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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SWANIKETA LECOLE BROWN,

Defendant and Appellant.

B289641

(Los Angeles County
Super. Ct. No. PA087849)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed as modified.

Jenny M. Brandt, 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, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

This case arises out of three domestic violence incidents between defendant Swaniketa Lecole Brown and her husband, Arthur P.¹ The first, which occurred in October or November of 2016 in Long Beach, resulted in Brown's conviction by jury for assault with a deadly weapon, namely an automobile (Pen. Code, § 245, subd. (a)(1);² count 4). The second, approximately one month later in Redondo Beach, resulted in Brown's conviction of a second count of assault with a deadly weapon, again an automobile (*ibid.*; count 5). The third, occurring on December 25, 2016, resulted in Brown's convictions for assault with a deadly weapon (this time, a knife), during which Brown inflicted great bodily injury on Arthur (§§ 245, subd. (a)(1), 12022.7, subd. (e); count 1); corporal injury on a spouse, during which Brown personally used a deadly weapon, a knife, and inflicted great bodily injury on Arthur (§§ 273.5, subd. (a), 12022, subd. (b)(1), 12022.7, subd. (e); count 2); and vandalism causing over \$400 in damage (§ 594, subd. (a); count 3).

The trial court denied probation. It sentenced Brown to the low term of two years on count two, plus an additional four years on the two enhancements. It stayed sentence on count 1 (§ 654), imposed a concurrent mid-term sentence of two years on count 3, and imposed consecutive terms of one year each on counts 4 and 5, for a total aggregate term of eight years. The court also

¹ Arthur P was identified in the trial court by first name and last initial only. We do the same to protect the personal privacy interests of a victim in a criminal proceeding. (See California Rules of Court, rule 8.90(b)(4).)

² All further statutory references are to the Penal Code unless otherwise stated.

imposed a \$300 restitution fine (§ 1202.4), a \$150 criminal conviction assessment (Gov. Code, § 70373), a \$200 court operations assessment (§ 1465.8), and a \$500 domestic violence fund fee (§ 1203.097, subd. (a)(5)).

On appeal, Brown claims instructional and sentencing error.³ She also asserts the trial court erred in imposing the restitution fine and court assessments absent a finding regarding her ability to pay. We conclude the domestic violence fund fee must be stricken, but in all other respects affirm the judgment.

I. BACKGROUND

A. Prosecution Evidence

1. *Brown's and Arthur P's Marriage and Living Arrangements*

Brown and Arthur P married in May 2015. They agreed to live in Brown's apartment in Chatsworth while they looked for a new home. Their nine-month-old daughter and Brown's four-year-old daughter from another relationship lived with them.

Initially, Arthur P spent most nights at the Chatsworth apartment, spending the night occasionally at his parents' home in Long Beach. Arthur began spending more time at his parents' home after Brown and Arthur began arguing over his alleged infidelity. On several occasions, Brown told Arthur to leave the apartment, and she changed the locks. Brown also called the police several times when Arthur came to the Chatsworth apartment. On other occasions, Brown told Arthur to "come home."

³ Brown has also filed a petition for writ of habeas corpus, alleging ineffective assistance of counsel. (*In re Brown*, B298319.) We address that writ in a separate order.

2. *The Long Beach Incident*

In October or November 2016, Brown and Arthur P were in Inglewood for a family gathering. Arthur left in his car to go to work. Brown called Arthur about 10 minutes later and told him to return. When he did, Brown demanded that Arthur give her his key to her apartment. Arthur refused and drove away.

Brown got into her car, along with her two daughters, and drove after Arthur. Brown followed Arthur onto the freeway, honking her horn and yelling out the window, “My key, my key.” Arthur sped up and drove “crazy,” hoping that Brown would stop following him; their speed reached 100 miles per hour. Brown followed Arthur all the way to his parents’ home in Long Beach. After Arthur parked his car, Brown pulled up behind him and bumped into his car.

Arthur walked over to Brown’s car. He said he was going to get his daughter out of the car. Brown said no. She backed up. Arthur told her she was not going anywhere until he got his daughter. Brown then revved her car engine and drove toward Arthur, who was forced to get on the hood of the car to avoid being hit. Brown then began driving around the neighborhood, with Arthur clinging to the hood of her car. Arthur managed to call the police. As Brown neared the freeway onramp, she saw the police approaching. She made a U-turn, and Arthur jumped off the car’s hood.

