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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE WAYNE RODDY,

Defendant and Appellant.

F060649

(Super. Ct. Nos. 08CM4025,
09CM7144)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. James T. LaPorte, Judge.

Peggy A. Headley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Dale Wayne Roddy of felony vandalism for breaking the windows of his girlfriend's house. On appeal, Roddy contends: (1) Penal Code section 594's \$400 felony threshold violates equal protection;¹ (2) the trial court erred in admitting a hearsay repair bill; (3) the trial court abused its discretion by admitting evidence Roddy was a parolee and was being monitored by GPS (global positioning system); (4) the trial court abused its discretion when it denied Roddy's motion for mistrial based on a parole agent's mention that the agent was "the GPS sex offender agent"; (5) defense counsel was ineffective for eliciting testimony that Roddy also was arrested for possessing a firearm; (6) section 594 violates the supremacy clause and is preempted by title 18 United States Code section 1361; (7) his sentence constitutes cruel and unusual punishment; and (8) Roddy is entitled to more conduct credits. We will direct the trial court to modify Roddy's abstract of judgment and otherwise affirm the judgment.

PROCEDURAL SUMMARY

On February 16, 2010, the Kings County District Attorney charged Roddy with felony vandalism (§ 594; case No. 09CM7144). The information further alleged that he had suffered three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served five prior prison terms (§ 667.5, subd. (b)). The allegation of five prior prison terms was later changed to four.

A jury found Roddy guilty as charged, and Roddy admitted the special allegations.

In a related case (case No. 08CM4025), Roddy was charged with being a felon in possession of a firearm. He pled no contest to this charge and admitted one prior strike conviction allegation.

The trial court sentenced Roddy to 25 years to life on the vandalism conviction, plus four years for the prior prison term enhancements. The trial court also imposed an

¹ All statutory references are to the Penal Code unless otherwise specified.

eight-month prison sentence on the firearm conviction, doubled to 16 months, to be served consecutively to the vandalism sentence. The abstract of judgment reflects that the four prior prison term enhancements were attached to the firearm conviction (designated count 1B) rather than the vandalism conviction (designated count 1A).

FACTUAL SUMMARY

Prosecution Evidence

Roddy lived in Hanford. His girlfriend, Ashley, lived with her child in Corcoran in a house owned by the Kings County Housing Authority. She was pregnant with Roddy's child, but she and Roddy were having problems because he was involved with another woman, Jackie Swafford, with whom he previously had been involved. Ashley would see her at Roddy's house, and Swafford would purposely set off Ashley's car alarm.

On December 13, 2008, Ashley was at her house in Corcoran. She and Roddy talked on the telephone and tried to resolve their differences. About 3:00 p.m., Ashley left to attend her nephew's birthday party. She returned home at 5:00 or 6:00 p.m., and everything was normal at the house. She called Roddy and told him they needed to talk to decide whether to work things out or go their separate ways. She invited him over for dinner. Neither of them was angry. Ashley left again and came back about 30 or 35 minutes later at around 8:00 p.m. She saw that three of her windows had been broken. Her living room window was broken and a cooking pot was lying on the living room floor. The pot previously had been in the backyard. Her kitchen window and the window in her child's room also were broken.

Ashley called Kelly Moore, the area manager for the Kings County Housing Authority, a federal entity. Ashley told Moore that her baby's daddy, Roddy, had broken three of her windows. Moore told Ashley she needed to make a police report or she would be responsible for the charges. Ashley spoke to Moore about the incident several

times. It was not until several months after the incident that Ashley told her someone other than Roddy might have been involved.

Ashley was angry. She called 911 and reported the broken windows. She told the dispatcher that she suspected Roddy. She gave the dispatcher Roddy's name and age and told her he was on parole. She explained that Roddy called her cell phone because he wanted her to come back, but she did not want to go over there. She told Roddy she did not want to be with him anymore. He was going to come over to fight with her, so she left. Then he called her again and said, "[Y]eah bitch, I just broke out your fucking windows." When the dispatcher asked where Roddy had gone, Ashley said she did not know, but he was on an ankle monitor, so the police would know where he was.

