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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH MACK, Defendant and Appellant.	B293897 (Los Angeles County Super. Ct. No. BA452571)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Kathleen Kennedy, Judge. Affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Kenneth Mack and codefendant Otis Barway (Barway) were jointly charged with assault with a deadly weapon and rape in concert.[1] The same accusatory pleading charged defendant only with an earlier rape and robbery, as well as another robbery. Following a joint trial before the same jury, defendant was found guilty on all charges and Barway was found guilty of assault and rape in concert.

On appeal, defendant contends that: his two convictions for rape in concert must be reversed because the trial court failed to instruct the jury sua sponte that accomplice testimony must be corroborated; insufficient evidence supported his conviction on count 4 for rape in concert; and the court erred by instructing on the assault with a deadly weapon charge using CALCRIM No. 875. Defendant also challenges his sentence, claiming: he is entitled under Senate Bill No. 1393 (Penal Code, §§ 667 and 1385)[2] to remand to allow the trial court to exercise its discretion to strike his five-year serious felony enhancements; the imposition of a fine and assessments violated his due process rights; and his 240-years-to-life sentence constituted cruel and unusual punishment under the Eighth Amendment. We affirm.

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[1] We earlier affirmed Barway's conviction in an unpublished opinion. (*People v. Barway* (July 8, 2019, B291746) [nonpub. opn.].) We take judicial notice of that opinion and the record in that appeal.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

II. FACTUAL BACKGROUND[3]

A. *Prosecution's Case*

1. Deadly Weapon Assault of Thomas (count 2 against both defendants)

Ryheem Thomas became acquainted with defendant and Barway through mutual friends. In November 2016, defendant and Barway were staying at Thomas's residence on Wilcox Avenue in Hollywood "for a few nights." Thomas "was just doing them a favor."

On November 30, 2016, Thomas argued with defendant and Barway about paying rent and then told them he "didn't want nobody staying there with [him] anymore." A fight broke out during which Barway approached Thomas from behind and punched him in the "back of [his] head," causing him to lose his balance. Defendant, who was facing Thomas with a screwdriver[4]

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[3] On appeal, defendant challenges only his convictions on counts 2, 3, and 4. We therefore set forth only the facts based on the trial evidence relating to those counts.

[4] According to Thomas, the metal portion of the screwdriver above the handle was five to six inches long. On cross-examination, Thomas stated that he was not certain what defendant stabbed him with, but it was not a knife.

in his right hand, then slashed the left side of Thomas's chest with the screwdriver, causing a four-inch laceration.[5]

After defendant cut Thomas, defendant and Barway ran from Thomas's house, and he followed them to the front porch while attempting to call the police. Thomas's chest laceration was bleeding heavily, leaving "a whole bunch of blood on the steps . . . ."

Thomas went to the emergency room that day for treatment of the laceration to his chest. Emergency room personnel had to "glue[] [him] back together." On a later date, lingering pain from the injury required Thomas to return to the emergency room for further treatment. The wound from the screwdriver left a two-inch scar on Thomas's chest.

2. Rape in Concert of Anett H. (counts 3 and 4 against both defendants)

On December 5, 2016, Anett H., who was visiting Hollywood from Berlin, drank with friends at a bar on Hollywood Boulevard.[6] At about 2:30 a.m., she left the bar alone and walked

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[5] Thomas identified exhibit 5 as a photograph taken at the scene depicting a significant laceration to the left side of his chest that exposed the flesh underneath.

[6] Anett admitted that while at the bar she consume three or four gin and tonics over a four or five-hour period. The parties stipulated that Anett's blood alcohol content was measured as part of her sexual assault examination and that the result was .19, which was over twice the legal limit for operating a motor vehicle.

toward her nearby vacation rental. On her way to the rental, Anett met and spoke with three men, who asked her if she wanted "to go on a rooftop to see the city . . . ." She agreed to accompany them.

Anett and the men entered a nearby building through a side door and climbed the stairs to the roof of the building. On the roof, all three men stayed close to Anett; they "were all one package . . . ." As Anett was looking around, one of the three men, defendant,[7] approached her and touched her neck. Anett tried to push him away, but "he got stronger." Defendant pushed her to the ground on her back and got on top of her. Anett tried to scream, but defendant covered her mouth with his hand. As she struggled, defendant punched her in the face at least once.

