

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

THEWDROS GEBER CHRISTOS,

Defendant and Appellant.

C062815

(Super. Ct. No.  
CRF090288)

Enraged when his attempts to buy alcohol at a neighborhood market were thwarted, defendant Thewdros Geber Christos threw various items at the clerk and pushed everything, including the cash register, off of the counter. A jury convicted him of felony vandalism, causing damage of \$400 or more (Pen. Code, § 594, subds. (a), (b)(1)), but acquitted him of assault with a deadly weapon or by force likely to cause great bodily injury and criminal threats. The trial court found defendant had two strike priors (Pen. Code, §§ 667, subd. (b)-(i); 1170.12) and

denied his motion to dismiss one or both strikes, sentencing him to 25 years to life in prison.

On appeal, defendant contends it was error to instruct on late discovery and to shackle a defense witness. Defendant also challenges his sentence, contending the trial court was required to strike one of his strikes under *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*) and *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*), because both strikes were based on the same criminal act. He further contends it was error to deny his *Romero* motion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and his sentence of 25 years to life constitutes cruel and unusual punishment in violation of both the Federal and California Constitutions. Finally, defendant contends it was an abuse of discretion to order restitution based on inadequate information. We find no prejudicial error and shall affirm.

#### **FACTS**

On the afternoon of January 16, 2009, defendant went to the Olive Drive Market to get some beer. Man Viswakarma, the assistant manager, was working. On previous occasions, Viswakarma had argued with defendant who wanted to get alcohol on credit, without paying for it. For two years, Viswakarma had refused to give defendant alcohol. He told defendant not to enter the store.

Defendant got angry and starting throwing water bottles at Viswakarma. He also threw boxes of beef jerky and lighters. He pushed things off of the counter and threw the Lotto machine.

He damaged the screen of the surveillance camera, the cash register, and the counter. He also broke a \$25 bottle of tequila. Defendant was yelling profanities and threatening to kill Viswakarma. Viswakarma was scared, but he was not injured or even struck by any of the flying objects. Defendant appeared to be intoxicated.

A salesman from the 7-Up Bottling Company was in the market that day. He saw Viswakarma grab a cardboard pole and swing it at defendant after Viswakarma told defendant not to enter the store. The salesman did not see Viswakarma hit defendant, but heard defendant say, "you hit me."

Michael Velebit had known defendant for six months. He testified that he went to the market once with defendant. On that occasion Viswakarma got upset and aggressive and called defendant, who is from Ethiopia, a racial slur. Velebit was in custody on an unrelated charge at the time of defendant's trial; further, his testimony was impeached with several felonies.

#### **DISCUSSION**

##### I

##### *Late Discovery--CALCRIM No. 306*

Immediately before calling the first witness at trial, the People turned over to the defense pictures of the crime scene that the prosecutor had just received. The defense asked the court to exclude this late discovery, but added that if it were admitted into evidence, the court should give the instruction on late discovery--CALCRIM No. 306. The court initially excluded the evidence, but later the parties agreed to admit 10

photographs of the crime scene and instruct the jury on late discovery.

The court instructed the jury in the language of CALCRIM No. 306 as follows: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose: photographs of the Olive Drive Market. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

Defendant notes that CALCRIM No. 306 is similar to the prior CALJIC No. 2.28 instruction,<sup>1</sup> which had been criticized,

---

<sup>1</sup> The earlier version of CALJIC No. 2.28 is set forth in *People v. Bell* (2004) 118 Cal.App.4th 249, 254 as follows: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the Defendant failed to timely disclose the following evidence: ... [¶] Although the Defendant's failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of

inter alia, for its failure to provide adequate guidance to the jury. (See *People v. Bell*, *supra*, 118 Cal.App.4th 249; *People v. Cabral* (2004) 121 Cal.App.4th 748; *People v. Saucedo* (2004) 121 Cal.App.4th 937.)

CALCRIM No. 306 is an extensively revised instruction on late discovery. (*People v. Riggs* (2008) 44 Cal.4th 248, 307.) This new instruction "arrives with a solid pedigree: The chair of the task force sponsoring the instruction was the authoring justice of *Bell*." (*People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249.) Nonetheless, defendant maintains the instruction is flawed because it gives inadequate guidance on how to evaluate the effect of evidence that was provided late.