Officer Padama was dispatched to Ashley's house. When he arrived, the front door was open and Ashley was talking on her cell phone about the windows. Padama identified himself and went in. When Ashley ended the call, she told Padama that Roddy had broken her windows. She said she suspected him because he called her before she got home and told her it was going to be a cold night tonight because he had broken her windows. While Padama was questioning Ashley, she received another cell phone call. This time Padama was able to record the conversation between Ashley and Roddy. The following occurred:

"Ashley: Inaudible.

"[Roddy]: Ok I'm gonna say it one more time why do you feel that you can play a mother fucker like that[?]

"Ashley: I didn't wanna play you like that but you ...

"[Roddy]: Hey but you ... but you was ... but you was[.]

"Ashley: Ok so that gives you a reason for you to break out my window[?]

"[Roddy]: Man[,] that shit was giving me [a] reason to go bounce out both of ya'll heads thinking that you can play me like that[.]

“Ashley: So that gave you a reason to break out my window ... that gave you a reason?

“[Roddy]: Na I should of ... I should of took it out on both of ya’ll[.]

“Ashley: Ok so but you just taking out the window[,] a bitch nigger who would just break my windows ... (beeping sound in background) like you[.]

“[Roddy]: Inaudible ... this nigger[. W]hy don’t you ... why don’t you and that nigger come see this bitch nigger[?]

“Ashley: Why’d you break out my window?

“[Roddy]: You still got the police there ... you still be trying to ask me if ... why’d I do this[?]

“Ashley: It ... no the police ain’t here[,] stupid[.] I told them that maybe a kid broke my windows[;] I don’t know who broke it ... but your bitch ass[,] you ain’t gonna replace these windows[?]

“[Roddy]: I ... I got the money in my pocket to do it[.]

“Ashley: Ok why did you bust ’em? Nigger[,] that’s three windows ... three ... three ... three[.]

“[Roddy]: Huh ok ... I can pay for the three ... three ... three[. I]t don’t matter[.] I can pay for it[.]

“Ashley: Ok ... nigger[.] I want you to pay me [two] hundred dollars apiece ... and I’m coming [to] pick up the money in an hour ... since you want to break windows and throw pots through my mother fuck[in’] window nigger you paying for ’em ... so you got six hundred dollars right now[?]

“[Roddy]: Since ... since ... since you want to sit there and say it like that then why don’t you and that nigger and your mama since that your mama be driving why don’t you and that nigger come over here[.]

“Ashley: Why[?] [W]hat you gonna do whoop my ass ... what you gonna do[?]

“[Roddy]: Ok[,] I don’t mind paying ... I don’t mind paying[,] like I said I pay for my shit I do[,] but like I said ... you and that nigger have your mama bring them over ... you and that nigger over here[.]

“Ashley: I’m pregnant so you’re gonna whoop on me[?]”

“[Roddy]: Nope[.]

“Ashley: Uh so ... oh so you just gonna beat the shit out of Anthony you think you’re so fuckin[’] tough[.]

“[Roddy]: I damn sure yes and I’m gonna beat every penny off that nigger’s ass ... I damn sure am[.]

“Ashley: Ok and what you gonna have your ... your bitch[es] whoop on me[?]”

“[Roddy]: What bitch?

“Ashley: Yeah don’t play stupid[.]

“[Roddy]: What bitch?

“Ashley: Wha ... what ... what you mean what bitch[?]”

“[Roddy]: What Bitch?

“Ashley: You know what I’m talking about[,] you dumb fuck[.]

“[Roddy]: What Bitch?

“Ashley: Telling you gonna have the bitch[es] whoop on me[.]

“[Roddy]: What Bitch?

“Ashley: And all this stuff[,] nigger[,] have them all whoop on me [’]cause I’m gonna send them all to jail (beeping in background)[.]

“[Roddy]: What Bitch? ... What bitch? I said (beeping in background)[.]

“Ashley: Damn ... hopefully we got it[.]”

A minute or two later, Ashley received another call that the officer also recorded.

