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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY M. DEVRIES,

Defendant and Appellant.

H042806

(Santa Clara County

Super. Ct. No. F1139242)

A jury found defendant Jeremy M. Devries guilty on ten counts of forcible lewd or lascivious acts on a child (Pen. Code, § 288, subd. (b))¹ and three counts of aggravated sexual assault on a child (§§ 269, 289, subd. (a)). The trial court sentenced Devries to an aggregate term of 105 years to life.

In Devries' first appeal in this matter, we found the evidence insufficient to support convictions on six of the ten counts of forcible lewd or lascivious acts.² Accordingly, we reversed and remanded for resentencing on the remaining counts. The trial court then resentenced Devries to a total term of 69 years to life.

Devries now appeals again. He contends the sentence of 69 years to life constitutes cruel and unusual punishment in violation of the Eighth Amendment to the federal Constitution.

¹ Subsequent undesignated statutory references are to the Penal Code.

² *People v. Devries* (Feb. 11, 2015, H039641) [nonpub. opn.].

We conclude the sentence does not violate the Eighth Amendment. Accordingly, we will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts of the Offenses

Our prior unpublished opinion in this matter set forth the facts in detail. We briefly restate them here.

Devries was charged with numerous acts of molestation against his cousin J. Doe over a three-year period from 1997 to 2000. J. Doe was between four and seven years old at the time. Devries was between 18 and 21 years old. At various times during this period, Devries lived with the Doe family and spent time at the family's house.

In 2002, J. Doe's older brother told their parents that Devries had sexually molested him during the 1997 to 2000 period. Devries subsequently pleaded no contest to one count of a lewd or lascivious act on a child under 14. (§ 288, subd. (a).)

In 2010, J. disclosed to her parents that Devries had previously molested her as well, leading to the charges at issue in this case. J. was 19 when she testified at trial. She recalled being "touched inappropriately" by Devries, but she could not recall how old she was the first time it happened because she was too young at the time. She testified that Devries touched her multiple times, at least once per year, from the ages of three to seven. She recounted "three independent memories" of incidents in which Devries penetrated her vagina with his fingers. She further testified that she struggled against Devries "most of the time," requiring him to grab her ankles, feet, or legs to restrain her or physically or bring her into his bedroom. J.'s brother testified about Devries' molestation of him under Evidence Code section 1108.

B. Procedural Background

The prosecution charged Devries in Counts One through Ten with committing lewd or lascivious acts on a child under 14 by force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (§ 288, subd. (b).) Counts Eleven through

Thirteen alleged aggravated sexual assault on a child—specifically, sexual penetration by a foreign object. (§§ 269, 289, subd. (a).) The jury found Devries guilty on all thirteen counts.

The trial court initially sentenced Devries to an aggregate term of 105 years to life, composed of 10 six-year terms for Counts One through Ten, plus three terms of 15 years to life for each of Counts Eleven through Thirteen, with all terms to run consecutively.

On appeal, we found the evidence sufficient to support Counts Eleven through Thirteen. However, we found the evidence insufficient to support more than four counts of forcible lewd or lascivious acts. Accordingly, we reversed the judgment, struck the convictions on Counts Five through Ten, and remanded for sentencing on the remaining seven counts.

At resentencing, the trial court imposed a total term of 69 years to life. The indeterminate portion of the sentence consisted of 45 years to life, composed of three consecutive terms of 15 years to life for each of Counts Eleven through Thirteen. The determinate portion of the sentence consisted of 24 years, equal to four consecutive six-year sentences for each of Counts One through Four. The court imposed the indeterminate term consecutive to the determinate term, for a total term of 45 years to life consecutive to 24 years.

II. DISCUSSION

Defendant contends the above sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Attorney General contends the sentence is neither cruel nor unusual. We conclude the sentence does not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

A. Legal Principles

The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” “The Eighth Amendment prohibition on cruel and unusual punishment ‘guarantees individuals the

right not to be subjected to excessive sanctions.’ ” (*People v. Franklin* (2016) 63 Cal.4th 261, 273, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 560.) “To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society.’ ” (*Graham v. Florida* (2010) 560 U.S. 48, 58 [quoting *Estelle v. Gamble* (1976) 429 U.S. 97, 102].) “A punishment is excessive under 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.’ ” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 199, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 173.)

In noncapital cases, “ ‘successful challenges to the proportionality of particular sentences have been exceedingly rare.’ ” (*Ewing v. California* (2003) 538 U.S. 11, 21 (plur. opn. of O’Connor, J.)) “[W]hen faced with an allegation that a particular sentence amounts to cruel and unusual punishment, ‘[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes’ ” (*People v. Reyes* (2016) 246 Cal.App.4th 62, 83, quoting *Solem v. Helm* (1983) 463 U.S. 277, 290.)