During his assault of Anett, defendant "took out his penis" and "put it in [her] vagina." Another one of the men, "the second guy," was "standing there" "right next to [defendant]," while the third man was "somewhere in the back." After a short time, defendant and the second guy "switched" places, and the second guy "did the same thing," i.e., he "[p]ut his penis in [Anett's] vagina." According to Anett, during the second rape, defendant stood nearby keeping "watch," and may have had his hand on her.

When they finished their assault, defendant and the second man took Anett's bag, which contained a smaller bag with her passport in it, and ran away from the scene. But the third man who was present during the assault came back and returned Anett's passport to her.

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[7] Anett identified defendant from a six-pack photographic line-up and at trial as the first man who assaulted her.

Anett came down from the rooftop and eventually called 911. The police arrived and took Anett for a sexual assault examination. She described several injuries she suffered as a result of the assault, including bleeding abrasions to her back, marks on her face, swollen cheeks, and abrasions to her knees and elbows.

Cindy Swintelski worked as a nurse practitioner at the Santa Monica UCLA rape treatment center. She performed forensic medical exams on both victims and suspects of rape. On December 5, 2016, Swintelski performed a forensic examination of Anett. Anett told Swintelski that she had not had consensual intercourse with anyone in the past five days. Anett further stated that she had been taken to a roof top and "physically and sexually assaulted" by three males. One of the assailants "repeatedly took her head and threw it onto the ground, hitting her head and face multiple times." The other two assailants "were holding her down and restraining her when she tried to move." She stopped resisting because she feared for her life. As she was being held down by her assailants, "[two of them] took turns forcing their penis[es] inside of her vagina multiple times."

During the physical exam, swab samples were taken from Anett's external genitalia, vagina, cervix, and anus to preserve genetic material for DNA testing. At the end of her testimony, the nurse opined that Anett's description of the assault on the rooftop was consistent with the multiple injuries that the nurse observed, which included abrasions to her back, knees, and elbows, lacerations to her vagina and debris around her vagina and anus.

City of Los Angeles Police Detective Daniel Wise was a member of the West Bureau sex unit assigned to investigate the

sexual assault of Anett. As part of his investigation, he took swab samples from defendant and Barway for purposes of DNA analysis. He also showed Anett six-pack photographic line-ups for both defendant and Barway. She identified defendant from the first line-up as the first man who assaulted her, and identified Barway from a second six-pack line-up as the second man who sexually assaulted her.

Heather Simpson was a criminalist for the Los Angeles Police Department assigned to the serology DNA unit. She worked as a DNA analyst and analyzed rape kits. She conducted the DNA analysis of Anett's sexual assault rape kit. Her analysis detected sperm cells on four swab samples taken from Anett. At least two of the swabs contained mixtures of DNA from two persons, with a major contributor, whose DNA was more prevalent, and a minor contributor, whose DNA was less prevalent. The major DNA profile from each of the four swabs matched defendant. The minor DNA profile from two of the four swabs matched Barway.

B. *Defense Case*

On December 5, 2016, Officer Chas Maloch responded to a call at approximately 4:00 a.m., in Hollywood. He made contact with Anett and noticed abrasions on her face, arms, and knees. Anett appeared intoxicated[8] and upset, making his initial attempts at interviewing her difficult.

Barway testified about the incident involving Thomas as follows: In November 2016, a man named Knox, who was leaving

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8 Anett told the officer she had consumed three vodka sodas.

town for a trip to Miami, told Barway, Thomas, and others that they were welcome "to crash" at his home. Thomas went to Knox's home first and picked up the key.

On or about November 27, 2016, Barway saw his friend, defendant, in Hollywood and invited him to stay at Knox's house. Thomas, however, did not want defendant to stay in the house because he believed defendant had taken his watch. After Barway gave Thomas money for the watch, Thomas agreed to allow defendant to shower.

On November 30, 2016, Thomas "kick[ed defendant] out" of Knox's house, which made Barway angry. Barway and Thomas then had a dispute over the key to Knox's house, which Thomas refused to give to Barway. The men argued and Thomas punched Barway. Barway "punched him back" and the two men wrestled. During the altercation, Barway saw the house key fall from Thomas's pocket, grabbed it, and ran away.

Thomas came outside with a bottle in his hand and demanded the key back. Thomas then threw the bottle at Barway, but missed, causing the bottle to shatter and cut Thomas's hand. Barway then kicked Thomas, who ran back into the house.