The following occurred:

“[Roddy]: Inaudible ... I ... I told you why don’t you get an estimate and I’ll take care of it[,] ok[.]

“Ashley: Inaudible[.]

“[Roddy]: And we just leave it at that ... we just leave it at that[.]

“Ashley: Ok estimate doesn’t mean shit[,] [Roddy. W]hat [am] I gonna do until the windows get fixed[? Y]ou ... you can’t afford six to eight hundred dollars to fix these windows[.]

“[Roddy]: Sixteen (inaudible) sixteen hundred[.]

“Ashley: S ... six to eight hundred[. T]hese are two ply windows and you broke three[.]

“[Roddy]: I (inaudible) I’ll fix it[.]

“Ashley: Well how you gonna fix it ... you gonna come over here and ... and put some fuck[in’] window together?

“[Roddy]: No[.]

“Ashley: Oh so you just got big money right now[?]

“[Roddy]: Well yeah[.]

“Ashley: Oh surprise the shit out of me[.] I couldn’t even get a fuck[in’] dinner for my hungry ass and I’m pregnant with your child[.]

“[Roddy]: Uh ... well you know uh ... it ain’t like I couldn’t (inaudible) ok ... so I mean hum ...

“Ashley: [Roddy.]

“[Roddy]: All you gotta do is get an estimate Monday and I’ll take care of it[.]

“Ashley: Monday[. T]oday is Saturday[,] asshole[.]

“[Roddy]: I know it is[. T]hey got a place open on Saturday[] too ... Sunday[.]

“Ashley: [Roddy,] that does not make no fuck[in’] sense and you stupid son of a bitch[,] why did you break all the windows[,] you dumb ass[? W]hat made you in your right mind to pick up a pot and just start

smashing my windows out like you fuck[in'] 5150 ... what made you do that?

“[Roddy]: [']Cause of you[.]

“Ashley: Just because me ... just because I had Anthony over here[?] [Is] that what made you do it?

“[Roddy]: Yup[.]

“Ashley: So [you're] big and bold that you're gonna smash fuck[in'] pots through my window[. T]hat makes you real good man I could imagine what I'm gonna explain to this child that I mean your daddy just smashed his pots through my window[.]

“[Roddy]: Huh ... yeah pretty much[.]

“Ashley: Pretty fuck[in'] much I could and you know I can't even bring my son in this house because all this fuck[in'] glass here and I don't even have a vacuum cleaner right now my vacuum cleaner broke so now I'm ... [I] just can't even be here [when] my fuck[in'] windows is broken[. A]in't no telling who's gonna come in this[,] bitch ... so explain that[.]

“[Roddy]: Ok[.]

“Ashley: You're still not ... you're still not telling me what made you in your right min[d] break out my fuck[in'] windows ... you didn't break one[,] you didn't break two[,] you broke three ... and these are expensive ass windows[. U]h yeah what

“[Roddy]: Yup I sure did[.]

“Ashley: Yeah you sure is one stupid mother fucker right about now[.]

“[Roddy]: Huh yeah[.]

“Ashley: What makes you think that you can just break down my fuck[in'] window and is gonna tell me wait until Monday to fix it[?]

“[Roddy]: Well uh I'll call first thing in the morning ... and see if I can get somebody out there to do it first thing in the morning[.]

“Ashley: [Roddy,] you don't have enough money to fix these windows[. O]k you fix the windows[,] nigger[. W]hat is the housing

authority gonna tell me that I got police over here[,] windows is busted out[,] what the hell do you think[?]

“[Roddy]: Inaudible[.]

“Ashley: I already got a problem next door and now you just made it more of a problem[.]

“[Roddy]: I didn’t see nobody next door and second of all hum ... if hum ... a (inaudible) ain’t got nothing to say about it if you said some kid broke your windows out[.]

“Ashley: That does not matter[.] I don’t give a damn ... nigger[. W]hat is wrong with you[? A]re you high?

“[Roddy]: No I’m not high[.]

“Ashley: Are you drunk?

“[Roddy]: I’m mad that you think that you can play me like that and play me with that nigger [Y]ou want that nigger ... you can have that nigger[.]