B. *The Sentence Imposed Is Not Cruel and Unusual*

Devries does not challenge his sentence on proportionality grounds; he expressly abandons that argument. Rather, Devries contends a sentence of 69 years to life serves no rational legislative purpose and no legitimate penal purpose in this case. He argues that he is certain to die in prison before completing his sentence, and that no purpose is served by imposing a sentence longer than his remaining life span.

Even if we accept Devries’ assumption that the sentence imposed is longer than his possible remaining life span,³ Devries cites no binding legal authority for the proposition that this fact would make his sentence unconstitutional.

³ Based on the dates and ages set forth in our prior opinion, it appears Devries may be eligible for probation by the age of 100.

Instead, Devries contends his sentence serves no purpose because he cannot “pay back the community, or feel the community’s disapproval from beyond the grave.” He points out there is no need to keep him incapacitated once he has died. He further contends such a sentence lacks any deterrent value, because “in the absence of any retributive [purpose] or incapacitation that survives the defendant, it cannot reasonably be argued that an individual will fear such posthumous burdens.”

Defendant relies on arguments put forth by Justice Stanley Mosk contending a sentence longer than a defendant’s possible life span must be cruel and unusual. (See Mosk, *State’s Rights—and Wrongs* (1997) 72 N.Y.U. L.Rev. 552; *People v. Deloza* (1998) 18 Cal.4th 585, 600-601 [a sentence that is impossible for a human being to serve violates the cruel and unusual punishments clause of the Eighth Amendment] (conc. opn. of Mosk, J.)) However, law review articles do not constitute binding legal authority. As to Justice Mosk’s concurrence, “no opinion has value as a precedent on points as to which there is no agreement of a majority of the court.” (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) And notwithstanding the force and eloquence of Justice Mosk’s arguments, California courts have declined to adopt them. (See *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383 (*Byrd*) [it is immaterial that defendant cannot serve his sentence during his lifetime].) As the court observed in *Byrd*, a sentence longer than a defendant’s life span “serves valid penological purposes: it unmistakably reflects society’s condemnation of defendant’s conduct and it provides a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future.” (*Ibid.*)

Devries also cites Justice Mosk’s dissenting opinion in *People v. Jones* (1990) 51 Cal.3d 294, for the proposition that “generic testimony” of a molestation victim may allow a prosecutor to “stack” multiple counts, resulting in an unduly harsh degree of liability. But a dissenting opinion carries no binding legal authority. Furthermore, our prior opinion in this matter already vacated Devries’ convictions on six of the charged

counts precisely because the victim's testimony was too nonspecific to substantiate all ten charged lewd or lascivious acts. We concluded the remaining counts were supported by substantial evidence sufficiently specific to each count.

Devries further contends his sentence was not statutorily authorized because it is functionally equivalent to a sentence of life without parole, and no statute authorizes a sentence of life without parole for the crimes he committed. Regardless of whether his sentence is equivalent to life without parole, his sentence was statutorily authorized. The version of section 288 in effect at the time of the offenses authorized a midterm of six years for each violation of subdivision (b)(1). (Former § 288, subd. (b)(1), Stats. 1998, ch. 925, § 2.) Section 269 mandated a term of 15 years to life for any violation of that statute. (Former § 269, subd. (b), Stats. 1993-1994, ch. 48, § 1.) The trial court imposed consecutive terms under subdivision (d) of section 667.6, which mandates imposition of a full, separate, and consecutive term for each violation involving the same victim on separate occasions. Devries does not dispute the trial court's sentence calculations based on these statutes, and he cites no contrary authority. We conclude his sentence was statutorily authorized.

Finally, Devries cites recent cases concerning sentences of life without the possibility of parole as imposed on juveniles. (See, e.g., *Miller v. Alabama* (2012) 132 S.Ct. 2455; *Graham v. Florida*, *supra*, 560 U.S. 48; *People v. Caballero* (2012) 55 Cal.4th 262.) But Devries was not a juvenile when he committed the offenses. Nor does he offer any evidence that youth or immaturity played any role in his conduct or decision-making. Those cases are therefore irrelevant.

For the reasons above, we conclude Devries' sentence does not constitute cruel and unusual punishment under the Eighth Amendment.

III. DISPOSITION

The judgment is affirmed.

WALSH, J.*

WE CONCUR:

RUSHING, P.J.

GROVER, J.

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.