3. *The Redondo Beach Incident*

About a month later, Brown and Arthur attended a birthday party at a club in Redondo Beach. After the party, they were both in Arthur’s car outside the club. Brown took Arthur’s phone to check for text messages to his ex-girlfriend. Arthur asked for his phone back. Brown took his phone to her car, rolled

up her window and locked the doors. Arthur told her he wanted his phone. Brown revved her engine and drove toward Arthur, who was forced up onto the hood. Arthur held on while Brown began driving away. However, when Brown made a hard turn around a corner, Arthur “went flying.” Arthur received cuts and scrapes when he hit the pavement. He had a two- to three-inch scar on his elbow as a result of his injuries.

4. *The Christmas Incident*

Arthur went to work at about 10:00 p.m. on December 24, 2016. He finished work around 5:00 a.m. on Christmas morning and drove to Brown’s apartment. They were supposed to go to a family event at Brown’s mother’s home later that day. Brown let Arthur into the apartment.

Brown asked to see Arthur’s phone. Arthur told Brown he was tired and needed to sleep, and did not have time to talk about the phone. Brown said she did not care; she wanted to see his phone. Arthur told her that he would not give her his phone. He went into the bedroom and lay down. Brown continued to ask for the phone. Eventually, Arthur told her it was in the living room and went to sleep.

Arthur awoke to the smell of smoke. He went into the kitchen and saw his phone, which had been smashed and burned, on the floor. Brown told Arthur that he did not have a phone. Arthur was upset, and argued with Brown. The value of the phone was about \$700.

The baby began crying. Arthur told Brown that he was going to get his daughter. Brown told Arthur he was not going to do that; he was going to listen to her. Arthur went down the hall to his daughter’s room and picked her up. Brown went to the kitchen, and returned with a large kitchen knife. Arthur put his

daughter back down in her crib, left the room, and closed the door behind him from the hallway.

Brown then poked Arthur several times with the knife. The knife thrusts left red marks, some of which started to bleed. Arthur asked Brown what she was doing, and put his hands up. Brown then stabbed Arthur's right hand and continued poking him with the knife. Arthur called Brown every "derogatory name" he could think of, but did not attack her physically because she was his wife.

Arthur went into the living room and sat down on the couch. He was bleeding from his wounds. Brown got her daughters ready for church, and then took them downstairs to the car. Brown returned to the apartment and told Arthur to leave. Arthur replied that she just stabbed him, and he was not going anywhere; he needed time to process what happened. He said he would go to church, but he was not leaving. Brown grabbed Arthur's shoes and threw them. Arthur stood up. He got his shoes and other things, and began putting them in his bag. Brown came up from behind and stabbed Arthur in his left shoulder. She stabbed him several more times, including in his chest and thigh. Doctors used 14 to 16 staples to close these wounds.

The stab wound to Arthur's thigh "really hurt." He took the knife from Brown and went to put it in the kitchen. Brown grabbed Arthur's bag and threw it down the stairs. Arthur left the apartment. Brown locked the door. She and Arthur exchanged words before she went to her car and drove to church. Arthur got into his car, still trying to process what happened and unaware of how bad his injuries were. He then drove to church.

When Arthur arrived at church, one of the elders observed that he was bleeding and appeared to be in shock. The elder asked what happened. Arthur said, “I got stabbed. She stabbed me.” Arthur asked if the elder could get a first aid kit and “patch me up.” The elder indicated that Arthur’s wounds were more serious than that. Arthur looked down at his shirt and saw that he was covered in blood. Arthur did not want the elder to call 911, but the elder made the call. The police and paramedics arrived at the church.

At the hospital, the staff told Arthur that his wife tried to kill him. Arthur, however, did not think Brown was trying to kill him. When a police officer spoke with him, Arthur said he did not want to file a police report or press charges against Brown.

B. Defense Evidence

1. *Background*

Brown testified in her own defense. Brown stated that when she and Arthur got married, Brown was living in her apartment in Chatsworth, and Arthur was living with his parents in Long Beach. Arthur asked to move into Brown’s apartment, but she said no. She did allow him access to the apartment, however, and he slept at the apartment on weekends. He kept some of his clothing at the apartment.