“Ashley: And I will have him[.]

“[Roddy]: About those windows[. W]e are done[.] I’ll pay for the windows and [whatever] you need for my child[.] I’ll pay for if shit my child need diapers[.] I don’t give a fuck what it is[,] I’ll pay for it[,] but as far as me and you dealing[,] we done[.]

“Ashley: We’re done[?]

“[Roddy]: Yeah we done[.]

“Ashley: Ok ... is that suppose to hurt my feelings[?]

“[Roddy]: We ... we are done[.]

“Ashley: Ok[.]

“[Roddy]: Ok ... you can have that nigger ... if that’s what you want[. Y]ou want come over ... you want to be with that nigger[,] I don’t give a fuck where you at[.]

“Ashley: Bye [Roddy.] I don’t got no more words for you[. Q]uit calling my phone[. D]on’t call my phone no more[. L]ose my number[.]

“[Roddy]: Alright ... alright I will[.]”

“Ashley: Bye ... bye[.]”

On cross-examination, Ashley explained that Swafford had been calling her, threatening her, and talking about killing her baby. About two months before the incident, Ashley started seeing Swafford at Roddy’s house. When Ashley spoke to Padama that night, she told him about Swafford’s threats. Ashley initially was not aware that Swafford had been to her house, but Swafford called and told her. Ashley asked Padama to watch her house that night because she decided not to stay there due to Swafford. Ashley contacted the district attorney shortly before trial and told him she did not want to testify because they were accusing the wrong person. Swafford, not Roddy, had broken the windows.

The Glass Doctor repaired Ashley’s windows, and the Kings County Housing Authority paid the \$543.91 bill.

At the time of the crime, Roddy was being supervised by Parole Agent Thomas Adams. All of Adams’s parolees were monitored by GPS. Adams explained that the GPS ankle monitor allowed him to track a parolee’s position to within feet of his or her location. The location data points from the GPS ankle monitor were collected via satellite at a rate of about one per minute. The points could be monitored on a detailed map to track the parolee’s movements. The company that produced the monitoring system advised that a point could deviate from the parolee’s actual position by up to 18 feet, but Adams had never seen this much deviation; in his experience, the points were always or within a few feet of the position.

On December 16, 2008, Adams examined the GPS data tracking Roddy’s movements on December 13, 2008. The data revealed that Roddy left Hanford about 6:15 p.m., drove to Corcoran, and was in a parking spot directly in front of Ashley’s house at 6:34 p.m. At 6:35 p.m., he was in Ashley’s backyard, next to the bedroom window that had been broken. At 6:36 p.m., he was in front of Ashley’s house (on the

roof, not the yard), near the front window that had been broken. The position of this third point suggested to Adams that Roddy was either inside the house or under an overhang or he was a few feet from the point. Roddy was at the house for at least two full minutes and no more than four minutes. By 6:37 p.m., he had left and was a few blocks from Ashley's house. He returned to Hanford and went to his house. The jury was shown a recording of this computerized tracking.

Parole Agent James Mitchell arrested Roddy at his house in Hanford. Roddy was still wearing the GPS tracking device that Mitchell had put on his ankle when he was released from prison. If his monitor had been tampered with, the parole agents would have received a notice from the monitoring company.

Defense Evidence

Swafford was unavailable at trial, so her preliminary hearing testimony was read to the jury. Swafford remembered December 13, 2008, because she committed a crime that day. She received a call from Jamal Harris's girlfriend, telling her that Roddy and Harris were getting ready to leave for Corcoran to visit Ashley. Swafford jumped in her car and followed them to Ashley's house. She watched Roddy knock on Ashley's door. When no one answered, Roddy and Harris left.

Swafford was angry because Roddy had lied to her when he said he was no longer seeing Ashley. She now knew where Ashley lived, so she got out and went to the house. She found an old pot in the backyard—but it was not like a backyard because “there [was] no fence, nothing”; it was in the back or maybe the front because the houses were low income and they looked the same—and she broke the three windows.