Defendant's challenge to CALCRIM No. 306 is precluded. Not only did he fail to request clarifying or amplifying language (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 ["Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"]), but the record indicates he *agreed* to the admission of the photographs with this instruction. Where a defendant joins in the request for an instruction, any claim of error concerning it is waived. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1223.)

---

importance, something trivial or subject matters already established by other credible evidence.' "

## II

### *Shackling Defense Witness*

Defense witness Velebit was in custody for a nonviolent crime at the time of his trial testimony. The defense requested that Velebit be permitted to testify without restraints. Although there was information that Velebit had acted violently while in custody, counsel suggested the close presence of a deputy would be an adequate security precaution. The court summarily denied the motion without hearing.

Defendant contends the trial court erred, arguing that the witness could not be shackled absent a "showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 291 (*Duran*)). This "manifest need" requirement applies to shackling defense witnesses as well as defendants. (*Duran, supra*, 16 Cal.3d at p. 288, fn. 4.) No such showing was made in this case.

The People concede it was error to shackle Velebit without a showing of manifest need. They argue, however, that any error was harmless. As we explain, we agree with the People.

The rationale for the rule against shackling a witness absent a manifest need is "the inherent prejudice to the defendant since it is likely the jury will suspect the witness's credibility." (*Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 105, fn. 5.) In *People v. Valenzuela* (1984) 151 Cal.App.3d 180 (*Valenzuela*), the court identified two inferences relating to the witness's credibility that the jury could draw from the witness being shackled. First, knowledge that a witness was

incarcerated might permit an inference of diminished credibility. (*Valenzuela, supra*, 151 Cal.App.3d at p. 194.) Here, as in *Valenzuela*, the jury learned Velebit was incarcerated apart from his shackles; he testified he was in custody. Second, "the presence of shackles permits the inference that the witness is dangerous and has probably engaged in violent conduct in the past." (*Valenzuela, supra*, at pp. 194-195.) The possibility that the jury might infer diminished credibility from the inference of Velebit's dangerousness is present here because Velebit's prior crimes were not violent. Because shackling Velebit posed possible prejudice to defendant, it was error to shackle him without a showing of manifest need. We consider whether the error was harmless.

In *Duran*, the court expressly declined to state whether an error in shackling defendant or a defense witness was constitutional error. (*Duran, supra*, 16 Cal.3d at p. 296, fn. 15.) The court did note, however, that the prejudice of shackling a witness was less than that of shackling a defendant because it did not directly affect the presumption of innocence. (*Duran, supra*, at p. 288, fn. 4.)

Focusing on the differences when a witness, rather than defendant, is shackled, the court in *People v. Cenicerros* (1994) 26 Cal.App.4th 266 (*Cenicerros*), found the error subject to the state harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818. The court relied primarily on the fact that shackling a witness does not affect the presumption of innocence. (*Cenicerros, supra*, 26 Cal.App.4th at pp. 269, 279.)

"Moreover, improper restraint of a witness does not affect the defendant's decision to take the stand, impede his ability to confer with counsel or otherwise significantly affect trial strategy. For these reasons, we conclude the erroneous shackling of a defense witness under the circumstances presented here does not result in the deprivation of a specific federal constitutional right or so impair the trial process that it resulted in a deprivation of due process." (*Ceniceros, supra*, at p. 280.) Under *Watson*, an error is prejudicial only if after an examination of the entire cause, we are of the opinion that "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Defendant contends *Ceniceros* was wrongly decided. He asserts that the error was of constitutional dimension and denied him due process. He contends the error must be tested under the standard enunciated in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*). The *Chapman* standard requires reversal unless the error is "harmless beyond a reasonable doubt." (*Chapman, supra*, at p. 24 [17 L.Ed.2d at p. 711].) Although we are not persuaded, we find no prejudice under either standard.

Velebit was not a witness to the crime and offered no direct evidence as to the vandalism. Nonetheless, defendant claims Velebit's credibility was important. He argues that Velebit's testimony, about the incident where Viswakarma called defendant a racial name, shows that Viswakarma harbored intense

animosity towards defendant, and therefore, according to defendant, was likely to exaggerate defendant's actions. Viswakarma's tendency to exaggerate, however, was apparent in his testimony. He initially testified defendant threw 30 to 40 individual water bottles at him, but later reduced the number to "almost 10." The 7-Up salesman also provided some evidence of provocation, that Viswakarma swung a cardboard pole at defendant.

