Filed 6/12/17 P. v. Hardwick CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADOLPH LEE HARDWICK, Defendant and Appellant.	B265447 Los Angeles County Super. Ct. No. TA135834

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Reversed in part, affirmed as modified in part, and remanded with directions.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen and Victoria B. Wilson, Supervising Deputy Attorneys General, and Alene M. Games, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Adolph Lee Hardwick appeals from a second-strike sentence imposed after a jury convicted him of abducting Mayra Zevallos at gunpoint, forcing her to drive him around aimlessly, and threatening to kill her. On appeal, defendant contends that the court failed to instruct the jury on the semiautomatic firearm element of assault with a semiautomatic firearm; that there is insufficient evidence of the asportation required for carjacking; that his carjacking conviction is unauthorized because it is a lesser-included offense of kidnap for carjacking; that his conviction for possessing a firearm as an ex-felon should have been stayed under section 654; and that his sentence is cruel and/or unusual punishment.

We conclude the court's instructional error was not harmless beyond a reasonable doubt and modify count 1 to the lesser-included offense of assault with a firearm. The People concede, and we agree, that carjacking is a lesser-included offense of kidnap for carjacking; we therefore reverse count 3. In all other respects, we affirm as modified and remand with directions to correct a typographical error in the abstract of judgment and an erroneous fee.

PROCEDURAL BACKGROUND

By information filed December 17, 2014, defendant was charged with assault with a semiautomatic firearm (Pen. Code,[1] § 245, subd. (b); count 1); kidnap for carjacking (§ 209.5, subd. (a); count 2) (hereafter, aggravated kidnapping); carjacking (§ 215, subd. (a); count 3); criminal threats (§ 422, subd. (a); count 4);

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1 All undesignated statutory references are to the Penal Code.

and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 5). The information alleged that defendant personally used a firearm (§ 12022.5, subd. (a)) in counts 1 and 4 and that he personally used a firearm in a violent offense (§ 12022.53, subds. (a)(5), (b)) in counts 2 and 3.[2] The information also alleged one prison prior (§ 666.5, subd. (b)), one strike prior (§ 667, subds. (b)–(j); § 1170.12, subds. (a)–(d)), and one serious felony prior (§ 667, subd. (a)(1)).[3]

Defendant pled not guilty and denied the allegations. After a bifurcated jury trial at which he represented himself but did not testify, the jury found defendant guilty of all counts and found the allegations true. In the bifurcated portion of the trial, the court found defendant was the person identified in the prior conviction records, and the jury found the prior-conviction allegations true.

The court denied defendant's post-trial motions—for trial transcripts, to strike a prior conviction as invalid under the *Boykin-Tahl* rule,[4] for a new trial, for post-conviction discovery,

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[2] The original information alleged the section 12022.5 enhancement as to counts 1 and 3. On April 27, 2015, the People amended the information by interlineation to delete that allegation from count 3 and add it to count 4.

[3] The original information alleged two additional drug-possession felonies. On defendant's motion, the court reclassified those convictions under Proposition 47 and struck them from the information.

[4] The *Boykin-Tahl* rule concerns the required advisement and waiver of constitutional rights when a defendant pleads guilty. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122, 130.) We note that defendant repeatedly and explicitly declined to

and to disqualify the trial judge—and sentenced him to an aggregate second-strike term of 36 years to life. The court selected count 5 as the base term and sentenced defendant to six years—the upper term of three years, doubled for the strike prior. The court imposed 14 years to life for count 2—the required term of seven years to life, doubled for the strike prior—to run consecutively. The court added 10 years for the firearm enhancement (§ 12022.53, subd. (b)), five years for the serious felony prior (§ 667, subd. (a)(1)), and one year for the prison prior (§ 667.5, subd. (b)), to run consecutively, and stayed the remaining counts and enhancements under section 654.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

On November 12, 2014, around 5:45 a.m., Mayra Zevallos, a four-foot eleven-inch-tall housekeeper, arrived for her shift at St. Francis Medical Center in Lynwood. As she gathered her belongings and prepared to leave her truck, she sensed someone standing next to her rolled-up window. She turned around and saw a stranger later identified as defendant.

Zevallos rolled down her window and asked if defendant needed anything. In response, he raised his sweater to display the gun handle protruding from his waistband. Defendant told Zevallos to let him inside the truck because he had a gun. She didn't have time to escape—she had already removed the key from the ignition and stowed it in her purse—so she let him in.

