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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JON GARY SCHNABEL, Defendant and Appellant.	C052400 (Super. Ct. No. 04F09537)

APPEAL from a judgment of the Superior Court of Sacramento County, Michael J. Sweet, J. Affirmed.

James Joseph Lynch, Jr., for Defendant and Appellant.

Edmund G. Brown, Jr., and Bill Lockyer, Attorneys General, Dane R. Gillette and Mary Jo Graves, Chief Assistant Attorneys General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, Jennifer M. Poe, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant Jon Gary Schnabel guilty of 15 counts of child molestation involving three different girls.

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* Under California Rules of Court, rules 8.1105 and 8.1110, only the Factual and Procedural Background, part I of the Discussion, and the Disposition are certified for publication.

The trial court sentenced him to state prison for 375 years to life.

On appeal, defendant raises the following contentions:[1] (1) the court erred in admitting into evidence his prior sex offenses and in instructing the jury on their use; (2) trial counsel was ineffective; and (3) the court committed sentencing error. Disagreeing with these contentions, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A

Molestation Of C. J. (counts one - five)

C. J. met defendant when was she was 12 years old, and he was her parents' realtor. She started working for him doing "chores" to earn money. On 8 to 10 different occasions during the summer of 1995, defendant had C. J. rub his penis until ejaculation and then had C. J. apply wart medication. During one of these episodes, defendant made C. J. press her lips

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[1] We address defendant's arguments only to the extent they are properly reflected in the headings and subheadings of his opening brief. As we have recently explained, "appellant's brief 'must' '[s]tate each point under a separate heading or subheading summarizing the point . . . .' [Citations.] This is not a mere technical requirement; it is 'designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.' [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

against his penis. During another episode, defendant made her "tickle [his] balls."

B

Molestation Of T. B. (counts six - ten)

T. B. was a 20 year-old college student at the time of trial. Before she moved away to college, T. B. and her family lived a few houses away from defendant in Citrus Heights. Defendant was "good friends" with her family, and he was like an uncle to her. Defendant molested her for the first time when she was approximately seven years old. Defendant unzipped his pants, pulled out his penis, and "suggested that [T. B.] touch it." She complied.

During other incidents at defendant's house, he would ask her to put wart medication on his penis, and again she complied. These incidents occurred from the time T. B. was 7 years old to the time she was 12.

There were incidents when T. B. was 9 or 10 years old when defendant made her put her mouth on his penis, and he put his hand up her skirt or shorts and stroked her vagina.

At some point, defendant moved to Granite Bay. T. B. recalled one incident there when she was 11 years old and defendant touched her thigh, unzipped his pants, and directed her to apply medication to his penis.

C

Molestation Of S. J. (counts eleven - fifteen)

S. J. was 16 years old at the time of trial. She met defendant was she was seven or eight years old, and he was her

parents' realtor. She frequently visited defendant's house with her family. On 5 to 10 occasions, defendant had her move her hand up and down his penis so it would become "big" so he could apply wart medication.

Defendant made S. J. "watch a video on how to give oral sex" and look at Playboy magazines. He later made her put her mouth on his penis.

D

Prior Acts Of Molestation

N. J. was 49 years old at the time of trial. She met defendant when she was seven years old, and he was living in her neighborhood with a family friend of N. J.'s. Once, while N. J. was at her friend's house, defendant exposed his penis, testicles, and legs, told her that he had hurt his leg, and said that he wanted her to "rub it for him." When N. J. started rubbing his leg, defendant took N. J.'s hand, put it on his penis, and with his hand on top of hers, starting massaging his penis. He also had her rub his inner thigh and put her lips on his penis. As a result of these acts, defendant pled guilty in 1963 to committing a lewd act on N. J.

DISCUSSION

I

The Court Did Not Err In Admitting Into Evidence Defendant's Prior Sex Offenses And In Instructing The Jury On Their Use

Defendant contends the admission of his prior sex offenses pursuant to Evidence Code section 1108 denied him a fair trial

and violated his right to due process under the United States Constitution. He further contends the instruction regarding the prior sex offenses was "structural" error requiring automatic reversal of his convictions. We disagree.