Brown did not want Arthur to live with her because of an incident which occurred in the first three months of their marriage. During a disagreement, Arthur backed Brown into a corner and refused to leave. Brown panicked.⁴ Brown eventually

⁴ Brown noted that she is five feet, eleven inches tall and weighs 130 pounds. Arthur is six feet, three and one-half inches tall.

was able to leave the apartment. When she returned home, Arthur was not there. She packed his things and left him a note, telling him to leave. She also changed the locks to the apartment. Brown gave Arthur a new key to her apartment in June 2016. She again changed the locks in September 2016.

During their marriage, Arthur cheated on Brown. He grabbed and pushed her, although he never hit her or used a weapon on her. Brown contemplated divorce, and participated in marriage counseling. She and Arthur entered into a marriage restoration agreement which provided that Brown would have access to Arthur's electronic devices to ensure that he was abiding by the agreement.

2. *The Long Beach Incident*

Brown and Arthur were at her cousin's home on Labor Day weekend. When she was ready to leave, Brown got upset because Arthur was not going to help her with the children but instead was planning on going to a nightclub. Brown demanded that Arthur give her his key to her apartment, but Arthur refused.

When Arthur left, Brown followed him. She drove no faster than 80 miles per hour on the freeway; she did not believe that her car was capable of reaching 100 miles per hour. She knew that Arthur was driving to his parents' home in Long Beach, and she believed his parents would tell him to return the key. When they reached the home of Arthur's parents, Brown told Arthur's father that Arthur refused to return the key. Arthur's father told Arthur to return the key. Arthur said that he wanted his daughter. Brown responded, "you can't be serious." Arthur then said that he did not have the key; it was at the apartment.

Brown decided to drive home. She backed up her car; she did not hit Arthur's car when she did so. Arthur asked where she

was going, and Brown said she was going home. Arthur demanded his daughter, and Brown said no. Arthur then jumped on the hood of her car. Brown and Arthur's father told Arthur to get off the car, but Arthur refused. Brown then began driving, hoping to scare Arthur so he would get off the car. When he remained on the hood, Brown drove slowly toward the freeway. Arthur called the police, telling them that Brown would not give him his daughter. When Brown saw the police behind her, she pulled into a gas station. She, Arthur, and his father spoke to the police. The police did not arrest her.

3. *The Redondo Beach Incident*

Brown and Arthur went to a club in Redondo Beach. After they left the club, they were in Arthur's car in the parking lot. Brown asked to see Arthur's phone, and he gave it to her. As Brown scrolled through the phone, Arthur acted agitated and irritated. Brown felt uncomfortable and went to her own car, locking the doors. Arthur went over to her car and began pounding on the window so hard that Brown was afraid it would shatter. Brown tried to drive away, but Arthur stood in front of her car. Brown put her car in reverse, and Arthur jumped on the hood.

Brown told Arthur to get off her car. Arthur demanded that she return his phone. Brown began driving out of the parking lot. Brown did not drive fast or make any abrupt movements; Arthur slid off the hood of her car because he was drunk. Brown drove to a residential street and parked her car. She continued looking through Arthur's phone and discovered text messages between Arthur and his ex-girlfriend. She returned to the parking lot, but Arthur was not there.

Brown started driving toward the freeway and discovered Arthur in his car, stopped at a red light. He was on the phone with a 911 operator. Brown drove back home, with Arthur following her. When they arrived at her apartment, there was a “big scene.” Arthur ended up spending the night at the apartment.

4. *The Christmas Incident*

By Christmas, Brown and Arthur had been arguing for days, and their relationship was terrible. Brown was upset because Arthur failed to attend a Christmas Eve event after saying he would be there. On Christmas morning, Arthur asked to come over after work and give her money for the babysitter. Brown needed the money and allowed him to come over. Brown thought Arthur would attend church and a Christmas Day event with her.

Arthur arrived at about 7:00 a.m. with a duffle bag and a backpack containing his laptop. Arthur did not leave his phone on the nightstand, as he usually did, so Brown began looking for his phone. She found a new phone in his jacket pocket. The phone was password protected, which upset Brown. She went into the bedroom and asked Arthur where his phone was. Arthur responded in a snappy tone that he was trying to sleep and he did not have time to deal with her questions about the phone. Brown retrieved Arthur’s phone, took it into the kitchen, and smashed it with a hammer. Brown said she destroyed the phone so Arthur could not use it to talk to other women. The phone exploded. Brown put it under running water and turned on the ceiling fan to get rid of the smoke.