Barway called for an Uber driver to pick him up from the residence. As he was waiting for his ride, the police arrived and arrested him. Barway denied stabbing Thomas that day.

Barway described the incident with Anett as follows: In the early morning hours of December 5, 2016, Barway was hanging out with friends "selling clothes in the middle of the street in Hollywood." They were listening to music and "smoking weed."

Barway saw Anett with defendant, a woman named Iris, and "some dude." Iris told Barway that Anett was visiting Hollywood from Germany. Barway introduced himself to Anett and spoke to her for about 25 minutes. According to Barway, he and Anett, who did not appear to be "sober," drank vodka shots from a bottle she had in her purse.

Because Anett wanted more to drink, the group walked to a liquor store. Defendant then told Barway that he, Iris, and Anett were going to a park.

Barway left and went to a mall. While there, he received a call about "a little kickback party at the rooftop." Defendant then dropped Anett off at Barway's location and left to visit his girlfriend. Anett told Barway she wanted "to hang out," i.e., go to a party, listen to music, and drink.

Barway, Anett, and Barway's friend went to the rooftop of a "condo." On the way, they stopped at a liquor store because Anett "want[ed] more drinks." They then proceeded to the rooftop where they drank, listened to music, and danced. Anett began touching Barway and asked him to show her his penis. When Barway complied, Anett performed oral sex on him; she then pulled her clothing down and Barway had sex with her.

After they had sex, Barway asked Anett if she wanted to get something to eat, but she "didn't want to . . . get nothing to eat[, as] she was still . . . drunk, going crazy, dancing with different people, doing all type of stuff that normal people don't do." Barway decided to leave the party, but left Anett $25 so she could get something to eat. He left the party and later saw Anett "with somebody else." Her face was bruised and she was crying. Barway tried to call Uber for her, but she threw a bottle against

the wall and "was just going crazy." Because Anett would not listen to him, Barway left.

Barway denied raping Anett and insisted that their sexual encounter had been consensual, i.e., "that's what she wanted to do."

Barway claimed that when he was interviewed by the police, he did not tell them the whole story because, based on prior experience, he was concerned they would "twist [his] word[s], because [he knew] how the police work[ed]." Also, when he was detained, he had a gun, a "bunch of drugs and a lot of money." The police told Barway, "'We don't really want you . . . we want [defendant].'" Barway decided to tell the police "what they wanted to hear."

Barway's interview with the police was played for the jury during his cross-examination by the prosecution and his description of his conduct on the morning of the incident with Anett was inconsistent in several material respects with his trial testimony. Portions of the interview relating to defendant's first contention on appeal are discussed in detail below.

III. PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant and Barway in count 2 with the assault with a deadly weapon of Thomas in violation of section 245, subdivision (a)(1); and in counts 3 and 4 with the rape in concert of Anett in violation of section 264.1, subdivision (a). The District Attorney also charged defendant in count 1 with the robbery of another man and in counts 5 and 6 with the rape and robbery of another woman, Amber A., on an earlier occasion. The

District Attorney alleged that defendant had committed sexual offenses against more than one victim within the meaning of section 667.61, subdivisions (a) and (e)(4), the one-strike law; had suffered two prior strike convictions within the meaning of sections 667, subdivisions (b) through (j) and 1170.12; and had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1).

In closing argument, the prosecutor argued that, with respect to count 3, defendant acted as the primary rapist and Barway aided and abetted him in the rape; and that with respect to count 4, Barway acted as the primary rapist and defendant aided and abetted him.

During deliberations, the jury sent the trial court a number of notes, including two asking how it should complete the verdict forms if jurors could not unanimously decide beyond a reasonable doubt that Barway forcibly raped Anett, but also concluded that Barway aided and abetted defendant's rape of Anett. After consulting with counsel, the court provided responses to those questions.

The jury found defendant guilty on all six charges against him and found the multiple victim allegation true. The jury found Barway not guilty on count 2, but guilty of the lesser included offense of assault, and guilty on count 3, the rape in concert of Anett. Because the jury could not reach a unanimous verdict on count 4,[9] the trial court declared a mistrial on that count.

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[9] The jurors advised the trial court that they had been deadlocked, eight to four, in favor of Barway's guilt on count 4.