She knew Roddy would be blamed because he had just been there with his GPS ankle monitor. When she got home, Roddy called and asked her where she had been. She asked him why it mattered. That was the last time they spoke. She then called Harris and told him, “[Y]ou [can] tell that asshole that ... I knew he was going to see

Ashley and I broke her windows and he is going to get blamed for it because his monitor says he was in Corcoran.”

On cross-examination, Swafford testified that she and Roddy were in an off-and-on relationship for about six months while she was in and out of prison. She had been in prison more than once for drug possession and sales. She currently was awaiting trial. On December 16, 2008, the day Roddy was arrested, Swafford was staying with Roddy at his house. Both she and Roddy were arrested that day for possession of a weapon.

Harris testified that he had known Roddy most of his life. In the past, Harris’s mother had dated Roddy’s older brother. Harris admitted he had been convicted of “a 290,” robbery, a couple of assaults, and trespassing. He said his convictions would not affect his testimony because he had done those things 24 years ago.

Harris explained that on December 13, 2008, he and Roddy had a couple of cell phone conversations while Harris was at football practice. They spoke around 1:15 p.m., then again around 5:00 p.m.

Around 9:00 p.m., Roddy came to Harris’s house. When defense counsel asked if it could have been earlier than 9:00 p.m., Harris said, “Well, 9:00 is when I know that [Roddy] was at my house, because I had just came home and he was there when I came home and that was at 9:00 when I had got home. As far as us being in Corcoran, I am going to say it was about—I am going to say it was about 10:15, maybe 10:30.” Harris said he drove Roddy to Corcoran and parked in front of Ashley’s house. Harris was not aware of any other vehicle going to Corcoran with them. Harris parked directly in front of the front window of Ashley’s house. Harris got out and walked about one minute to a store to buy a soda. When he got back, he got a cell phone call and he told Roddy they had to go. After being there for a total of four or five minutes, they left and returned to Hanford. Harris did not see Swafford when he was in Corcoran.

On cross-examination, Harris agreed that some of his convictions were less than 24 years old. He agreed that “290” referred to a statute that required a person to register

as a sex offender, and he admitted he had been convicted in 1991 of committing lewd and lascivious acts upon a child under 14 years of age. In 2008, he was convicted of misdemeanor sexual battery.

On December 13, 2008, Harris got off work at 9:00 p.m. and went home. Roddy was at his house and he asked Harris for a ride to Corcoran. Harris admitted he did not know where Roddy had been before 9:00 p.m. Roddy did not mention his reason, but they left for Corcoran at 10:00 or 11:00 p.m. Harris did not know where Ashley lived, but Roddy directed him. At Ashley's house, all of the windows were intact. After Harris parked in front, he walked to the store on the corner. He did not see whether Roddy got out of the car. When he returned, he got a call from his girlfriend telling him she needed to go to the hospital. Harris told Roddy they needed to leave.

Harris's girlfriend did not know Swafford or talk to her on the telephone, but Harris did have other girlfriends and almost everyone knew Swafford.

While Harris and Roddy were driving back to Hanford, sometime after 10:00 p.m., Harris received a call from the police. The officer said, "Is this [Roddy]?" Harris said, "No, this ain't [Roddy]." The officer said, "Stop playing with me," or "Well I know that this is [Roddy]." The officer asked Harris if he had been to Corcoran. At this point, Harris knew nothing about the broken windows. Harris could not remember anything more about the conversation, except that he told the officer he would talk to him, but never did.

Next, Harris received a call from Ashley. She asked to talk to Roddy. Roddy and Ashley talked on speaker phone and Harris heard them arguing and calling each other names. Ashley asked Roddy if he broke her windows, and Roddy denied breaking them or knowing anything about them. Roddy told her, "The windows is not an issue to me, that if you need me to[,] I will pay for them." Harris did not remember anything else about the conversation. The subsequent calls between Ashley and Roddy were not on speaker phone.

Harris and Roddy both knew Roddy needed to get home before his midnight curfew, and they returned to Hanford just before midnight. Then, Harris took his girlfriend to the hospital. The next day, Harris went to Roddy's house and saw a lot of police vehicles.