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bring a motion to dismiss his prior strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

As defendant walked around to the passenger side, Zevallos leaned over and opened the door. He got in, removed the gun from his waistband, and pointed it at Zevallos's waist. Zevallos asked defendant where he wanted to go; he replied, "Just drive."

As they were driving around, defendant told Zevallos to "call a fool." Zevallos said she didn't know what fool he was talking about and asked defendant to give her the number. He replied, "No, you have the number." Defendant was getting angry at her and had started loading the gun with bullets; Zevallos saw them in his hand. Defendant never asked her for money or for her truck; he just kept saying he was going to kill her.

After driving around for 10–15 minutes, Zevallos told defendant she wanted to return to the hospital. In response, he grabbed her hair and pointed the gun at her head. Zevallos saw a police car parked ahead, so she sped through a red light and stopped next to the car.

Los Angeles County Deputy Sheriff Jessica Nava was on her way to work that morning and had stopped for coffee at a Starbucks on Martin Luther King, Jr. Boulevard and Bullis Street. As she was getting ready to go, she saw a truck speeding toward her. The female driver was hysterical and crying. The driver and her male passenger were both yelling and waving their arms.

Nava got out of the car to see what was happening; as soon as she stood up, Zevallos yelled, "He's got a gun." Zevallos ran from the truck and took cover behind the patrol car. Nava drew her gun and pointed it at defendant; she told him to show his hands and unlock the passenger door. As defendant repeatedly raised and lowered his hands, Nava called for backup.

Eventually, defendant unlocked the door and was taken into custody.

Nava interviewed Zevallos while Deputy John Hunziker searched the vehicle. Zevallos was trembling, crying, and gasping for breath as she told Nava what had happened. Meanwhile, Hunziker found the gun on the passenger floorboard. Hunziker testified that he saw one round in the chamber and three rounds in the magazine. The bullet in the chamber was a "hollow point," a restricted type of ammunition. Hunziker explained that to chamber a round of ammunition, one had to rack "this" all the way back, so the forks could catch the round and pull it into the chamber for firing.

Before the close of the prosecution case, the parties stipulated that defendant had been convicted of a felony sometime before November 12, 2014.

CONTENTIONS

Defendant contends that the court failed to instruct the jury on an element of count 1 and there is insufficient evidence of the omitted element; that his conviction for count 3 is unauthorized because it is a lesser-included offense of count 2; that there is insufficient evidence of carjacking in counts 2 and 3; that count 5 should have been stayed under section 654; and that his second-strike sentence is cruel and/or unusual punishment.

DISCUSSION

1. The court failed to instruct the jury on the semiautomatic firearm element of assault with a semiautomatic firearm.

Defendant contends that the court's failure to instruct on the semiautomatic firearm element of assault with a semiautomatic firearm allowed the prosecution to convict him of count 1 without proving every element of the offense beyond a reasonable doubt. The People concede that "the jury was not told that the firearm had to be semiautomatic" but argue that the error was harmless because the type of firearm was "a peripheral element" of assault with a semiautomatic firearm. Because the instruction omitted an element of the charged offense, and the People have not proven beyond a reasonable doubt that the error was harmless, we reduce count 1 to the lesser-included offense of assault with a firearm (§ 245, subd. (a)(2)).

1.1. The court had a duty to instruct the jury on every element of the charged offense.

The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 363–364; U.S. Const., 14th Amend.; see Cal. Const., art. I, §§ 7, 15.) The Sixth Amendment, in turn, provides that any fact that increases a defendant's maximum or minimum sentence is an element of the offense that must be submitted to the jury. (*Alleyne v. United States* (2013) 570 U.S. __ [133 S.Ct. 2151, 2155] (*Alleyne*).) These principles are so fundamental to our system of justice that every criminal defendant has a non-waivable right to correct jury instructions on

the elements of each charged offense. (*People v. Mil* (2012) 53 Cal.4th 400, 409 (*Mil*) [court has sua sponte duty to instruct on elements of charged offense]; § 1259 [appellate court may review instructional errors affecting defendant's substantial rights notwithstanding failure to object].)

The basic elements of assault with a deadly weapon (§ 245) are:

- The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;
- The defendant did that act willfully;
- When the defendant acted, he had the present ability to apply force with a deadly weapon to a person.