Moreover, on the issue of felony vandalism, there was considerably more evidence than Viswakarma's testimony. The 7-Up salesman independently described defendant's rampage. The policeman who responded to the scene testified the store was in disarray and it appeared items had been thrown and knocked off shelves and the counter. Defendant admitted to this officer that he knocked over some items and threw things. The crime scene photographs corroborated the testimony of Viswakarma and others, showing the condition of the store. The store owner testified to the damage defendant caused.

The evidence that defendant committed felony vandalism was overwhelming.<sup>2</sup> It is clear that any error in shackling the

---

<sup>2</sup> On appeal, defendant argues the evidence of felony vandalism was not "terribly strong" and argues this was a close case, citing the length of jury deliberations. But the jury also had to consider assault and criminal threats charges, on which the jury ultimately acquitted defendant. In closing argument, defense counsel focused on the other charges and seemed to concede the vandalism charge. The entire argument on count 3, felony vandalism, follows: "Count 3. I simply ask you to look at all the evidence and read all the instructions and apply the

defense witness without making the required finding of manifest need did not contribute to the verdict and was harmless under either *Watson* or *Chapman*.

### III

#### *Failure to Strike a Strike*

Defendant was charged with two strikes: both convictions in 2005, one for corporal injury to a cohabitant and one for assault with a deadly weapon. As to both counts, the jury found true an enhancement for great bodily injury, lacerating the victim's head with a bottle. These convictions arose from an incident where the victim attempted to hide liquor from defendant, who was drunk. He grabbed a bottle and used it to knock the victim out of a recliner to the floor and then hit her on the head. Defendant also choked the victim and dragged her to the bathroom by her hair, where he banged her head against the floor.

Defendant contends the trial court erred in not striking one of his strikes pursuant to *Benson, supra*, 18 Cal.4th 24 and *Burgos, supra*, 117 Cal.App.4th 1209, because both strikes were based on the same criminal act. He raised this issue both at sentencing and in his motion for resentencing.

In *Benson*, defendant was found to have two strikes, residential burglary and assault with intent to commit murder,

---

facts to the law. Okay. If you vote guilty, then that's the way it is, but I am confident that 1, 2, and 4 you will vote not guilty."

based on a single incident where he entered the victim's residence and stabbed her multiple times. (*Benson, supra*, 18 Cal.4th at p. 27.) He argued that a course of conduct for which separate punishment was proscribed by Penal Code section 654 generated only one strike. The California Supreme Court found the plain language of the statute defeated this contention. (*Benson, supra*, at pp. 30-32.) The court did not determine "whether there are some circumstances in which two prior felony convictions are so closely connected--for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct--that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8.)

In *Burgos*, the court found it was an abuse of discretion not to strike one of defendant's prior strike convictions for robbery and carjacking. It held "that the failure to strike one of the two prior convictions that arose from a single act constitutes an abuse of discretion." (*Burgos, supra*, 117 Cal.App.4th at p. 1214, fn. omitted.) The court read the *Benson* footnote to "strongly indicate[]" that where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*Burgos, supra*, at p. 1215.) The two priors not only arose from the same act, but sentence on both crimes was expressly prohibited by subdivision (c) of Penal

Code section 215. In finding an abuse of discretion, the court also considered defendant's criminal history and that defendant could serve a term as long as 20 years even if one prior were stricken. (*Id.* at p. 1216.)

The same issue--whether it was an abuse of discretion to fail to strike one of two strike priors for robbery and carjacking--was before this court in *People v. Scott* (2009) 179 Cal.App.4th 920 (*Scott*). We expressed doubt as to the *actual* holding of *Burgos*; the holding suggested that the "same act" circumstances mandated striking a strike, but also seemed to treat that circumstance as but one factor under the traditional *Romero* analysis. (*Scott, supra*, 179 Cal.App.4th at p. 930.) We adopted the latter view; "Whichever rule *Burgos* meant to announce, we conclude the 'same act' circumstances posed by robbery and carjacking cases provide a factor for a trial court to consider, but do not *mandate* striking a strike." (*Scott, supra*, at p. 931, original italics.)

Defendant contends that *Scott* was wrongly decided. He criticizes *Scott* for creating a false divergence of views about the holding of *Burgos*. *Scott* notes that treatises conclude *Burgos* holds that when two strikes arise from the same act, one must be stricken; on the other hand, only uncitable, unpublished cases find *Burgos* merely identified another factor a court must consider in a *Romero* analysis. (*Scott, supra*, 179 Cal.App.4th at p. 930.)