Brown yelled at Arthur “you don’t have a phone.” They began arguing. Eventually, Brown told Arthur to leave the

apartment, but he refused. Arthur said Brown would have to call the police to get him to leave, and he would not leave without his daughter. When Brown tried to block Arthur from getting to their daughter, he shoved her out of his way and into the wall. Brown ran into the kitchen and grabbed a knife, thinking that if Arthur saw the knife, he would leave without their daughter.

Brown went to her daughters' room, where Arthur was reaching into the crib to get the baby. She told him to put the baby down. Arthur saw the knife and put the baby down. Arthur then walked up to Brown and asked what she was going to do with the knife. Brown held the knife with the blade pointed at Arthur. Arthur told Brown that she was crazy. Brown told Arthur to get his things and leave. Arthur walked closer to Brown, so that his chest was touching the tip of the knife blade. Brown was scared, because Arthur did not appear to be afraid of the knife.

The baby started crying, and Arthur said he was going to pick her up. Brown again told him to get his things and leave. They argued. Arthur grabbed Brown's arms and pinned them down. When he reached for the knife, Brown cut his hand. Arthur backed away. Brown then went into her daughters' room, picked up the baby, and got ready to go to church. Arthur paced between the hallway and the living room, muttering. Eventually, he sat down in the living room.

Brown put the baby in her carrier. Brown thought that if she left, Arthur would also leave. Brown left her apartment, put her daughters in her car, and pulled out of the driveway. She waited to see if Arthur would leave the apartment. He did not. After about 10 minutes, Brown left the car and returned to her

apartment. She wanted to make sure that Arthur left so he did not damage the apartment.

Brown told Arthur he had to leave the apartment. He asked for a minute, and Brown responded she did not have a minute because the girls were in the car. Brown picked up Arthur's shoes. Arthur told her not to throw the shoes outside. This upset Brown, so she threw the shoes outside. This agitated Arthur, who jumped up. As Arthur was gathering his things inside the apartment, Brown reached for the backpack containing the laptop. In response, Arthur grabbed her by the neck. Brown felt panicked and fearful, and pushed Arthur off her.

Brown ran to the kitchen and grabbed a knife. Brown shouted at Arthur about grabbing her neck, and told him to leave. Arthur came at her, and Brown jabbed his hip with the knife to keep him from grabbing her again. She did not use her full strength or try to stab him. Brown stated she did not want to hurt Arthur, she just wanted him to leave. Arthur ignored the knife and grabbed Brown's arms, pulling them down and squeezing them. Brown kept jabbing with the knife, trying to break free from Arthur's grasp. Arthur twisted her arms, pushed Brown down onto the couch and pinned her there. He then was able to pull the knife out of Brown's hand.

When Arthur began walking away, Brown took his backpack and threw it outside, hoping he would go after it. Arthur did so, and Brown then closed and locked the door. When Arthur could not get back in the apartment, he walked away. Brown then left.

Brown did not call the police because they had not been helpful when she called them in the past. It took a long time for them to arrive; on one occasion, it took so long for the police to

arrive that she had to call a second time. On a second occasion, Arthur told the police they could not make him leave.

Brown went to church. Someone there saw how upset she was and suggested she go to her mother's house. Brown later called Arthur and apologized.

II. DISCUSSION

Brown asserts the trial court erred in refusing to give certain jury instructions she requested. She also claims that in sentencing her, the trial court misunderstood her eligibility for a probationary sentence and erred in imposing fines and assessments absent a finding as to her ability to pay them.

A. Alleged Jury Instruction Errors

Brown does not contest her vandalism conviction. With regard to the remaining counts arising out of the Christmas incident, Brown argued self-defense and the jury was so instructed. Brown also requested a defense of habitation instruction, which was not given. Brown claims the trial court committed reversible error by failing to instruct the jury on the permissible use of force to eject a trespasser from her apartment. With regard to the Long Beach and Redondo Beach incidents, Brown asserts the trial court erred in failing to instruct the jury on the lesser included offense of simple assault.