The elements of the crime vary, however, based on the instrumentality a defendant uses to commit the assault, with maximum terms ranging from four to 12 years. (Compare § 245, subd. (a)(1) [assault with a deadly weapon] with *id*., subd. (a)(3) [assault with a machine gun].) Each instrumentality is a separate offense. If a defendant assaults his victim with a basic firearm, for example, he has committed a crime that subjects him to confinement for two, three, or four years (*id*., subd. (a)(2)); if he commits the same assault with a semiautomatic firearm, he has committed a different crime and faces three, six, or nine years (*id*., subd. (b)). Because use of a semiautomatic weapon exposes defendants charged with that crime to five additional years of potential punishment, it is an element of the offense that the People must prove to the jury beyond a reasonable doubt. (*Alleyne*, *supra*, 133 S.Ct. at p. 2155.) In other words, to convict a

defendant of a more serious offense carrying a higher sentence, the People must prove additional facts.

As the People concede, the court did not mention the semiautomatic firearm element of the offense to the jury. This was error.

1.2. The People have not proven that the instructional error was harmless beyond a reasonable doubt.

"We assess federal constitutional errors under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Under *Chapman,* we must reverse unless the People 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Ibid.*) Where the trial court fails to instruct on an element of the charged offense, however, the People must make a more substantial showing. That showing is governed by *Neder v. United States* (1999) 527 U.S. 1, 17–19 (*Neder*), and by the California Supreme Court's decision interpreting *Neder, People v. Mil*, *supra*, 53 Cal.4th 400 … .

" '*Neder* instructs us to "conduct a thorough examination of the record. If, at the end of that examination [we] cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[we] should not find the error harmless." ' (*Mil, supra,* 53 Cal.4th at p. 417, quoting *Neder, supra,* 527 U.S. at p. 19.) On the other hand, the error is harmless if the People can prove beyond a reasonable doubt that the omitted element was uncontested and supported by such overwhelming evidence that no rational juror could come to a

different conclusion. (*Mil, supra,* at pp. 417–419; accord, *People v. French* (2008) 43 Cal.4th 36, 53.)

"Here, the People's 'analysis of the prejudicial effect of the instructional error suggests' not only that they failed to apply *Neder,* but also that they 'may have relied instead on the less demanding standard of whether [the jury's] finding was supported by substantial evidence.' (*Mil, supra,* 53 Cal.4th at p. 417.) The People have not addressed the evidence supporting the defense on the omitted element. Instead, as in *Mil,* the People's argument 'focused exclusively on evidence that was favorable to the verdict' and presented 'the evidence in the light most favorable to the prosecution.' (*Id.* at pp. 417–418.) In assessing prejudice, we must 'determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." ' (*Id.* at p. 417, quoting *Neder, supra,* 527 U.S. at p. 19.) Therefore, our 'task in analyzing the prejudice from the instructional error is' not to determine whether a reasonable jury could have [concluded that the prosecution proved the omitted element], but rather, 'whether any rational fact finder could have come to the *opposite* conclusion.' (*Mil,* at p. 418.) This is the converse of the substantial evidence test. If the record shows some evidentiary basis for a finding in the defendant's favor on the omitted element, the People have not met their burden and we must reverse. (*Id.* at pp. 417–419.)" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165–1166, italics and first two alterations in *Valenti*.)

The People insist that the missing element was both "peripheral" to the case and conceded by the defense. We disagree with both contentions. As discussed, section 245 is

divided into sub-offenses based on the instrumentality of the assault. The defendant's punishment depends on which sub-offense he committed. If he uses a standard firearm, he faces a maximum term of four years (*id*., subd. (a)(2)); if he uses a semiautomatic firearm, he may receive up to nine years (*id*., subd. (b)). As such, defendant had the right to a jury determination of the type of firearm used in the assault. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) ["[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."]; *Blakely v. Washington* (2004) 542 U.S. 296, 303 [" 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."]; *Alleyne*, *supra*, 133 S.Ct. at p. 2155 ["[a]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."].)