Whatever the true holding of *Burgos*, we confirm the holding of *Scott* that the "same act" circumstance does not *mandate*

striking one of defendant's strikes, but is merely a factor for the trial court to consider in exercising its discretion to strike a strike.<sup>3</sup> As in *Scott*, here defendant "chose to reoffend, knowing he had two prior strike convictions." (*Scott, supra*, 179 Cal.App.4th at p. 931.)

In *Scott*, defendant did not challenge the exercise of the trial court's discretion to strike a prior strike. (*Scott, supra*, 179 Cal.App.4th at p. 931.) Defendant makes that challenge here. We next consider that challenge.

#### IV

##### *Denial of Romero Motion*

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at p. 504.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and

---

<sup>3</sup> Although defendant suggests that *Scott* is inappropriately based on unpublished opinions, *Scott* makes clear that this is not so. (*Scott, supra*, 179 Cal.App.4th at p. 931.)

hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.”

(*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A trial court’s refusal to strike a prior conviction allegation is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)).) The three strikes law “not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm. . . . [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Carmony, supra*, 33 Cal.4th at p. 378.) It is not enough to show that reasonable people might disagree about whether to strike a prior conviction. (*Carmony, supra*, at p. 378.) Only extraordinary circumstances justify a finding that a career criminal is outside the three strikes law. (*Ibid.*) Therefore, “the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Ibid.*)

Defendant contends the trial court abused its discretion in failing to strike one of his strikes because he is outside the spirit of the three strikes law. He argues his current offense of felony vandalism is a low level felony and that his prior offenses are mostly misdemeanors and do not involve violence (other than his strikes). Aside from his strikes, his only felony was automobile theft, not involving a weapon. Defendant

asserts he is not a "hard-core" offender. He notes in mitigation that he is 56 years old and educated.

We find no abuse of discretion in the trial court's refusal to strike a prior strike. The trial court articulated that in deciding whether to grant the *Romero* motion, it considered numerous factors, including the nature of the current offense and defendant's prior strikes, as well as defendant's background, character and prospects. The court noted defendant was acquitted of the more serious offenses of assault with a deadly weapon or by force likely to cause great bodily injury and criminal threats, and that although the present conviction for felony vandalism was less egregious than defendant's prior crimes, it, too, was apparently alcohol related. The court also noted there was some provocation from the clerk.

The court found, however, that defendant's current offense was reminiscent of his strike offenses. In both incidents, defendant was drinking, blamed the victim, and never took responsibility for his actions. His criminal history was extensive. Defendant had a theft related misdemeanor in 1985, automobile theft in 1990, a public intoxication misdemeanor in 2001, and the two strike offenses in 2005. While the two strike offenses arose from the same incident, the court found the incident encompassed multiple acts; defendant knocked the victim out of her chair, hit her with his fists and the bottle, dragged

her by her hair, and banged her head on the floor.<sup>4</sup> Considering defendant's character, the court noted that while in his mid-50's, he continued to drink, fail to take responsibility for his actions, and violate the law. There was no evidence as to his prospects; he remained unemployed and transient. The court concluded defendant was not outside the spirit of the three strikes law. The court believed he was a danger to society and delusional about his past actions.

In denying defendant's motion for resentencing, the court explained further: "I will tell you in all frankness that I was seriously considering striking one of the strikes during the oral arguments, . . . and what tipped me over the line in not striking the strike was Mr. Christos's comments to the Court. [¶] When Mr. Christos stood up and addressed the Court, it became clear to me that he is not a candidate who should be considered outside the three strikes law. He showed me a person who had no remorse, who blamed the victim of the prior strikes, did not blame himself, was blaming other people, a person who was prone to violence."<sup>5</sup>

---

<sup>4</sup> The jury found the great bodily injury allegation true as to both strikes based on lacerating the victim's head. It found *not* true great bodily injury enhancements based on impairing the victim's hearing or memory.

<sup>5</sup> In his statement to the court at sentencing, defendant blamed Viswakarma, who, he claimed, hit defendant four times very hard, threatened to kill him, called him names, lied, and had previously taken his money. As to his strike priors, defendant explained his girlfriend had a "mental problem." He denied he hit her with a bottle or his hands or slammed her head on the

"[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [ ] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*Carmony, supra*, 33 Cal.4th at p. 378.) None of those limited circumstances are present here. The trial court understood the scope of its discretion and carefully and thoroughly considered the permissible factors in declining to dismiss one of defendant's prior strikes. Given defendant's repeated tendency toward violent outbursts while drinking and his continuing refusal to accept responsibility for his actions, the result was not "arbitrary, capricious or patently absurd."