Harris testified that he did not speak to law enforcement until a few days before trial. When asked why he waited a year and one-half before speaking up for Roddy, Harris explained that although he told Roddy he would make a statement if Roddy needed him to, Roddy told him he would call if he needed anything and otherwise there was no need to worry. When the prosecutor pressed Harris about letting his close friend sit in jail for a year and one-half, Harris explained that a guilty person should suffer his consequences and an innocent person "shouldn't go through it if he don't have to basically." The prosecutor asked, "[Y]ou're here because you don't believe he did anything?" Harris answered, "Exactly." The prosecutor asked, "Why didn't you come forward a year-and-a-half ago?" Harris said, "Because I told him if he needed me to[,] I would, if not—" The prosecutor asked, "So only when he asked you to come and testify[,] you do it?" Harris said, "Yeah, I mean, yeah, period." Harris agreed he and Roddy had communicated several times since the incident.

On redirect examination, Harris said he could see Ashley's front door and what he believed was her living room window. The area was lit and he did not see any broken windows.

The defense called Ashley. She testified she was at the birthday party from about 12:00 p.m. to 5:00 p.m. She and others got home about 5:35 or 5:36 p.m. and her windows were not broken. After being home for about 25 minutes, everyone went to the store to get some beer about 6:25 p.m. After about 20 minutes, they returned home about 6:45 p.m., and the windows were not broken. They stayed at the house for about an hour and one-half. They left again about 8:45 p.m. because Ashley needed to take something to the woman she worked for. Ashley and her friend returned home after 9:00 p.m. and

her friend noticed the windows were broken. Ashley called the police. She spoke to Padama numerous times, telling him about Swafford's threatening calls and asking him to watch her house to make sure no one broke into it. Padama called her once and told her he was watching her house. He asked her if she knew of "this little car and [she] asked him[, 'W]as there two white girls in there[?'] and he said[, 'Y]eah,['] and [she] said[, 'I] think that is her and her cousin or niece or somebody,['] and so he was like[, 'W]ell I will see[']'"

Calinda Carter was Ashley's friend and she knew Roddy well. On December 13, 2008, Carter had her daughter's one-year birthday party, which was attended by Ashley and others. The party started at 2:00 p.m. About 5:30 or 6:30 p.m, Carter, Ashley, and others went to Ashley's house for drinks. Then they went to the store to get some beverages and returned. The windows were not yet broken. About 7:00 p.m., Carter and Ashley left to go to Carter's mother's house because she needed them to go to the store.

Rebuttal Evidence

Mitchell testified that he saw Swafford on December 16, 2008, the day she and Roddy were arrested. Swafford, who was familiar with Mitchell, said, "Hey, Mitchell, I am the one that broke out the windows." Mitchell said, "So you taking the [rap[;]] you broke out those windows?" Swafford just looked at him and smiled. She said nothing more and Mitchell "didn't take it with any validity." Several months later, when Swafford got out after the parole violation, she came into the office for her interview. Mitchell saw her in the lobby and asked, "So you broke out those windows huh?" She smiled and said, "I was just trying to take a [rap for that nigger]," so Mitchell "didn't [think] anything about it."

Padama testified he arrived at Ashley's house about 8:00 p.m. on December 13, 2008. He verified this time with dispatch; he did not rely on his memory. When he arrived at 8:00 p.m., the windows already were broken. Padama also noted in his report

that he called Harris at the number he took off Ashley's cell phone. It was the number from which Ashley received the two calls from Roddy that Padama recorded.

Padama thought it was odd that Swafford testified she could not tell Ashley's front yard from her backyard. Ashley's backyard was separated from the front yard by a block wall on the side of the house with a closing iron gate. Whoever retrieved the pot from the backyard had to go through that gate. When Padama arrived at the house, the gate was closed.

On cross-examination, Padama testified that the first time he heard Ashley mention Swafford was on May 26, 2009, when Ashley said Swafford had called her and told her she had broken the windows.