Here, the court instructed the jury that a "firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion." While that definition concerns how a gun is **fired**, the definition of *semiautomatic firearm* addresses how a gun is **loaded**—that is, the mechanism by which a cartridge is presented for firing, the spent casing is removed, and a fresh cartridge is introduced. (See, e.g., CALCRIM No. 875 [semiautomatic firearm "extracts a fired cartridge and chambers a fresh cartridge with each single pull of the trigger."]; *In re Jorge M.* (2000) 23 Cal.4th 866, 874–875, fn. 4 ["A semiautomatic firearm 'fires once for each pull on the trigger

and reloads automatically, but requires the shooter to release the trigger lever before another shot can be fired.' (Walter, Rifles of the World (2d ed. 1998) p. 498)"]; § 17140 [" 'semiautomatic pistol' means a pistol with an operating mode that uses the energy of the explosive in a fixed cartridge to extract a fired cartridge and chamber a fresh cartridge with each single pull of the trigger."].)

There was scant testimony on this subject at trial. The prosecutor asked Hunziker, "To get a bullet in the chamber, what do you have to do?" He replied, "You have to—you have to cock the gun back. So you have to—you'd have to rack this all the way to the rear, in order for the catch—or the forks to catch the round and pull it into the chamber for it to be fired." On its face, however, this abbreviated and unclear description is broad enough to encompass a variety of firearms. A semiautomatic firearm is designed to fire a single cartridge, eject the empty case, and reload the chamber each time the trigger is pulled; it uses the energy from the fired shot to accomplish these tasks. Hunziker's testimony reveals nothing about this process, the key feature that distinguishes a semiautomatic firearm from other kinds of guns. None of the witnesses described the gun's appearance or, importantly for our purposes, explained how defendant's gun worked. The trial testimony established only that defendant used a firearm of some kind.

The closing arguments did not clarify matters. The People did not explain that the firearm's semiautomatic character was an element of the offense—or even identify the gun as semiautomatic. Defendant did not concede that a semiautomatic firearm was used. To the contrary, during closing argument defendant repeatedly reminded the jury that the prosecution was required to prove "every element of every crime" beyond a

reasonable doubt. He asked the jurors, "What is really the real evidence that establishes what the People is saying is true? … [W]e are down to the evidence. It's all about the evidence."

When a conviction is contrary to law, but the evidence shows that defendant is guilty of a lesser-included offense, we may reduce the conviction to the lesser-included offense and affirm the judgment as modified. (§ 1181, subd. (6); § 1260; *People v. Navarro* (2007) 40 Cal.4th 668, 681.) We therefore modify count 1 to reflect a conviction of assault with a firearm (§ 245, subd. (a)(2)).

2. The court must strike count 3 because it is a lesser-included offense of count 2.

Generally, a criminal defendant may be convicted of (though not punished for) multiple offenses based on a single act or course of conduct. (§ 954; *People v. Reed* (2006) 38 Cal.4th 1224, 1226–1227.) However, "California law prohibits convicting a defendant of two offenses arising from a single criminal act when one is a lesser offense necessarily included in the other." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1033.) "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether ' " 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]" ' [Citation.] In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*Id.* at p. 1034.)

Here, defendant was convicted of two carjacking-related offenses—kidnap for carjacking (§ 209.5, subd. (a); count 2) and simple carjacking (§ 215, subd. (a); count 3). "The People correctly concede carjacking is a … lesser included offense of

kidnap during a carjacking. [Citations]." (*People v. Montes* (2014) 58 Cal.4th 809, 898.) Because we conclude below that there is sufficient evidence to support count 2, defendant's conviction and sentence for count 3 and the related enhancement are reversed, and the court is directed to dismiss them on remand.

3. There is sufficient evidence of carjacking.

Defendant contends there is insufficient evidence of either simple carjacking (§ 215, subd. (a); count 3) or aggravated kidnapping (§ 209.5, subd. (a); count 2) because the People did not establish asportation beyond a reasonable doubt.[5] We disagree.

"In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt. [Citation.] 'The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] In applying this test, we review the evidence in the light most favorable to the verdict and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citation.] The same standard applies where the conviction rests primarily on circumstantial evidence. [Citation.]

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[5] Since defendant does not challenge the sufficiency of the evidence of the kidnapping, we only address the elements of carjacking. (See *People v. Contreras* (1997) 55 Cal.App.4th 760, 763, 765 [since § 209.5 penalizes a kidnapping "during the commission" of a carjacking, violation of the statute requires a completed carjacking].)

We may not reweigh the evidence or resolve evidentiary conflicts. [Citation.] The testimony of a single witness can be sufficient to uphold a conviction—even when there is significant countervailing evidence, or the testimony is subject to justifiable suspicion. [Citation.] Accordingly, we may not reverse for insufficient evidence unless it appears ' "that upon no hypothesis whatever is there sufficient substantial evidence to support …" ' " the verdict. (*People v. Valenti*, *supra*, 243 Cal.App.4th at pp. 1157–1158.)

