. During one of the visits, he was talking with V.E. and J. V.E. opened her legs, pointed to her vaginal area, and asked him, “Why don’t you touch me here?” J. started to laugh and told V.E. “Don’t try this again,” or “Don’t try to lie again.” Jose E. believed E.M. brainwashed her daughters, and that she had convinced them to make up these allegations against Fragoso because he was cheating on her.

Fragoso offered the testimony of three witnesses, Espinoza’s relatives, who all lived in the same apartment complex. All three witnesses testified they never saw anything suggesting Fragoso was inappropriate with the girls or that the girls were afraid of him.

The next day, defense counsel asserted he should be permitted to admit L.A.’s out-of-court statements to a defense investigator because L.A. still had not been arrested. When it became apparent L.A.’s out-of-court statements were not admissible, counsel requested a continuance to allow more time for the warrant to be served on L.A. at his home. When the trial court asked why the warrant had not been served, counsel replied: “I don’t know. I’m not an agent of the sheriff’s department.” The bailiff explained he had spoken with a sergeant the end of April and informed him the warrant needed to be executed but he had not heard anything. The court asked for an offer of proof as to what L.A. would say if called as a witness. Counsel explained the following: L.A. lived in the same apartment complex as Fragoso and the victims and he observed them before and after E.M. banished Fragoso from the home. After Fragoso left, L.A. saw the victims coming and going at all times of the night and hanging out with older boys. According to counsel, L.A.’s proffered testimony supported the defense’s argument the victims wanted Fragoso out of the house because he disciplined them. Counsel added it also supported the statements E.M. made to the investigating officers that a few days after Fragoso moved out, the girls were doing whatever they wanted to.

Later that day, the trial court stated the bailiff had called about the warrant and was told deputies had not executed it yet. The court denied defense counsel’s request

for a continuance, explaining: “That would be an undue hardship, I think, on this jury. We’re about to close probably today. We have no idea where this individual is, how long it would take; and it will almost have to be an indefinite continuance not knowing how long it would take to procure that individual. [¶] Also, based on the offer of proof, it would appear this individual is basically bringing to the table similar -- if not similar type of testimony that has already been alluded to or testified to by several other witnesses called by the defense.” Counsel responded L.A.’s whereabouts were known because he was at his home. The court did not change its ruling.

Fragoso testified he did not sexually abuse the girls. The parties stipulated that on December 21, 2009, J.E. denied to OCSS representatives Fragoso sexually abused her.

The trial court reviewed the jury instructions with counsel. The court stated “the ‘actual arousing’” sentence was “available upon request[,]” and invited comment. Defense counsel stated he did not have a problem with that language being taken out. The prosecutor asked that the language be left in. Defense counsel responded, “I don’t believe it’s necessary. The defense’s position isn’t going to be covered. He wasn’t trying to gratify himself.” The court stated it was going to include the language over defense counsel’s objection. Fragoso did not object to the court instructing the jury willful commission of an act does not require the person intend to break the law, hurt someone, or gain any advantage. The trial court instructed the jury with the relevant instructions. As relevant here, the court instructed the jury on the substantive offenses as follows: CALCRIM Nos. 1110, 1111, and 1112.

The jury convicted Fragoso of all the counts as charged except count 8, on which it concluded he was guilty of the lesser included offense of misdemeanor simple assault.

At the sentencing hearing, the trial court indicated it had read and considered the prosecutor’s sentencing brief and the probation report. The probation

report listed as aggravating factors the following: the crimes were cruel, vicious, and callous; the victims were particularly vulnerable; the crimes were planned; and Fragoso took advantage of a position of trust or confidence. The only mitigating factor was Fragoso had “an insignificant record of criminal conduct.” Defense counsel argued anything more than the minimum 30 years to life is “beyond punitive.”

The trial court sentenced Fragoso to a determinate term of nine years and four months as follows: the upper term of eight years on count 5 (high degree of cruelty, viciousness, and callousness & victims particularly vulnerable) and consecutive one-third terms of eight months on counts 9 and 10 (planning). The court sentenced Fragoso to an indeterminate term of 90 years to life as follows: principal term of count 1-15 years to life; count 3-mandatory consecutive term of 15 years to life; and counts 2, 4, 6, and 7-discretionary consecutive terms of 15 years to life. The court suspended the sentence on count 8, a misdemeanor.

DISCUSSION

I. Motion to Continue

Fragoso argues the trial court erred by denying his motion for a continuance to secure the presence of his witness L.A., who would have testified to events concerning *after* he moved out. We disagree.