The trial court sentenced defendant to an aggregate term of 240 years to life, which term included six five-year terms for his prior serious felony convictions. The trial court also imposed a fine and assessments without holding an ability to pay hearing, as discussed in detail below.

IV. DISCUSSION

A. *Sua Sponte Duty to Instruct on Corroboration of Accomplice Testimony*

Defendant contends that the trial court erred by failing to instruct the jury sua sponte that Barway's statements to investigators implicating defendant in the rape of Anett required corroborating evidence. According to defendant, those statements were made by an accomplice and were "extremely damaging" to him because they suggested to the jury that defendant had assaulted and raped Anett.

1. Background

During cross-examination, following the playing of a portion of his taped interview with investigators, Barway acknowledged that he told investigators that Anett claimed defendant "put a bottle inside her vagina to try and clean out his DNA." But according to Barway, he lied to the investigators about Anett's bottle comment in order to avoid criminal charges and shift blame to defendant. In addition to Barway's statement to investigators about Anett's bottle comment, the jury also heard the following from his recorded statement: Barway admitted that

he went to a rooftop with Anett and that she orally copulated him; but he denied that he had intercourse with her. According to Barway, he left Anett on the rooftop and later saw defendant, who asked him, "'[W]here is that girl you [were] walking with?'" Later that same morning, Barway again encountered Anett. She had a cut on her face and was crying. She told Barway to tell defendant that she was going to call the police on him.

During jury instructions, the trial court did not advise the jury that Barway's statements to investigators implicating defendant in the rape of Anett needed corroboration because Barway was an alleged accomplice to the rape in concert charges against defendant. Thus, the jury was allowed to consider those statements as evidence against defendant on the rape in concert charges without corroboration.

During his rebuttal, the prosecutor referred to defendant's statements to investigators and argued that Barway's testimony was not credible. "Let's think about this. [] Barway made a statement to [investigators] implicating [defendant] in the rape of Anett. . . . In the recorded interview he [said] that Anett came back crying to him later in the night and [said] 'Hey, where is your friend?' and 'You know what? Your friend tried to clean out my vagina from his DNA with a bottle.' [¶] Let's make no mistake about it; in the recording [] Barway is laying out [defendant]. [¶] And [defendant]'s attorney is telling you that [] Barway was credible when he [was] on the stand. This is a man who admitted to you that when the pressure was on him, he was willing to say whatever he needed to say about his friend, [defendant], even if it meant that he was going to throw [defendant] under the bus and [defendant] was going to get in trouble; he was willing to say whatever he needed to say to get

himself out of trouble. [¶] And that is what both [defense counsel] are telling you is credible."

2. Legal Principles

"Section 1111 provides: 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.' An 'accomplice' is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (*Ibid.*) In order for the jury to rely on an accomplice's testimony, "'[t]he corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 505 . . . .)" (*People v. Gomez* (2018) 6 Cal.5th 243, 307–308.)

3. Analysis

We will assume, without deciding, that the trial court erred by failing to instruct the jury that Barway's statements to investigators implicating defendant in the assault and rape of Anett required corroborating evidence. We nevertheless conclude

that any error in failing to give such an instruction was harmless. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303–304 [a trial court's failure to instruct on corroboration of accomplice testimony is harmless if there is sufficient corroborating evidence].)

Here, the independent corroborating evidence implicating defendant in the rapes of Anett was not only sufficient, it was overwhelming. Anett identified defendant, at trial and in a photographic lineup, as the first man who raped her on the roof. She described his conduct in detail, explaining that he physically assaulted and raped her and then stood nearby keeping "watch" while the "second guy" raped her. Anett also told the UCLA nurse who performed her sexual assault exam that three men assaulted her on a rooftop and that two of them held her down as two of them took turns raping her. After the second assault, defendant and Barway took her purse and fled the scene together. Moreover, the sexual assault exam produced physical evidence that showed the presence of defendant's DNA in and around Anett's genitalia and physical injuries to her consistent with the assault and rape by defendant that she described.

In response to such overwhelming evidence, defendant's counsel argued only that Anett was not credible because she was extremely intoxicated on the night of the incident, suggesting that any sex defendant may have had with her was consensual. But the physical evidence of Anett's injuries and her testimony amply demonstrated that defendant's sexual encounter with Anett was nonconsensual. Such evidence was more than sufficient to corroborate Barway's statements to police implicating defendant in the rape of Anett.