To convict a defendant of carjacking (§ 215, subd. (a)), the People must prove:

- The defendant took a motor vehicle from someone's person or immediate presence;
- The taking was against the victim's will;
- The taking was accomplished by force or fear;
- The defendant intended to permanently or temporarily deprive the person of possession of the vehicle.

Defendant concedes that his actions in this case "constituted a taking" under *People v. Duran* (2001) 88 Cal.App.4th 1371, but insists that "the asportation element of carjacking was not satisfied." Defendant misconstrues the relationship between taking and asportation.

Taking includes "two necessary elements: caption or gaining possession of the victim's property, and asportation or carrying away the loot. [Citation.]" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) Unless both elements are present, a defendant has not taken the vehicle. (*Id.* at pp. 1056–1062.) When defendant threatened Zevallos and told her to drive, he

asserted his dominion and control over her truck. When Zevallos drove the truck in response to defendant's threats, she was carried away, and the taking was complete. (See, e.g., *People v. Hill* (2000) 23 Cal.4th 853, 855, 860–861 [infant can be the victim of a carjacking even though he or she is unaware of the taking and too young to give or withhold consent]; *People v. Quinn* (1947) 77 Cal.App.2d 734 [manual possession not required for asportation].)

Defendant also appears to argue that at some point, he lost control of the vehicle or failed to provide Zevallos with sufficiently detailed driving directions. But carjacking only requires a temporary deprivation of property. The offense is complete once a defendant accomplishes the taking with the required force and mental state. Any subsequent loss of control is irrelevant.

4. Defendant was properly sentenced for count 5.

Under section 654, a criminal defendant may not be punished for more than one offense arising from a single act or indivisible course of conduct. (§ 654, subd. (a).) Thus, if each of defendant's crimes was merely incidental to or was committed to facilitate a single objective, he may receive only one punishment. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Whether a course of conduct is divisible, giving rise to more than one punishable act, depends on the intent and objective of the actor. (*Kellett v. Superior Court* (1966) 63 Cal.2d 822, 824–825.)

Here, defendant was convicted of five counts related to abducting Zevallos at gunpoint, threatening to kill her, and forcing her to drive him around while he pointed a loaded gun at her head. At sentencing, the court imposed consecutive terms for count 2 (§ 209.5, subd. (a); aggravated kidnapping), its related firearm-use enhancement (§ 12022.53, subd. (b)), and count 5

(§ 29800, subd. (a)(1); felon in possession). Defendant argues that the aggravated kidnapping and firearm possession were part of an indivisible course of conduct undertaken to facilitate the carjacking. Because the two crimes were committed in furtherance of a sole criminal objective, he contends, the court's failure to stay count 5 resulted in an unauthorized sentence. The People argue that section 654 typically does not apply to section 29800, and therefore, defendant's sentence is valid. While defendant argues that the People's statement of the rule is too broad and that assumptions are not evidence, in light of this division's holding in *People v. Jones* (2002) 103 Cal.App.4th 1139 (*Jones*), we conclude the sentence is proper.

4.1. Legal principles

"It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]

"If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense." (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) Although the question of whether defendant harbored a "single intent" within the meaning of section 654 is generally a factual one, however, the " 'applicability of a statute to conceded facts is a question of law.' [Citation.]" (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.)

4.2. The sentence was proper.

This division held in *Jones* that "when an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime." (*Jones*, *supra*, 103 Cal.App.4th at p. 1141.) Here, Zevallos's testimony established that defendant arrived at her truck with the gun already tucked into his waistband. As Zevallos drove, defendant showed her bullets, which he carried separately, and started loading the gun with them. We conclude that as in *Jones*, defendant "necessarily intended to possess the firearm when he first obtained it, which," on these facts "necessarily occurred antecedent to" the carjacking. (*Jones*, at p. 1147.) Accordingly,

there is substantial evidence to support the court's sentencing choice.

5. Defendant's second-strike sentence is not grossly disproportionate to his culpability.

Defendant argues that his age, his criminal history, the facts of his offenses, and the lesser sentences imposed in California for other, more serious crimes render his sentence of 36 years to life unconstitutionally cruel or unusual. We disagree.

Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel or unusual punishment."[6] A sentence may violate this prohibition if " 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*); accord *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*).)

We use a three-part test to evaluate whether a sentence passes constitutional muster. First, we examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Lynch*, *supra*, 8 Cal.3d at p. 425.) Second, we compare the defendant's punishment with punishments prescribed by California law for more serious offenses. (*Id.* at pp. 426–427.) Third, we compare the defendant's

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[6] Since the California Constitution's prohibition against cruel **or** unusual punishment is broader than the Eighth Amendment's prohibition against cruel **and** unusual punishment, a punishment that satisfies the California constitution necessarily satisfies the Eighth Amendment as well. (See *People v. Anderson* (1972) 6 Cal.3d 628, superseded on other grounds as stated in *Strauss v. Horton* (2009) 46 Cal.4th 364.) Accordingly, we analyze defendant's contention under our state constitution only.

punishment with punishments prescribed by other jurisdictions for the same offense. (*Id.* at pp. 427–429.) Any factor, standing alone, can support a finding of disproportionality. (*Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38.)

Because a defendant must overcome a "considerable burden" to demonstrate that a sentence is disproportionate to his level of culpability (*People v. Wingo* (1975) 14 Cal.3d 169, 174; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 569 (*Sullivan*)), however, "[f]indings of disproportionality have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) Such findings in three-strikes cases are rarer still. (See, e.g., *People v. Cooper* (1996) 43 Cal.App.4th 815, 820; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630–1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134–1137.)[7]

Here, defendant does not argue that the sentence imposed for his offenses "shocks the conscience and offends fundamental notions of human dignity[]" as a general matter. (*Lynch*, *supra*, 8 Cal.3d at p. 424.) Instead, he contends, the sentence is

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[7] We do not mean to imply that conscience-shocking recidivist sentences do not occur—only that they rarely require constitutional correction. Such sentences are typically reduced via *Romero*, *supra*, 13 Cal.4th 497 (motion to dismiss prior strike convictions), a more flexible doctrine that allows courts not only to examine the factors at issue here, but also to focus on modern notions of fairness and justice. Defendant explicitly and repeatedly declined to bring such a motion in this case, however, and because he represented himself below, he cannot challenge that decision on appeal. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1226–1227 [self-represented defendants cannot claim ineffective assistance of counsel on appeal].)

unconstitutional as applied to him. (See *Dillon*, *supra*, 34 Cal.3d at pp. 479, 482–488.)

5.1. Nature of the offense

When evaluating the nature of the offense, we consider the circumstances of the crime, including motive, the extent of defendant's involvement, and the consequences of his actions. (*Dillon*, *supra*, 34 Cal.3d at p. 479; *People v. Morales* (1992) 5 Cal.App.4th 917, 930.) "Whether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will … . Defining crime and determining punishment are matters uniquely legislative in nature, resting within the Legislature's sole discretion. [Citations.] Only when the punishment is out of all proportion to the offense and is clearly an extraordinary penalty for a crime of ordinary gravity committed under ordinary circumstances, do the courts denounce it as unusual. [Citations.]" (*Sullivan*, *supra*, 151 Cal.App.4th at pp. 568–569, internal quotation marks omitted.)

We see no evidence that the aggravated kidnapping in this case was unusually benign. Defendant abducted Zevallos at gunpoint and, when she failed to comply with his bizarre, confusing requests, repeatedly threatened to kill her. When Zevallos told defendant she wanted to return to work, he grabbed her hair and pointed the loaded gun at her head. But for Zevallos's quick thinking and luck, her abduction could have ended quite differently.

The potential consequences of defendant's actions here illustrate the ways in which firearm use heightens the danger already inherent in abduction. (See, e.g., *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314 [" 'public policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them.' [Citation.]"].) Indeed, California voters are so concerned about misadventures with firearms that they recently excluded defendants who use them during nonviolent, nonserious offenses from Proposition 36's ameliorative provisions. (See, e.g., *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1055–1057 [discussing ballot materials].)

5.2. Nature of the offender

The next factor "focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*People v. Thompson* (1994) 24 Cal.App.4th 299, 305.) Typically, "[r]ecidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent sentences." (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds by *People v. Deloza* (1998) 18 Cal.4th 585.) We conclude defendant is not unusual in this regard.