V

*Cruel or Unusual Punishment*

Defendant contends his sentence of 25 years to life constitutes cruel and unusual punishment in violation of both the United States and California Constitutions. At sentencing, defendant argued that any sentence greater than three years

---

floor. Defendant claimed she lied and he was convicted on a lie. Defendant told the probation department his strike was a "lie" and the victim stabbed him eight times and cut off his finger. The probation report noted: "His finger did not appear to be missing."

would constitute cruel and unusual punishment given "the unusual degree of provocation in this case."

"The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' [Citations.]" (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 117].) Defendant contends his sentence was not proportionate to his relatively minor crime. He notes his current offense was less severe than the possession of 650 grams of cocaine, for which a life sentence without parole was upheld in *Harmelin v. Michigan* (1990) 501 U.S. 957 [115 L.Ed.2d 836].

Here, in contrast, defendant was punished not just for his current offense, but also for his recidivism. The United States Supreme Court has repeatedly held that recidivism justifies the imposition of longer sentences for subsequent offenses, even nonviolent offenses, and nothing in the cases cited by defendant supports a finding that his sentence of 25 years to life was cruel and unusual. (See *Ewing v. California, supra*, 538 U.S. 11, 30-31 [155 L.Ed.2d 108, 123] [25 years to life for grand theft of golf clubs was not cruel and unusual]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 76-77 [155 L.Ed.2d 144, 159] [sentencing recidivist to two 25-year-to-life terms on two counts of petty theft not cruel or unusual under either state or federal Constitutions]; *Rummel v. Estelle* (1980) 445 U.S. 263, 266 [63 L.Ed.2d 382, 386] [life sentence under Texas recidivist statute for obtaining \$120.75 by false pretenses after previous

convictions for credit card fraud and passing a forged check does not violate United States Constitution].)

Article I, section 17 of the California Constitution prohibits "cruel or unusual punishment." "A defendant has a considerable burden to overcome when he challenges a penalty as cruel or unusual." (*People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 529.) He must demonstrate that the punishment is so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) In considering a claim of cruel or unusual punishment, reviewing courts consider: (1) the nature of the offense and the offender; (2) how the punishment compares with punishments for more serious crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Lynch, supra*, 8 Cal.3d at pp. 425-427.)

Nothing about defendant's background or the nature of his present crime signals his 25-year-to-life sentence was improper on constitutional grounds. As discussed *ante*, although defendant is in his mid-50's, he continues to break the law and refuses to take responsibility for his actions, instead placing all the blame on others. On appeal, defendant claims a problem with alcohol, but the probation report indicated he admitted to a problem only "sometimes" on the weekends. He did not believe his alcohol use was a problem and denied being intoxicated during either the current offense or his strike priors, despite evidence to the contrary. Defendant had been drinking since he

was 25 and there was no evidence he ever sought treatment. Drug or alcohol addiction "is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 (*Martinez*).)

Defendant stresses that his current offense was not violent and that most of his criminal history was nonviolent. Both his current offense and his strike priors reveal a dangerous lack of control and willingness to use violence when defendant is denied alcohol. Although vandalism is strictly a property crime, here defendant's rampage had the potential to injure any of those present. His strike priors involved severe violence.

Defendant relies heavily on *In re Foss* (1974) 10 Cal.3d 910 (disapproved on another ground in *People v. White* (1976) 16 Cal.3d 791, 796-797, fn. 3), which involved parole eligibility provisions for recidivist narcotics offenders. We find *Foss* of little assistance to our task in this *particular* case-- determining the constitutionality of a sentence under the three strikes law. The *Foss* court focused on the penological purposes of the punishment at issue, which it found to be rehabilitation, isolation of the offender, and deterrence. (*In re Foss, supra*, 10 Cal.3d at p. 923.)

Conspicuously absent from this list is punishment. "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." (Pen. Code, § 1170, subd. (a)(1).) Further, in *Foss* there were mitigating factors under the first prong of the *Lynch* analysis (the nature of the offense and the

offender). There, defendant had agreed to assist an acquaintance to obtain heroin only because the latter was an addict and was going through withdrawal; defendant was himself an addict and was suffering from withdrawal at the time of the events; and his sole payment was enough of the narcotic for a dose of his own. (*In re Foss, supra*, 10 Cal.3d at p. 918.) Such mitigating factors are absent here.