1. Standard of Review

The trial court must instruct the jury on a defense if requested by the defendant only if the defense is supported by substantial evidence. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1049; *People v. Lee* (2005) 131 Cal.App.4th 1413, 1426.) “ ‘Substantial evidence is “evidence sufficient ‘to deserve consideration by the jury,’ not ‘whenever *any* evidence is presented, no matter how weak.’ ” ’ [Citations.]” (*People v.*

Wilson (2005) 36 Cal.4th 309, 331; accord, *People v. Larsen* (2012) 205 Cal.App.4th 810, 823.) We view the evidence in the light most favorable to the defendant. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30; *Larsen, supra*, at p. 824.) “In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether ‘there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt’ [Citations.]” (*People v. Salas* (2006) 37 Cal.4th 967, 982-983; accord, *Larsen, supra*, at pp. 823-824.) The trial court must resolve any doubts regarding the sufficiency of the evidence in favor of the defendant. (*Larsen, supra*, at p. 824.)

The court’s duty to instruct the jury “ ‘ ‘on the general principles of the law relevant to the issues raised by the evidence’ ” ’ ” includes the duty to instruct “ ‘ ‘on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]’ ” ’ [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) Put differently, “[a]n instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser uncharged offense but not the greater, charged offense. [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) We apply the de novo standard of review to the failure by a trial court to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Brown* (2016) 245 Cal.App.4th 140, 152.)

**2. *Failure To Instruct the Jury on the Use of Force
To Eject a Trespasser (Counts 1 and 2)***

Brown requested that the trial court instruct the jury pursuant to CALCRIM No. 3475 on the right to use force to eject a trespasser from real property, also known as defense of habitation.⁵ Brown argued the instruction was appropriate because she demanded that Arthur leave the apartment, and when he did not Brown was entitled to use reasonable force to eject him. The trial court refused to give the instruction, believing pursuant to section 198.5 the right to use force to eject a

⁵ CALCRIM No. 3475 provides: “The (owner/lawful occupant) of a (home/property) may request that a trespasser leave the (home/property). If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to (the (home/property)/ [or] the (owner/ [or] occupants), the (owner/lawful occupant) may use reasonable force to make the trespasser leave. [¶] *Reasonable force* means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. [¶] [If the trespasser resists, the (owner/lawful occupant) may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property.]

“When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable. If the People have not met this burden, you must find the defendant not guilty of _____
<insert crime>.”

trespasser applies only if the intruder was not a family member, and the intruder unlawfully and forcibly entered the residence.

As the People concede, the trial court's reasoning was erroneous. Section 198.5 creates a presumption regarding the reasonableness of force used against certain intruders. Brown did not rely on that presumption, which is addressed by CALCRIM No. 3477. Instead, she relied on the rule set forth in Civil Code section 50 that "[a]ny necessary force may be used to protect from wrongful injury the person or property of oneself" which is addressed by CALCRIM No. 3475. (See, e.g., *People v. Watie* (2002) 100 Cal.App.4th 866, 878 ["just because the presumption in [§] 198.5 did not apply to the victim, 'that does not mean that [the victim] did not have the right to defend himself against a violent attack in his own house'"].)

While the trial court's reason for refusing CALCRIM No. 3475 was incorrect, " "we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm." ' [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 39.) We therefore examine whether substantial evidence supported giving CALCRIM No. 3475. In addressing this issue, we (like the parties) divide the Christmas incident into two separate timeframes: when Brown used the knife prior to taking the children out of the apartment, and when Brown used the knife after she returned to the apartment while the children remained in the car. For the instruction to be given, substantial evidence was required on CALCRIM No. 3475's six elements: (1) Brown was the owner or lawful occupant of the home; (2) Arthur was a trespasser; (3) Brown asked Arthur to leave; (4) Arthur failed to leave the property within a reasonable amount of time; (5) it appeared to a reasonable person that Arthur posed a threat to

the property or its occupants; and (6) Brown used reasonable force to make Arthur leave. The parties agree, as do we, that there was substantial evidence Brown was the owner and lawful occupant of the apartment, and that she asked Arthur to leave. They dispute, however, whether substantial evidence supported the remaining four elements.

(a) *The First Part of the Christmas Incident*

With regard to the first part of the Christmas incident, even if one assumes Arthur was trespassing once Brown asked him to leave, there was no substantial evidence that Arthur failed to leave the property within a reasonable amount of time, or that Brown used reasonable force to make Arthur leave. Instead, Brown's testimony showed Arthur was attempting to leave the apartment. Brown brandished the knife not to eject Arthur, but instead to prevent him from leaving with their child.