Defendant has a lengthy criminal history replete with rehabilitation failures. He has been to prison at least twice; has violated probation three times and parole twice; and has sustained multiple convictions involving violence, driving under the influence causing injury, and driving with a license that was

suspended for driving under the influence. To the extent these offenses are based on an intractable drug problem, we agree with the People that that factor "is not necessarily regarded as … mitigating" where, as here, the "defendant has a long-term problem and seems unwilling to pursue treatment." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.) In short, the imposition of this particular sentence on this particular recidivist defendant does not shock the conscience.

5.3. Comparative punishment

Defendant has also failed to establish that his sentence is excessively harsh when compared to either the punishment for more serious crimes in this state or the punishment for the same crimes in other states.

Defendant's proffered comparison between his sentence and a sentence imposed upon a hypothetical knife-wielding first-degree murderer is flawed in several respects. Fundamentally, however, the problem is that defendant's hypothesized killer is apparently a first-time offender, whereas " 'proportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible.' [Citations.] Defendant 'ignores that the three strikes law punishes not only his current offenses, but also his recidivism. California statutes imposing more severe punishment on habitual criminals have long withstood constitutional challenge.' [Citation.]" (*Sullivan*, *supra*, 151 Cal.App.4th at p. 571.) Here, defendant's lengthy sentence was imposed not only for his current offenses but also for his recidivist behavior. (*Ibid.*)

"Thus, a comparison of defendant's 'punishment for his current crimes with the punishment for other crimes in

California is inapposite since it is his recidivism in combination with his current crimes that places him under the three strikes law.' [Citation.] 'Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals,' we cannot logically compare [defendant's] 'punishment for his [current offenses,] which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons. … The proper comparison would be to a recidivist killer,' whose punishment would not be less severe than defendant's. [Citation.]" (*Sullivan*, *supra*, 151 Cal.App.4th at p. 571.)[8]

5.4. Conclusion

We are mindful of Justice Mosk's warnings that "grossly excessive" sentences "demean[] the government inflicting [the punishment] as well as the individual on whom [the punishment] is inflicted." (*People v. Deloza*, *supra*, 18 Cal.4th at pp. 601–602 (conc. opn. of Mosk, J.); Mosk, *States' Rights—And Wrongs* (1997) 72 N.Y.U. L.Rev. 552, 556–559.) We conclude, however, that defendant's sentence does not offend the proscription against cruel or unusual punishment under the governing standards.

6. The abstract of judgment is incorrect.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) "Courts may correct clerical errors at any time, and appellate

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[8] Defendant has not attempted to compare punishment for recidivists in California with punishment for recidivists in other states.

courts (including this one) that have properly assumed jurisdiction of cases" (*ibid.*) may order correction of an abstract of judgment that does not accurately reflect the oral pronouncement of the sentence (*id.* at pp. 185–188).

The abstract of judgment for the indeterminate part of the sentence imposed in this case inaccurately designates the serious felony prior as an enhancement under section **99**7, which concerns the requirements for a motion to set aside an information, rather than under section **66**7, which governs enhancements for serious felony priors.

The abstract also lists an incorrect fee. The sentencing court must impose a $40 court security fee (§ 1465.8) and a $30 criminal conviction assessment (Gov. Code, § 70373) for every criminal conviction, including counts stayed under section 654. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 483–484.) The court in this case properly imposed one set of these assessments for each of the five counts, resulting in a total security fee of $200 and a total conviction assessment of $150. However, taken together, the two abstracts of judgment reflect a total operations assessment of $240.

We are confident that upon remand, the court will correct these errors and " 'actively and personally [e]nsure the clerk accurately prepares a correct amended abstract of judgment.' " (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1459.)[9]

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[9] Our reversal of count 3 also requires a reversal of the fees attached to that count, of course. Thus, as modified, the judgment includes four $40 court security fees (§ 1465.8) totaling $160 and four $30 criminal conviction assessments (Gov. Code, § 70373) totaling $120.

DISPOSITION

The conviction for count 1 is modified to a conviction for Penal Code section 245, subdivision (a)(1). Count 3 is reversed. In all other respects, the judgment is affirmed as modified.

Upon issuance of remittitur, the trial court is directed to dismiss count 3 and its related enhancement, to amend the abstract of judgment to reflect the judgment as modified, to correct the errors identified in section 6 of the discussion, and to send a certified copy of the amended/corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

JOHNSON (MICHAEL), J.*

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