B. *Sufficiency of Evidence on Count 4—Rape in Concert of Anett*

Defendant argues that there was insufficient evidence to support his conviction on count 4 for rape in concert of Anett. As defendant views the evidence, there was nothing to suggest that he aided and abetted the second rape of Anett because she was uncertain of his whereabouts during that rape.

1. Substantial Evidence

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

2. Rape in Concert

Defendant was charged in count 4 with the rape in concert of Anett in violation of section 264.1. "Acting in concert occurs

when 'the defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, . . . either personally *or by aiding and abetting the other person,*' commits rape, penetration with a foreign object, or sodomy. (§§ 264.1, 286, subd. (d), italics added.) The "'acting in concert language" [covers] *both* the person who committed the physical act and the person who aided and abetted.' [Citation.] The purpose of proscribing 'in concert' conduct is to protect against gang sexual assault. [Citation.] 'It also exhibits a legislative recognition that [sexual assault] is even more reprehensible when committed by two or more persons. [Citation.]' [Citation.]" [¶] Courts have sustained 'in concert' findings when two men 'wearing ski masks or knit caps over their heads, together entered [the victim's] home and successively raped the victim, each in the presence of the other' [citation], and when one assailant held the victim's arm while the other committed the act of rape [citation]." (*People v. Adams* (1993) 19 Cal.App.4th 412, 429.)

3. Analysis

Contrary to defendant's assertion, there was sufficient evidence from which a reasonable jury could have concluded that defendant aided and abetted the second rape of Anett. Anett described three men, including defendant and Barway, accompanying her to a rooftop. Once there, the men stayed close to Anett, like one "package." According to Anett, defendant began to physically assault her with the other two men in close proximity. Moreover, when defendant began raping Anett, she saw the "second guy" standing right next to defendant. And,

when defendant finished his rape, the "second guy" did "the same thing," i.e., raped Anett, while defendant stood nearby on "watch." At some point during the second rape, Anett believed that defendant had his hand on her. In addition, the account Anett provided to the UCLA nurse described the three men acting in concert during the entire course of the two rapes, with the men holding her down while two of them took turns raping her. And, after the second rape, defendant and Barway took Anett's purse and fled the scene together with the third man.

The totality of the circumstances surrounding the rooftop assault, as described by Anett at trial and to the UCLA nurse on the morning of the incident, suggests that the two rapists were acting in concert, each sharing an intent to rape Anett and each actively supporting the other's rape. That evidence was sufficient to support a finding that defendant aided and abetted the second rape of Anett.

Defendant argues that the jury's failure to convict Barway on count 4 as the primary actor in the second rape of Anett demonstrates that there was insufficient evidence that defendant aided and abetted that second rape. The jury's inability to reach a unanimous verdict as to Barway on count 4, however, only suggests that four members of the jury were not convinced beyond a reasonable doubt that Barway was the primary actor in the second rape. But the mistrial on that count does not suggest that a second rape did not occur or that defendant did not aid and abet that second rape. Anett clearly described a second rape following immediately after the first by the "second guy," and she testified that defendant did not leave the scene during that rape, but rather stood nearby keeping watch. Thus, whether the "second guy" was Barway or the unidentified third man, there

was sufficient evidence to show that defendant aided and abetted that man's second rape of Anett.

C. *Instruction with CALCRIM No. 875*

Defendant contends his conviction for assault with a deadly weapon must be reversed because the trial court's instruction defining "deadly weapon" erroneously allowed the jury to find a screwdriver to be an inherently deadly weapon, regardless of how it was used. We conclude that any such instructional error was harmless beyond a reasonable doubt.

1. Background

Defendant was charged in count 2 with assault with a deadly weapon in violation of section 245, subdivision (a)(1). On that charge, the trial court instructed the jury with CALCRIM No. 875 ("Assault With a Deadly Weapon") which provided in pertinent part that "[a] *deadly weapon other than a firearm* is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (Italics added.) Based on that alternative definition of deadly weapon, the jury could have found defendant guilty of assault with a deadly weapon either because it: (i) found the screwdriver to be "inherently dangerous;" or (ii) found that he used the screwdriver "in such a way that it [was] capable of causing and likely to cause death or great bodily injury."