A motion for a continuance requires a showing of good cause. (§ 1050.) “““The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.”” [Citations.] In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his or her motion for a continuance does not require reversal of a conviction. [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.) Where the motion is based upon the

absence of a witness, the requesting party must show that he was diligent in trying to obtain the witness's attendance, the witness's expected testimony is material and not cumulative, the facts to which the witness would testify cannot otherwise be proven, and the testimony can be obtained within a reasonable time. (*People v. Roybal* (1998) 19 Cal.4th 481, 504.)

Here, the trial court did not abuse its discretion in denying Fragoso's request for a trial continuance to secure L.A.'s presence at trial. At trial, Fragoso failed to establish L.A.'s testimony could be obtained within a reasonable time. L.A. refused to come to court and managed to evade arrest on the bench warrant. Although defense counsel indicated his whereabouts were known, there was no guarantee whatsoever L.A. would not continue to refuse to come to court and to evade arrest. The court properly concluded continuing the case would be an undue hardship on the jury because the trial was nearly over and it was unclear how long it would take to procure L.A.'s appearance.

Additionally, based on defense counsel's offer of proof, L.A.'s testimony was largely cumulative. Numerous witnesses testified they saw no inappropriate conduct between Fragoso and the girls. And contrary to Fragoso's claim otherwise, there was evidence concerning the girls' conduct *after* Fragoso moved out. E.M. testified she told officers that a few days after Fragoso moved out, the girls were "out of control" and V.E. was found in a boy's bedroom. Considering this evidence with the evidence Fragoso was the primary disciplinarian in the house, the jury could have reasonably concluded, had it chose to do so, that the girls fabricated their claims of sexual abuse to get Fragoso out of the house. Thus, L.A.'s testimony was cumulative.

Fragoso relies on *People v. Jacobs* (2007) 156 Cal.App.4th 728 (*Jacobs*), to argue the trial court's denial of his motion to continue violated the "spirit of the law." *Jacobs* is inapposite as it concerned a motion to continue to allow the judge who presided over the trial to sentence him and not a motion to continue to produce a witness. Also, the trial court here did not violate the spirit of the law by denying the motion because the

court properly considered the relevant factors, i.e., timeliness and materiality. The trial court considered the burden of a continuance on the jurors and that L.A.'s testimony was cumulative and concluded a continuance was not warranted. Thus, the trial court did not abuse its discretion in denying Fragoso's motion to continue. (*People v. Laursen* (1972) 8 Cal.3d 192, 204 ["In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction"].) Finally, the court's denial of Fragoso's motion to continue did not deny him a right to a fair trial or prevent him from presenting a defense.

II. Jury Instructions & Ineffective Assistance of Counsel

Fragoso contends the trial court erred by instructing the jury with CALCRIM Nos. 1110, 1111, and 1112, on the substantive offenses because the instructions were argumentative and duplicative in that they informed the jury what the prosecutor "need not prove." Not so.

""The trial judge functions . . . as the jury's guide to the law. This role requires that the court fully instruct the jury on the law applicable to each particular case."" (*People v. Watie* (2002) 100 Cal.App.4th 866, 876.) In criminal cases, the trial court must sua sponte instruct on the general principles of law governing the case which are necessary for the jury's understanding of the case, including all the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) The language of a statute defining a crime is generally a sufficient basis for an instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 980-981.) If the legal meaning of a statutory term differs from its meaning in "common parlance," the trial court should provide clarifying instructions. (*Id.* at p. 981.) However, the trial court should not give argumentative instructions, which "invite[s] the jury to draw inferences favorable to [a party] from specified items of evidence on a disputed question of fact, and therefore properly belongs . . . in the arguments of counsel to the jury." (*People v. Flores* (2007) 157 Cal.App.4th 216, 220.) We review claims of instructional error de novo. (*People v. Cole* (2004)

33 Cal.4th 1158, 1210.)

Here, CALCRIM Nos. 1110, 1111, and 1112 provided the jury with the elements of section 288, subdivisions (a), (b)(1), and (c)(1) (subdivision (a), defines the substantive offense and subdivisions (b) and (c) provide variations concerning force and age differentials). In addition, as relevant here, all three instructions had the following language: “Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.”

Fragoso relies on these two provisions, primarily the latter sentence, to claim the instructions were argumentative and duplicative. The Attorney General responds Fragoso forfeited appellate review of the correctness of the language defining “willfully” because he did not object at trial. Because Fragoso alternatively argues his counsel was ineffective for failing to object, we address the merits of both his claims. (*People v. Marlow* (2004) 34 Cal.4th 131, 150.)