Defendant's constitutional challenge to Evidence Code section 1108 was rejected in *People v. Falsetta* (1999) 21 Cal.4th 903, 922. We are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[2]

As to defendant's challenge to the instruction, it is based on his assertion that the instruction on the use of prior sex offenses "wholly swallowed the 'beyond reasonable doubt' requirement." The California Supreme Court has rejected this argument in upholding the constitutionality of the 1999 version of CALJIC No. 2.50.01. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016.) The version of CALJIC No. 2.50.01 considered in *Reliford* is similar in all material respects to CALCRIM No. 1191 (which was given here) in its explanation of the law on permissive inferences and the burden of proof.[3] We are in no

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[2] Defendant's attack on the constitutionality of Evidence Code section 1108 is based on the United State Supreme Court's construction of the Federal Rules of Evidence. We note that Evidence Code section 1108 was modeled on a federal rule of evidence that has also withstood such attacks. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 912, 920.)

[3] The version of CALCRIM No. 1191 given to the jury in this case reads, in pertinent part, as follows: "You may consider [the uncharged sex offenses] evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond

position to reconsider the Supreme Court's holding in *Reliford* (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455), and by analogy to *Reliford*, we reject defendant's argument regarding the jury instruction on use of his prior sex offenses.

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a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely, that is, the uncharged crimes evidence. [¶] If you decide that the defendant committed the uncharged offense or offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit the sex offenses as charged here. [¶] If you conclude that the defendant committed the uncharged offense or offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged sexual offenses. The People must still prove each element of every charge beyond a reasonable doubt."

The version of CALJIC No. 2.50.02 given to the jury in *Reliford* reads, in pertinent part, as follows: "If you find that the defendant committed a prior sexual offense in 1991 involving S[.]B[.], you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense in 1991 involving S[.]B[.], that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide." (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1012.)

II

Defendant Has Not Established He Received Ineffective Assistance Of Counsel Within The Meaning Of The Sixth Amendment

Defendant contends he was denied the effective assistance of counsel because his attorney failed to: (1) call certain witnesses; (2) investigate the background of T. B.'s mother; (3) object to admission of defendant's prior sex offense *conviction*; (4) obtain defendant's "waiver of rights regarding [his] custody status"; and (5) prepare for trial.

Many of these contentions were raised in a motion for new trial brought by newly-retained counsel. At a hearing on the motion, trial counsel responded to the allegations she was ineffective. After listening to trial counsel's explanations, the court ruled that her conduct did not "f[a]ll below the objective standards of reasonableness under prevailing professional norms" and she "had reasons and tactics for not doing certain things."

To prevail on a motion for new trial on the ground of ineffective assistance of counsel, a defendant must show "that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.]" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659-660.) In reviewing the court's denial of a motion for new trial on the

ground of ineffective assistance of counsel, we defer to the court's findings, express and implied, if they are supported by substantial evidence. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) Where, as here, the defendant is represented by different counsel on the motion for new trial, the trial court's ruling on the incompetence of counsel is entitled to great weight. (*People v. Wallin* (1981) 124 Cal.App.3d 479, 483.) "Absent a showing of clear and unmistakable abuse, we will not disturb [the trial court's] decision." (*Ibid*.) With these principles in mind, we turn to the specific allegations of trial counsel's incompetence.

A

Failure To Call Witnesses

Defendant contends trial counsel should have called "numerous witnesses" "[who] gave positive support for the defendant in terms of current character, and opportunity." Specifically, he argues trial counsel should have called Susan Winslow, Calvin Sukow, and Dr. Marcum Samaan.

Trial counsel explained Winslow would have testified about "other people leaving their children with [defendant] and her opinion that she didn't think those people would leave their children with him if, in fact, he was a child molester." Winslow also would have testified that defendant babysat children and wanted to get involved with children from child protective services. Trial counsel did not call Winslow because she did not "want to bring in more evidence of [defendant] wanting to be around more children."

Sukow is defendant's cousin and would have testified that he saw one of the girls alone with defendant and never saw anything inappropriate. Trial counsel explained that this evidence conflicted with the trial testimony of defendant's wife that defendant was never alone with any of the girls.

Dr. Samaan would have testified that when he spoke with his now-adult children about the allegations against defendant, none of his children "complained about" defendant. Trial counsel explained that such testimony would have "open[ed] the door" to the People questioning Dr. Samaan about whether he would have allowed his children in defendant's presence given defendant's prior child molest conviction. Counsel "didn't want to go down that path to draw more and more attention to the fact of his prior conviction."

These tactical reasons were inherently reasonable and therefore sufficient for trial counsel to decline to call these witnesses, regardless of any reasons newly-retained counsel might have proffered about the utility of these witnesses' testimony or trial counsel's lack of investigation regarding these witnesses.

B

Failure To Investigate The Background Of T. B.'s Mother

Defendant contends trial counsel should have "explor[ed] [T. B.'s mother's] character and common connection." According to defendant, T. B.'s mother's license to practice psychology had been "terminated," and she had been overheard saying that she "'want[ed] to see the son of a bitch [defendant] in jail.'"