2. Legal Principles

"'As used in section 245, subdivision (a)(1), a "deadly weapon" is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. (*People v. Graham* (1969) 71 Cal.2d 303, 327 . . . .) Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.' (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 . . . ; accord, *People v. Perez* (2018) 4 Cal.5th 1055, 1065 . . . .) [¶] Because a knife can be, and usually is, used for innocent purposes, it is not among the few objects that are inherently deadly weapons. 'While a knife is not an inherently dangerous or deadly instrument as a matter of law, it may assume such characteristics, depending upon the manner in which it was used . . . .' (*People v. McCoy* (1944) 25 Cal.2d 177, 188 . . . .)" (*People v. Aledamat* (2019) 8 Cal.5th 1, 6 (*Aledamat*).)

The Attorney General concedes, and we agree, the trial court's instruction erroneously permitted the jury to determine that a screwdriver was an inherently dangerous weapon—without considering the manner in which it was used—and convict defendant on that erroneous basis. (*Aledamat, supra*, 8

Cal.5th at p. 6.) Having concluded the trial court thus erred, we next consider whether defendant was prejudiced by the error.

3. Analysis

The error in instructing the jury here was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *Aledamat, supra*, 8 Cal.5th at p. 13 ["[W]e conclude that alternative-theory error is subject to the more general *Chapman* harmless error test. The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt"].)

The evidence concerning the assault of Thomas showed that defendant used a five- or six-inch screwdriver to slash open a serious wound on the left side of Thomas's chest. The wound, which was photographically depicted in exhibit 5, was four inches long, bled heavily, exposed the flesh under the skin, and had to be glued together at the emergency room. The wound caused Thomas lingering pain and left a two-inch scar.

The description of the screwdriver and the nature, extent, and location of the wound it inflicted establish it was "used in such a way that it [was] capable of causing and likely to cause death or great bodily injury." (CALCRIM No. 875). Moreover, there was no evidence or argument that the screwdriver qualified as an inherently dangerous weapon, regardless of how it was used. And, the defense did not attempt to show that the screwdriver was not used in a manner likely to cause injury; it argued only that Thomas was not credible and that Barway's testimony showed defendant was not present during the

altercation with Thomas. In light of the entire record, we conclude, beyond a reasonable doubt, that the trial court's instruction did not contribute to defendant's conviction on the assault with a deadly weapon charge. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295–296.)

D. *Remand Under Senate Bill No. 1393*

The trial court imposed five-year sentence enhancements on each of defendant's six convictions at a time when imposition of those enhancements was mandatory. Senate Bill No. 1393, which became effective on January 1, 2019, amended sections 667 and 1385 to give the trial court discretion to strike five-year sentence enhancements under section 667, subdivision (a) in furtherance of justice. Defendant contends that in light of Senate Bill No. 1393, we should remand this matter to the trial court to allow it to decide whether to strike his section 667, subdivision (a) enhancements.

The Attorney General argues that remand is not necessary because the record shows that the trial court would not have stricken the five-year enhancements, even if it believed it had the authority to do so. According to the Attorney General, the "trial court's statements [during sentencing] regarding [defendant's] culpability, circumstances of the crimes, and likelihood of reoffense, clearly indicate the court would not have dismissed [defendant's] prior serious felony enhancements." We agree.

Here, the trial court sentenced defendant to 240 years to life in prison. In imposing this sentence, the court observed that defendant's "life consist[ed] of . . . preying on others," and his conduct with respect to the charged offenses constituted a "one-

man crime wave" that evinced a "pattern of violence and predatory behavior." Moreover, defendant's rape of Anett was particularly violent and callous and followed an earlier rape of Amber A. which conduct, when considered along with his score on the Static-99 assessment,[10] placed him in the "high-risk category" for committing further sexual offenses if released. Given the record of the sentencing hearing and the evidence against defendant, we conclude that a Senate Bill No. 1393 remand is not warranted. (See e.g. *People v. Jones* (2019) 32 Cal.App.5th 267, 273.)

E. *Remand Under Dueñas*

At the sentencing hearing, the trial court imposed a $10,000 victim restitution fine (§ 1202.4, subd. (b)); a $240 court operations assessment (§ 1465.8, subd. (a)(1)); and a $180 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)). At the time, defendant did not request a hearing to determine whether he was able to pay the fine and assessments.