Section 288, subdivision (a), defines the lewd act offense as committed when a person (1) “willfully and lewdly commits any lewd or lascivious act” upon the body of a child under age 14, and (2) “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.”

Here, the trial court properly instructed the jury with CALCRIM Nos. 1110, 1111, and 1112 because the language in question clarified the elements of the offense. The sexual intent element, given its ordinary meaning, could be construed to require actual sexual arousal. Actual sexual arousal is not an element of the offense. (*People v. Cordray* (1963) 221 Cal.App.2d 589, 593; 2 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 53, p. 453 [“whether passions are actually aroused or gratified is of no consequence except as it may support the inference of intent”].)

Additionally, the statutory requirement the touching be done “willfully” does not clearly explain the required state of mind. Without clarification, the jury may question the required intent. The instructions definition of willfully conforms with the statutory definition of “willfully” set forth in section 7, subdivision 1, i.e., willfully means “a purpose or willingness to commit the act It does not require any intent to violate the law, or to injure another, or to acquire any advantage.” Thus, CALCRIM Nos. 1110, 1111, and 1112 provides appropriate clarification regarding the meaning of sexual arousal and willfully and therefore they were not argumentative or duplicative.

Finally, Fragoso complains the instructions “diminishe[d] the weight of the evidence” because they told the jury what the prosecutor did not have to prove, which effectively prevented the jury from considering the lack of actual sexual arousal in his favor. As we explain above, actual sexual arousal is not an element of the offense. The additional information in CALCRIM Nos. 1110, 1111, and 1112 properly explained to the jury the meaning of the elements of the offenses. They did not prevent the jury from considering any evidence in his favor. The trial court’s instructions were proper.

III. Sentence

Fragoso argues the trial court erred by imposing the upper term of eight years on count 5, imposing consecutive terms on counts 9 and 10, and imposing consecutive terms on counts 2, 4, 6, and 7, the indeterminate counts. The Attorney General responds Fragoso forfeited appellate review of these claims because he did not object below and alternatively they are meritless.

We agree with the Attorney General that Fragoso forfeited appellate review of these issues. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [“waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices”]; *People v. Lewis* (2006) 39 Cal.4th 970, 1000 [federal and state cruel and unusual claims must be raised in trial court in first instance]; *People v.*

Norman (2003) 109 Cal.App.4th 221, 229 [federal and state cruel and unusual claims must be raised in trial court because fact specific].) Nevertheless, because Fragoso again asserts his defense counsel was ineffective, we address the merits of his claims.

On appeal, the court will consider whether the trial court exercised its sentencing discretion in a way “that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’ [Citation.]” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) “‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

A. Count 5

Fragoso contends the trial court erred by imposing the upper term on count 5. Not so.

While exercising its discretion in selecting one of the three authorized prison terms, the trial court may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. (*People v. Black* (2007) 41 Cal.4th 799, 811; Cal. Rules of Court, rule 4.420(b).) Circumstances in aggravation include the following: “[t]he crime involved . . . a high degree of cruelty, viciousness, or callousness” (Cal. Rules of Court, rule 4.421(a)(1)); and “[t]he victim was particularly vulnerable” (Cal. Rules of Court, rule 4.421(a)(3)). A single factor in aggravation is sufficient to justify the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730).

Here, the trial court properly concluded the crimes were highly cruel and callous and the victims were particularly vulnerable. “Callous” is defined as “insensitive; indifferent; unsympathetic’ [citation], as in ‘a callous indifference to the suffering of

others' [citation].” (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 558.) “Cruel is defined as “[d]isposed to give pain to others; willing or pleased to hurt or afflict; savage, inhuman, merciless.” (*People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1201.)

The crimes were highly cruel and callous because Fragoso molested the victims numerous times over a lengthy period of time causing the girls to live in a constant state of fear. With respect to count 5 specifically, J.E. testified that when Fragoso touched her breasts and lay down on top of her, he would ignore her pleas for him to stop. Fragoso’s conduct displayed an unsympathetic indifference to the girls well-being and inflicted pain on them. J.E. did not report the crimes because Fragoso scared her into believing her mother would never survive without him. J. did not report the crimes because she feared Fragoso would punish the girls and leave with her brother. V.E. engaged in highly self-destructive behavior as a result of the crimes.