Brown testified that, after she asked Arthur to leave, Arthur said "I'm not going anywhere unless I take my daughter." He then headed to the baby's room, indicating he intended to leave with the child. Brown then tried to block Arthur from getting to their child, and he shoved her out of his way. Brown got a knife, thinking that if Arthur saw the knife, he would leave without his daughter. She then told Arthur to put the baby down, which he did. Brown then asked Arthur for a second time to leave. The baby then started crying, and Arthur again said he needed to get his daughter. An argument ensued, during which Arthur was slashed with the knife.

Because Brown's testimony was that Arthur was seeking to leave with their child, there was not substantial evidence it appeared to Brown that Arthur failed to leave the apartment within a reasonable amount of time. Furthermore, Brown did not

use reasonable force to make Arthur leave the apartment but rather used a knife to prevent him from leaving with their daughter. Accordingly, there was no substantial evidence to support the giving of CALCRIM No. 3475 as to the first half of the Christmas incident.

(b) *The Second Part of the Christmas Incident*

With regard to the second part of the Christmas incident, there was no substantial evidence that Arthur failed to leave the property within a reasonable amount of time, or that reasonable force was used to make Arthur leave.

Brown argues that between the two incidents, Arthur had more than a reasonable amount of time in which to leave her apartment, but made no attempt to do so. This ignores that Arthur was stabbed before Brown left for the first time, and was trying to gather both himself and his things. Brown testified that when she returned to the apartment, Arthur immediately acknowledged that he would leave but needed a minute to get dressed and gather his things. He then proceeded to begin gathering his things as promised. Instead of letting Arthur pack up and leave, Brown proceeded to toss Arthur's things. They then had a physical altercation initiated by Brown's grabbing Arthur's backpack and laptop that ended in Brown stabbing Arthur.

Beyond her failure to give Arthur a reasonable amount of time to leave, there was no substantial evidence Brown's second use of force was to make Arthur leave. Brown testified she brandished the knife after she grabbed Arthur's backpack and laptop. Arthur then began to approach her, and she stabbed him in the leg because "I didn't want him to grab me." The jury was instructed on self-defense, and rejected that claim. Brown was

not further entitled to a defense of habitation instruction given the lack of substantial evidence for such an instruction.

3. *Failure To Instruct on the Lesser Included Offense of Simple Assault (Counts 4 and 5)*

The trial court instructed the jury on assault with a deadly weapon with respect to the Long Beach and Redondo Beach incidents involving Brown’s car. The defense requested, and the trial court refused, an instruction on the lesser included offense of simple assault. Brown argues there was substantial evidence that she did not drive her car in a manner likely to produce great bodily injury or death, and therefore an instruction on the lesser included offense of simple assault was required.

Simple assault is a lesser included offense of assault with a deadly weapon. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 747.) For purposes of “ ‘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.]” (*In re B.M.* (2018) 6 Cal.5th 528, 532-533.) “ ‘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.’ [Citation.]” (*Id.* at p. 533.) A car is a deadly weapon when used in a manner likely to produce death or great bodily injury. (See *People v. Tahl* (1967) 65 Cal.2d 719, 734; *People v. Russell* (2005) 129 Cal.App.4th 776, 782.) Great bodily injury means significant or substantial physical injury—something greater than minor or moderate harm. (CALCRIM No. 875.) “[S]ome physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for

a finding of ‘great bodily injury.’ [Citations.]” (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047.)

With respect to the Long Beach incident, Brown testified she was driving slowly—15 to 20 miles an hour. She was concerned about Arthur’s safety and thought it was safe for him to jump off the hood at that speed. Regarding the Redondo Beach incident, Brown testified that she was driving 10 to 15 miles per hour. Arthur slid off her car while she was making a turn because he was drunk; he did not fly off the hood due to the way she was driving.