Defendant takes issue with trial counsel's "fail[ure] to investigate the ramifications" of this evidence.

Trial counsel explained she had asked T. B. if "somebody had put these ideas into her head" and T. B. denied it, so counsel had no reason to believe that the mother told T. B. to make up the allegations of molest. Trial counsel was aware that T. B.'s mother's psychology license had been "withdrawn," but she did not know the reason. Trial counsel did not think the evidence was relevant.

Other than defendant's speculation, there is nothing to support defendant's theory that trial counsel was deficient in investigating T. B.'s mother. Trial counsel's actions in questioning T. B. about her mother and her tactical choice not to pursue the questioning further was reasonable, given there was nothing to show T. B. had fabricated the allegations against defendant. Furthermore, trial counsel's conclusion that the evidence about the mother's license was irrelevant was reasonable given the mother did not testify at trial.

C

Failure To Object To The Admission Of Defendant's Prior Sex Offense Conviction

Defendant faults trial counsel for allowing the jury to learn that defendant was in fact *convicted* of a prior sex offense and can think of no tactical reason why counsel acted as she did. We, however, can think of a very simple tactical reason: had the jury heard only of defendant's prior bad acts without the fact of his felony conviction, it could be argued

that the jury would have wanted to punish him for his prior acts. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917 ["the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses"].) Trial counsel therefore cannot be faulted for not objecting to the introduction of defendant's prior conviction.

D

Failure To Obtain Defendant's Waiver Of Rights Regarding His Custody Status

Defendant argues trial counsel was ineffective for allowing into evidence, "unitarily and without defendant's informed consent," the fact he had been in custody for the charged crimes. The People stated they were going to ask defendant's wife about her visits with defendant when he was in jail. Trial counsel explained she did not object because the jury "probably already know[s] he's in jail" and if she tried to keep that fact out of evidence, "it would leave the jurors wondering if we're holding back some information from them." Defendant fails to cogently explain the deficiency of this manifestly reasonable explanation to not object to the evidence and fails to understand that the law does not require a defendant to acquiesce to his attorney's decision to allow into evidence the fact of his custodial status.

E

Failure To Prepare For Trial

On the second day of trial during a break from voir dire, trial counsel stated she was "finalizing" the witness list and "need[ed] to go over that with [the prosecutor]" and would have the list ready before 9:00 a.m. the next morning. Defendant contends trial counsel was not prepared for trial because she did not "turn in a witness list" on time.[4] Defendant's contention that trial counsel was ineffective fails because there is no reasonable probability -- or more accurately any possibility -- of a different outcome had trial counsel tendered her witness list sooner. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [80 L.Ed.2d 674, 693-699].)

In sum, defendant's contention that trial counsel was ineffective lacks merit, and the trial court acted well within its discretion in denying defendant's motion for new trial based on ineffective assistance of counsel.

III

Sentencing Issues

The court sentenced defendant to state prison a consecutive 25 years to life for each count of molest for an aggregate term of 375 years to life. On appeal defendant contends the trial court: (1) abused its discretion in failing to strike his prior

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[4] In this subargument defendant also takes issue with other aspects of trial counsel's performance with which we have already dealt. We will not repeat that discussion here.

conviction; (2) imposed a sentence that is cruel and unusual punishment; (3) erred in imposing a consecutive sentence.

A

The Court Did Not Abuse Its Discretion

In Denying Defendant's Romero[5] *Motion*

Newly-retained counsel argued that the court should strike defendant's prior conviction because it occurred 32 years before the charged crimes, defendant could be monitored with "modern technology" to ensure he would not "prey on children," he was 71 years old, he had an age-appropriate wife, and he had not "been a burden on society financially or in any other way."

The court denied the motion stating the following: "I'm not going to, obviously, grant the oral Romero to strike the 1963, lewd and lascivious conduct. [¶] [Defendant] was give[n] a grant of probation in 1963 and sentenced to serve an eight month county jail sentence. He's been convicted of 15 counts of lewd and lascivious acts of a variety of conduct involving three separate victims. His conduct does not warrant any justification to strike a prior similar offense."