Additionally, the victims were particularly vulnerable. The girls lived in the same house with Fragoso and he was their step-father, caretaker, and the primary disciplinarian. With respect to count 5 specifically, J.E. testified Fragoso disciplined her by taking away her cell phone and placing her on restriction. Additionally, V.E. said the fact Fragoso disciplined them made it difficult to report the abuse. (*People v. Garcia* (1985) 166 Cal.App.3d 1056, 1069 [potential factor to consider in determining whether a victim is particularly vulnerable whether defendant had supervision or control over a victim].) And again, because he was the caretaker while E.M. was working, he often isolated one of the girls by sending the other girls to the store. (*People v. Ginese* (1981) 121 Cal.App.3d 468, 477 [in considering whether victim vulnerable courts can consider “the time or location of the offense giving rise to a vulnerability through isolation, temporary dependency or fear of factors other than the defendant himself”].)

It is true, as Fragoso suggests, that by definition victims of section 288 crimes are vulnerable because they are children. However, it is also true that where the predator lives in the same house as the victims, is a parent figure, and exercises control

over them, the victims can be found to be particularly vulnerable. Fragoso cites to no authority, and we found none, that prohibits a trial court from relying on the aggravating circumstance of particular vulnerability where a defendant has been convicted of violating section 288. Therefore, the trial court properly concluded the crimes were unusually cruel and callous, and the victims were particularly vulnerable. The court properly imposed the upper term on count 5.

B. Counts 9 and 10

Fragoso asserts the trial court erred by imposing consecutive sentences on counts 9 and 10 because there was no evidence of planning. Again, we disagree.

The trial court retains broad discretion in determining whether sentences are to run concurrently or consecutively. “[I]n the absence of a clear showing that its sentencing decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate sentencing objectives and, accordingly, its discretionary determination to impose consecutive sentences ought not be set aside on review.” (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) In addition to the criteria articulated in California Rules of Court, rule 4.425, the trial court may consider “[a]ny circumstances in aggravation or mitigation . . . in deciding whether to impose consecutive rather than concurrent sentences.” (Cal. Rules of Court, rule 4.425(b).) One of those aggravating factors is “[t]he manner in which the crime was carried out indicates planning, sophistication, or professionalism.” (Cal. Rules of Court, rule 4.421(a)(8).)

Here, the trial court properly concluded the crimes indicated planning. With respect to counts 9 and 10 specifically, J. testified Fragoso would send her sisters to get food and while her brother had his headphones on, and he would then molest her. J. also stated Fragoso “play fought” with her and then touched her inappropriately. This conduct demonstrated Fragoso devised a strategy to get J. alone and initiate contact to then molest her. J.E. explained that while E.M. was at work Fragoso would molest her. Fragoso developed a ruse where he would tell J.E. to go into his room to get something

and he would follow her into the room and molest her. V.E. also testified Fragoso would molest her while E.M. was at work and her sisters were still at school. Fragoso's conduct demonstrates he was constantly scheming to separate one of the girls from her siblings so he could then molest the helpless victim without the risk of a witness. Therefore, the trial court properly imposed consecutive sentences on counts 9 and 10.

C. Counts 2, 4, 6, and 7

Fragoso raises two contentions concerning the indeterminate terms. We will address each in turn.

1. Consecutive Sentences

Fragoso argues the trial court erred by imposing consecutive terms of 15 years to life on counts 2, 4, 6, and 7 because "there was no evidence that [he] took advantage of a position of trust to commit any of these charged crimes." (Original underscoring.) Given his quasi-parental role, we find this claim remarkable.

As we explain above, a trial court may consider any aggravating or mitigating factor in deciding whether to impose consecutive or concurrent sentences. (Cal. Rules of Court, rule 4.425(b).) One of those aggravating factors is "[t]he defendant took advantage of a position of trust or confidence to commit the offense." (Cal. Rules of Court, rule 4.421(a)(11).)

Here, the trial court properly concluded Fragoso took advantage of a position of trust to commit the offenses. E.M. testified Fragoso acted like a father to the children, cared for them, got them ready for school, and put them to bed. Fragoso cared for the children while E.M. was at work. To put it differently, E.M. trusted Fragoso to care for her children while she was at work. Fragoso took advantage of that position of trust to sexually abuse E.M.'s children. To claim otherwise, is ludicrous. Section 1203.066 regarding probation does not persuade us otherwise. The court properly imposed consecutive sentences on counts 2, 4, 6, and 7.

2. Cruel & Unusual Punishment

Fragoso contends his sentence of 99 years to life constitutes cruel and unusual punishment under the federal and California constitutions because it “requires him to serve a term longer than a human life” and “is grossly disproportionate.” He also contends California’s “One Strike” law, section 667.61, is unconstitutional both facially and as applied to him. None of his contentions have merit.