Assuming the truth of Brown’s testimony, common sense still dictates that driving a car on city streets with someone clinging to the hood, even at 10 to 20 miles per hour, is likely to produce great bodily injury. (Cf. *People v. Golde* (2008) 163 Cal.App.4th 101, 116-117 [no substantial evidence for simple assault instruction when defendant drove car towards victim at 15 miles per hour while victim tried to avoid car].) Even if Arthur merely lost his grip and slid to the ground, it was likely he would land awkwardly, or be run over or hit by Brown’s car or another vehicle, and suffer great bodily injury. Not surprisingly, because of these inherent dangers, the Vehicle Code expressly prohibits driving with a person riding upon a portion of the vehicle not designed or intended for the passenger use. (Veh. Code, § 21712, subds. (a) & (b).) That Brown did not actually inflict greater injury was fortuitous. It did not, however, negate the likelihood that great bodily injury would result from continuing to drive with a person clinging to the hood of a car.

In sum, there was no substantial evidence to support an instruction on simple assault as a lesser included offense of

assault with a deadly weapon. The trial court did not err in refusing the instruction.

B. Alleged Sentencing Errors

1. *Denial of Probation*

Section 1203, subdivision (e)(2), provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to” “[a]ny person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted.” The probation officer’s report recommended that probation be denied and Brown be sentenced to state prison. The report explained: “Despite the fact [that Brown] lacks a prior criminal record, her actions clearly indicate she is a serious threat to the victim. She is quick to resort to violence and has no remorse for her actions. She needs to be held accountable to the full extent of the law and immediately sanctions need to be imposed. As charged, [Brown] is ineligible for probation [pursuant to section 1203, subdivision (e)(2)], unless the court determines this to be an unusual case.”

At the sentencing hearing, a number of people made statements on Brown’s behalf requesting leniency, including Arthur. The trial court stated it had “reviewed the various reports in this case” as well as “the letters that were submitted” on Brown’s behalf. The court then noted Brown had declined a plea offer, and that the court had “advised her at that time, if she was convicted of the charges, the court’s sentencing is somewhat limited.” The court then observed Brown had “been convicted of four strikes. The court is bound by the sentencing [guidelines] under . . . section[s] 1170 and 1203[, subdivision] (e)(2), and in a case such as this, she is not eligible for probation. Again, the

only time she could have gotten probation is if she had taken advantage of the plea bargain. This court cannot give her probation under . . . section 1203[, subdivision] (e)(2).”

Brown argues the trial court abused its discretion in sentencing her because it was under the mistaken belief that it lacked authority to grant probation. “To prove an abuse of discretion, ‘ “[t]he 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.] To meet this burden, the defendant must ‘affirmatively demonstrate that the trial court misunderstood its sentencing discretion.’ [Citation.] When ‘the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] . . . If the record is silent, however, the defendant has failed to sustain [her] burden of proving error, and we affirm. [Citation.]” (*People v. Lee* (2017) 16 Cal.App.5th 861, 866-867.)

Here, the trial court stated that it had read the “reports,” which would include the probation officer’s report. This report clearly stated that Brown was not eligible for probation unless the court determined that this was an unusual case. The court then went on to specifically cite section 1203, and state it could not give Brown probation under subdivision (e)(2). As both the probation report and the court cited the correct statute, we interpret the court’s reference to not being able to grant

probation as expressing that unusual circumstances were not present—not that the court misunderstood the statute it was expressly citing.

Although it did not use the words “unusual circumstances,” the court elsewhere explained that it did not view this as an unusual case meriting consideration of a probationary sentence. Brown’s driving at 100 miles per hour with the children in the back seat was “totally irresponsible.” The court recognized Brown did not have a prior criminal record, but “the court has to look for the safety of Arthur P., of the two children and of society in general from a woman who has shown conduct of being out of control. There was not one car hood incident, there were two. There were not just two incidents, there was a stabbing incident.” In reviewing aggravating factors under California Rules of Court, rule 4.421, the court found Brown’s offenses involved great violence and threat of bodily harm, that Brown used a weapon during the offenses, and that Brown’s violent conduct indicated a potentially serious danger to society. The only mitigating factors were her lack of prior criminal record, and that Arthur was “someone she was personally involved with.” After reciting these factors, the court stated that “[p]robation is denied.” That the trial court focused its comments on the factors which made Brown ineligible for probation but did not expressly mention there were no unusual circumstances does not mean the trial court failed to consider whether this was an unusual case. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