While the trial court has the power to dismiss a strike conviction (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530), we will not disturb the trial court's ruling absent an abuse of discretion (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434). Under this standard, the inquiry is

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[5] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

whether the ruling in question "'falls outside the bounds of reason' under the applicable law and the relevant facts." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

Here, the trial court did not abuse its discretion in denying defendant's request to strike his prior conviction. Defendant was convicted of repeatedly molesting three different girls, and on many occasions used the ruse of a medical condition to get them to fondle him. His marital status was irrelevant as it clearly was of no deterrence when he committed these crimes. And the fact that "modern technology" now exists to track sexual offenders would be of no assistance in preventing defendant from committing these crimes because the majority occurred in defendant's own home. Against this backdrop, we cannot say the trial court acted irrationally in failing to dismiss defendant's prior conviction.

B

Defendant's Sentence Is Not Cruel And Unusual

Defendant contends his sentence constitutes cruel and unusual punishment within the meaning of the Eighth Amendment to the federal Constitution because human beings "rarely" live "over 100 years of age."

The fact a sentence exceeds a defendant's life expectancy does not render the sentence constitutionally cruel or unusual. (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383.) As the *Byrd* court explained: "[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.]" (*Byrd*, at p. 1383.)

Although defendant's sentence is severe, his conduct in repeatedly molesting young girls over a long period of time was reprehensible. His case is not an "'exquisite rarity'" where the sentence is so harsh as to "shock[] the conscience" or to "offend[] fundamental notions of human dignity." (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

C

Reversal Of Defendant's Consecutive Terms Are Not Required

The court sentenced defendant to 15 consecutive 25-year-to-life terms based on its finding that S. J. "acted out as a result of the victimization and was sent to a reformatory [school] in Utah to try to curb her behavior, when it appears to me that the problem was strictly the molest perpetrated on her by [defendant]."

Defendant contends the court erred in imposing consecutive terms because: (1) the court violated his right to a jury trial by making the finding in aggravation; and (2) "there is a total absence of any evidence, records or professional, that has tied causation for [S. J.'s] condition to anything [d]efendant did."

1. *Alleged Violation Of Defendant's Right To A Jury Trial*

Defendant contends imposition of consecutive terms violated his Sixth Amendment right to trial by jury as recognized in *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856].

In *Cunningham,* the Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham v. California*, *supra,* 549 U.S. at p. ___ [166 L.Ed.2d at p. 864], overruling on this point *People v. Black* (2005) 35 Cal.4th 1238, vacated in *Black v. California* (2007) ___ U.S. ___ [167 L.Ed.2d 36].) *Cunningham* did not address whether the decision to run separate terms concurrently or consecutively must be made by the jury.

Penal Code section 669 imposes that duty on the trial court. In most cases, this is a matter of the trial court's discretion. (*People v. Morris* (1971) 20 Cal.App.3d 659, 666.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Penal Code section 669 provides that when a trial court fails to determine whether multiple terms are to run concurrently or consecutively, they shall run concurrently. However, this does not create a presumption or other entitlement to concurrent sentencing. It merely provides for a default in the event the court neglects to perform its duty in this regard.

The trial court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement serves a number of interests: "it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable." (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) However, the requirement that reasons for a sentence choice be stated does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to the trial court the decision whether to impose concurrent or consecutive sentences is not precluded by *Cunningham*. In this state, every person who commits multiple offenses knows that, if convicted, he or she runs the risk of receiving consecutive sentences without any further factual findings. While such a person has the right to

the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing. As the Supreme Court said in *Blakely v. Washington* (2004) 542 U.S. 296, 309 [159 L.Ed.2d 403, 417], "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." Accordingly, defendant's Sixth Amendment rights were not violated when the trial court imposed consecutive terms.

2. *Alleged Lack Of Evidence Defendant Caused S. J.'s Emotional Harm*

Notwithstanding *Cunningham*, defendant contends the court abused its discretion in imposing consecutive sentences because there was no evidence defendant caused S. J.'s emotional harm. Defendant's argument ignores the record. At trial, S. J. testified defendant's actions made her "scared" and "helpless." She was afraid she would "lose [her] house," and her family "would get hurt" if she did not comply with defendant's demands. She thought that if her parents found out "they wouldn't respect [her] or like [her] or [they would] think that [she] was a bad kid." S. J.'s mother testified that after S. J. met defendant, S. J. "had a terrible problem with authority figures," "had fits of sudden rage over small things," "had trouble focusing in school," "was acting out in school," and "had real big trust issues." She never had these problems before meeting defendant. S. J.'s mother sent her to a behavior modification treatment facility in Utah. Contrary to defendant's argument, there is no requirement that "records or professional" evidence substantiate

this evidence of harm. Accordingly, there was no abuse of discretion in using this factor to impose consecutive sentences.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SIMS, Acting P.J.

BUTZ, J.