A punishment violates the Eighth Amendment if it involves the “unnecessary and wanton infliction of pain” or if it is “grossly out of proportion to the severity of the crime.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) A punishment may violate article I, section 17 of the California Constitution if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

Relying on federal proportionality analysis articulated in *Solem v. Helm* (1983) 463 U.S. 277, and its progeny, and a concurrence in *People v. Deloza* (1998) 18 Cal.4th 585, 600 [conc. opn. of Mosk, J.] (*Deloza*), Fragoso asserts his sentence “is the statistical equivalent of a life term without possibility of parole[]” and “is in excess of what he would have received had he murdered, rather than sexually assaulted, his victims.”

We respectfully decline to follow Justice Mosk’s concurring opinion in *Deloza*, as it was not joined by the majority of the Supreme Court and therefore lacks precedential value. (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383 (*Byrd*) [opinion lacking majority support no precedential value].) Instead, we follow the analysis of cases such as *Byrd, supra*, 89 Cal.App.4th at page 1382, where the court upheld a sentence of 115 years plus 444 years to life. In *Byrd*, the court reasoned as follows: “[I]t is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute

cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution. [Citation.]” (*Id.* at p. 1383)

For example, in *People v. Retanan* (2007) 154 Cal.App.4th 1219, the court upheld a sentence of 135 years to life where defendant was convicted of numerous sex offenses against four girls. (*People v. Wallace* (1993) 14 Cal.App.4th 651, 666-667 [283-year sentence not cruel and unusual punishment where defendant committed numerous sexual offenses].) Here, Fragoso was convicted of nine sexual offenses against three vulnerable girls whom he was entrusted with caring for and thus his sentence was not grossly disproportionate.

Nor was Fragoso’s sentence cruel and unusual in comparison to the sentence for other serious offenses under California law. Fragoso complains he would have received a lighter sentence had he murdered his step-daughters instead of molesting them. Although murder is of course the gravest of offenses, molesting a child is a heinous act. In *People v. Wutzke* (2002) 28 Cal.4th 923, 930-931, the California Supreme Court stated “persons convicted of sex crimes against multiple victims . . . ‘are among the most dangerous’ from a legislative standpoint.” Additionally, in *People v. Alvarado* (2001) 87 Cal.App.4th 178, 200 (*Alvarado*), the court stated punishing a defendant for committing a rape during a burglary as severely as second degree murder “is [n]either shocking [n]or outrageous.” Although Fragoso did not murder his step-daughters, we are confident his conduct will have negative long-term effects on their physical and emotional wellbeing.

With respect to the constitutionality of section 667.61, Fragoso concedes One Strike terms were upheld in *Alvarado, supra*, 87 Cal.App.4th at pp. 199-201, *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1278-1280 (*Estrada*), and *People v. Crooks* (1997) 55 Cal.App.4th 797, 807-808 (*Crooks*), against a claim of cruel and unusual punishment. Contrary to Fragoso’s claim otherwise, section 667.61 does recognize

gradations of culpability because it provides for punishment based on specifically defined factors. (*Alvarado, supra*, 87 Cal.App.4th at p. 186, *Estrada, supra*, 57 Cal.App.4th at p. 1274, *Crooks, supra*, 55 Cal.App.4th at p. 804.) Fragoso provides us no compelling justification for departing from this well reasoned authority. He also claims these cases are distinguishable because they involved forcible rape during the commission of burglary. We agree those cases are distinguishable because they were not as egregious as the offenses here, nine counts of sexual molesting his step-daughters.

Finally, Fragoso argues section 667.61 is unconstitutional as applied to him because he has no prior serious criminal record and again his sentence is greater than that of a murderer. Although Fragoso does not have a prior criminal record, the crimes here were atrocious. Fragoso committed nine sexual offenses against three very vulnerable girls, his step-daughters, over the course of about eight years. E.M. entrusted her daughters to Fragoso's care and supervision and he repeatedly and egregiously violated that trust. He used the position of caretaker and disciplinarian to manipulate their home life to create situations where one girl was isolated from the rest of the family. Although all the girls were traumatized by Fragoso's actions, V.E. was traumatized to such an extent she engaged in extremely self-destructive behavior that jeopardized her life. Thus, the application of section 667.61 was not unconstitutional as applied to Fragoso. We conclude Fragoso's sentence is not so disproportionate to the crimes for which it was inflicted that it shocks the conscience and offends fundamental notions of human dignity.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.