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant contends the trial court erred in ordering him to pay the restitution fine, the court operations assessment, and the criminal conviction assessment without first conducting a hearing on his ability to pay those amounts. Our Supreme Court has recently granted review to decide whether, as *Dueñas* holds, a court must consider a defendant's ability to pay before imposing

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10 "[T]he Static-99 test [is] a tool used to assess the risk that a sex offender will reoffend." (*People v. McKee* (2012) 207 Cal.App.4th 1325,1340.)

or executing fines, fees, and assessments. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844) [2019 Cal. LEXIS 8371].) But even if the Supreme Court concludes consideration of ability to pay is required, that holding would not warrant reversal in this case because any error in failing to conduct an ability to pay hearing was harmless beyond a reasonable doubt. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 (*Jones*); *People v. Johnson* (2019) 35 Cal.App.5th 134, 139.)

According to the probation report, at the sentencing hearing, defendant's employment and financial status were unknown. We do know, however, that defendant was a healthy, 29-year-old male at the time of the hearing and that the trial court sentenced him to an aggregate term of 240 years to life, a term that should enable him to earn sufficient wages during his incarceration to make payments toward his fine and assessments obligations. (*Jones, supra*, 36 Cal.App.5th at p. 1035 ["Wages in California prisons currently range from $12 to $56 a month"].)

F. *Cruel and/or Unusual Punishment*

Defendant contends that his sentence of 240 years to life constitutes cruel and unusual punishment in violation of his rights under the Eighth Amendment. According to defendant, that sentence was "disproportionate to the gravity of the non-homicide offenses that were at issue and serve[d] no penological purpose."

The United States Constitution prohibits the imposition of cruel and unusual punishment (U.S. Const., 8th Amend.), and the California Constitution prohibits the imposition of cruel or unusual punishment (Cal. Const., art I, § 17). The California and

federal constitutional provisions have both been interpreted to prohibit a sentence that 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, fn. omitted; see also *Ewing v. California* (2003) 538 U.S. 11, 32–35; *Harmelin v. Michigan* (1991) 501 U.S. 957, 962.) The federal constitutional standard is one of gross disproportionality. (*Ewing v. California, supra*, 538 U.S. at p. 21; *Harmelin v. Michigan, supra*, 501 U.S. at p. 1001.) Successful challenges to the proportionality of particular sentences have been very rare. (*Rummel v. Estelle* (1980) 445 U.S. 263, 272; *Ewing v. California, supra*, 538 U.S. at p. 21 ["'outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare'"]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196 ["Findings of disproportionality have occurred with exquisite rarity in the case law"].)

The California Supreme Court has instructed that, when reviewing a claim of cruel or unusual punishment, courts should examine the nature of the offense and offender, compare the punishment with the penalty for more serious crimes in the same jurisdiction, and measure the punishment to the penalty for the same offense in different jurisdictions. (*People v. Dennis* (1998) 17 Cal.4th 468, 511; *In re Lynch, supra*, 8 Cal.3d at pp. 425–427.)

Defendant has forfeited his Eighth Amendment challenge to his sentence by failing to object on that ground in the trial court. (*People v. Baker* (2018) 20 Cal.App.5th 711, 720 ["A claim that a sentence is cruel or unusual requires a 'fact specific' inquiry and is forfeited if not raised below"].) Contrary to defendant's assertion, his challenge does not "involve pure

questions of law that can be resolved without reference to the particular sentencing record developed in the trial court" such that it can be raised for the first time on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 235 (*Welch*).) Rather, defendant's Eighth Amendment claim requires us to refer to the record of his sentencing in order to assess, for example, the nature of the offenses and the offender. Moreover, we disagree with defendant's argument that any objection to his sentence would have been futile or wholly unsupported under substantive law then in existence. (See *Welch, supra*, 5 Cal.4th at pp. 237–238.) According to defendant, his sentence was mandated by applicable sentencing statutes and rules, and thus an objection that it nevertheless violated his rights under the Eighth Amendment would have been futile. Even at the time of sentencing, the trial court had the discretion to decline to sentence defendant as a Three Strike offender, pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, but even if defendant's sentence was required by state law—and it was not—the trial court could have entertained an argument that the sentence violated the federal constitution and, if it determined the sentence violated defendant's constitutional rights, conformed his sentence to the mandates of the Eighth Amendment. Thus, because an objection to his sentence on Eighth Amendment grounds would not have been futile, that exception to the forfeiture doctrine does not apply under these circumstances.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.