Comparing his punishment to that for other crimes in California, defendant contends his punishment is grossly disproportionate to his crime because he would have received the same sentence for more serious crimes, such as rape by force. His punishment, however, is not disproportionate to that imposed on other recidivists under the three strikes law whose present offense, like defendant's, is not a serious or violent felony. (See, e.g., *People v. Poslof* (2005) 126 Cal.App.4th 92, 109 [failure to register as sex offender]; *People v. Meeks* (2004) 123 Cal.App.4th 695, 706-710 [failure to register]; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1433 [felony petty theft]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [petty theft with a prior].)

Defendant relies on *People v. Carmony* (2005) 127 Cal.App.4th 1066, in which this court rejected the analysis that defendant's sentence was not disproportionate because it was the same as all other defendants with two strikes. "A one-size-fits-all sentence does not allow for gradations in culpability between crimes and therefore may be disproportionate to the crime when as here, the crime is minor and the penalty severe."

(*People v. Carmony, supra*, 127 Cal.App.4th at p. 1082.) We find *Carmony* distinguishable.

In *Carmony*, defendant's crime was failing to update his sex offender registration within five working days of his birthday, although he had registered his correct address as a sex offender with the police one month before his birthday and his parole agent knew his registration had not changed. This court described this offense as "the most technical and harmless violation of the registration law we have seen;" "no worse than a breach of an overtime parking ordinance." (*People v. Carmony, supra*, 127 Cal.App.4th at pp. 1078, 1079.) Further, we found "the current offense bears little indication he has recidivist tendencies to commit offenses that pose a risk of harm to the public." (*People v. Carmony, supra*, at p. 1080.) Here, in contrast, defendant's current offense was much more serious--he was lucky that no one was injured by his throwing objects. More importantly, as the trial court found, the similarities between the current offense and his strikes illustrated defendant's recidivist tendencies.

As for the third prong, the interjurisdictional comparison, defendant contends no other state punishes felony vandalism with the "draconian" sentence of 25 years to life. "That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual.'" (*People v. Romero, supra*, 99 Cal.App.4th at p. 1433, quoting *Martinez, supra*, 71 Cal.App.4th at p. 1516.) California is not required "to march in lockstep with other states in

fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct.'" (*Martinez, supra*, at p. 1516.)

Defendant's sentence of 25 years to life was not cruel or unusual under either the United States or California Constitutions.

## VI

### *Restitution*

Defendant contends the trial court erred in ordering restitution of \$2,330 without hearing any testimony on the issue. He contends testimony was necessary because this restitution amount exceeded the amount testified to at trial. Defendant requests remand for a new restitution hearing.

At trial, the manager of the Olive Drive Market testified the damage caused by defendant's vandalism totaled \$1,400. The probation report indicated the victim requested \$2,330 in restitution, \$2,230 for damage to the cash register and \$100 for damage to the counter. Defense counsel took issue with the greater amount. The prosecutor explained that not all damage had been repaired at the time of trial. The defense submitted the matter and the trial court awarded \$2,330 in restitution. Defendant did not raise the issue of restitution in his motion for resentencing.

We review the trial court's restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663 (*Giordano*)). "Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*Giordano, supra*, 42 Cal.4th at pp. 663-664.) "'A defendant's due process rights are protected when the probation report gives notice of the amount of restitution claimed . . . , and the defendant has an opportunity to challenge the figures in the probation report at the sentencing hearing.'" (*People v. Resendez* (1993) 12 Cal.App.4th 98, 113, italics omitted.)

A failure to object to a restitution order forfeits the claim on appeal. (*People v. Gillard* (1997) 57 Cal.App.4th 136, 165, fn. 18; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.) Although defendant originally objected to the increased amount of restitution, he abandoned his objection once given a reason for the increased amount and he did not challenge or refute the reason. "'When the probation report includes information on the amount of the victim's loss and a recommendation as to the amount of restitution, the defendant must come forward with contrary information to challenge that

amount.' [Citations.]" (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1275.) The trial court did not abuse its discretion in making the restitution order.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
DUARTE, J.

We concur:

\_\_\_\_\_  
RAYE, P. J.

\_\_\_\_\_  
BUTZ, J.