People v. Whelchel (1969) 269 Cal.App.2d 379 and *People v. Hollis* (1959) 176 Cal.App.2d 92, on which Brown relies, do not compel a different conclusion. In *Whelchel*, the trial court erroneously found prior felony convictions made the defendant

ineligible for probation, and it thus had no discretion to impose a probationary sentence. (*Whelchel, supra*, at p. 380.) The Court of Appeal remanded for resentencing, because “[t]he trial court indicated it may have determined this an unusual case both by its remark this was not a state prison case and a remark it probably would have considered probation if it could have.” (*Ibid.*) Similarly, in *Hollis*, the trial court erroneously thought certain offense characteristics made the defendant ineligible for probation, and stated that “ ‘[i]f under the law I was given a discretion, I might be able to consider’ ” certain mitigating facts. (*Hollis, supra*, at p. 98.) The Court of Appeal remanded with directions to consider the defendant’s request for probation on the merits. (*Id.* at p. 100.)

In contrast to *Whelchel* and *Hollis*, the trial court gave no indication it would have considered probation, or felt hamstrung to impose the sentence it did instead of granting probation. The court instead noted that it would have had greater sentencing discretion if Brown had taken a plea offer that avoided the unusual circumstances rule of section 1203, subdivision (e)(2), and then went through a lengthy list of considerations—nearly all of them in aggravation—before noting that probation was denied. We conclude Brown has not met her burden of demonstrating an abuse of discretion. (*People v. Whelchel, supra*, 269 Cal.App.2d at p. 380.)

2. Fines and Assessments

At the April 30, 2018 sentencing hearing, the trial court imposed a \$300 restitution fine (§ 1202.4), a \$200 court operations assessment (§ 1465.8), a \$150 conviction assessment (Gov. Code, § 70373), and a \$500 domestic violence fund fee (§ 1203.097). Brown contends the trial court erred in imposing

these amounts without a determination as to her ability to pay, and her contention is not forfeited by her failure to raise it below. We conclude the trial court erred in imposing the domestic violence fund fee, and it must be stricken. As to the restitution fine and court assessments, we find no error.

The \$500 domestic violence fund fee is to be imposed only when a defendant is “granted probation.” (§ 1203.097, subd. (a)(5)(A).) Brown was not granted probation; she was sentenced to prison. Accordingly, imposition of this \$500 was unauthorized, and it must be stricken. (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520.)

With regard to the remaining fine and assessments, the People argue that Brown’s failure to object below, or to raise the issue of inability to pay, caused her to forfeit any such argument on appeal. The Courts of Appeal are divided on the issue of forfeiture in these circumstances. (Compare *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [no forfeiture] and *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [same], with *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeiture] and *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155 [same].) We find it unnecessary to weigh in on this debate because in our view *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) was wrongly decided. (*People v. Kingston* (2019) 41 Cal.App.5th 272; see also *People v. Caceres* (2019) 39 Cal.App.5th 917, petn. for review pending, petn. filed Oct. 22, 2019.)⁶

⁶ Other courts have also disagreed with *Dueñas*. (See *People v. Allen* (2019) 41 Cal.App.5th 312, 326, petn. for review pending, petn. filed Nov. 22, 2019; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068; *People v.*

In *Kingston*, we agreed with the opinion of our colleagues in Division Two of this district in *People v. Hicks, supra*, 40 Cal.App.5th 320 that, contrary to the analysis in *Dueñas*, “due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant’s incarceration.” (*People v. Kingston, supra*, 41 Cal.App.5th at p. 279, citing *Hicks, supra*, at pp. 325-326.) Here, the “imposition of the [restitution fine] and fees in no way interfered with [Brown]’s right to present a defense at trial or to challenge the trial court’s rulings on appeal And their imposition did not result in [Brown]’s incarceration.” (*Kingston, supra*, at p. 281.)

At this point in time, due process does not deny Brown the opportunity to try to satisfy these obligations. (*People v. Hicks, supra*, 40 Cal.App.5th at p. 327.) The trial court accordingly did not violate Brown’s due process rights by imposing the restitution fine and assessments without first ascertaining her ability to pay them.

Kopp (2019) 38 Cal.App.5th 47, 93-98, review granted Nov. 13, 2019, S257844.)

DISPOSITION

The \$500 domestic violence fund fee is stricken. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the deletion of the domestic violence fund fee and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

CHANEY, Acting P. J.

BENDIX, J.

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