Investigator Bellar worked for the district attorney. In the week before trial, Bellar spoke to Harris for about 45 minutes. Four or five times Harris explained to Bellar that at no point did he or Roddy get out of the car when they were parked at Ashley's house. Harris was very clear that he never got out from the time they left Hanford until the time they returned to Hanford. Harris did not mention getting out to buy a soda. Harris told Bellar they left Hanford sometime between 10:45 and 10:53 p.m. returned to Hanford at 11:55 p.m. When Bellar asked Harris why he never told anyone this story, he said he had spoken with Roddy right after his arrest and informed him he would be willing to give a statement. Harris had no good explanation for why he waited a year and one-half.

Adams testified he made a more detailed recording showing Roddy's movements during the 12-hour period from 6:00 p.m. on December 13, 2008, to 6:00 a.m. on December 14, 2008. The recording, which was played for the jury, showed Roddy at a location on Florinda Street in Hanford at 6:00 p.m. He went to Corcoran and was at Ashley's house at 6:34 until 6:36 p.m., as the other recording showed. He returned to his house about 6:59 p.m., stayed there until about 7:03 p.m., then arrived back at the location on Florinda Street about 7:18 p.m. He was still there at 11:00 p.m., his curfew

time, which caused the green points on the screen to turn red. He left about 11:08 p.m. and arrived at his house about 11:14 p.m. He remained there all night.

DISCUSSION

I. Equal Protection

Under section 594, vandalism is a felony if the crime resulted in at least \$400 worth of property damage. (§ 594, subd. (b)(1).)² Roddy takes issue with the \$400 felony threshold, pointing out that the Legislature recently has increased the felony thresholds of many property crimes—such as grand theft (§ 487) and destruction of prison property (§ 4600)—from \$400 to \$950.³ Roddy contends there is no rational basis

² Section 594 provides in pertinent part: “(a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism: [¶] (1) Defaces with graffiti or other inscribed material. [¶] (2) Damages. [¶] (3) Destroys. [¶] Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, furnishings, or property belonging to any public entity, ... or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

“(b)(1) If the amount of defacement, damage, or destruction is four hundred dollars (\$400) or more, vandalism is punishable by imprisonment pursuant to subdivision (h) of Section 1170 or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars (\$10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars (\$10,000) or more, by a fine of not more than fifty thousand dollars (\$50,000), or by both that fine and imprisonment. [¶] (2)(A) If the amount of defacement, damage, or destruction is less than four hundred dollars (\$400), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment. [¶] (B) If the amount of defacement, damage, or destruction is less than four hundred dollars (\$400), and the defendant has been previously convicted of vandalism or affixing graffiti or other inscribed material ..., vandalism is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five thousand dollars (\$5,000), or by both that fine and imprisonment.”

³ (See Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 17, eff. Jan. 25, 2010; Stats. 2010, ch. 693, § 1; Stats. 2010, ch. 694, § 1.5.)

for the disparity in felony thresholds, and therefore section 594 violated his equal protection rights. We disagree.

“Similarly Situated” Requirement

Both the federal and state Constitutions provide that no person may be denied equal protection of the law. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7, subd. (a).) “‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) “Under the equal protection clause, we do not inquire ‘whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.”’ [Citation.]” (*Id.* at pp. 1199-1200.) “The ‘similarly situated’ prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.)

Roddy argues he is similarly situated to defendants convicted of other property crimes, the felony thresholds of which have been increased from \$400 to \$950. He explains that when punishment is based on the value of the damage or loss, defendants convicted of the different property crimes are similarly situated.

Specifically, Roddy asserts that defendants who are convicted of vandalizing property under section 594 are similarly situated to defendants who are convicted of destroying prison property under section 4600.⁴ He maintains that the two groups should

⁴ Section 4600 provides in pertinent part: “(a) Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any jail, prison, or any public property in any jail or prison, is punishable by a fine not exceeding ten thousand dollars (\$10,000), and by imprisonment pursuant to subdivision (h) of

not be subjected to different penalties, and the Legislature should have increased the felony threshold from \$400 to \$950 for vandalism, just as it did for destroying prison property.

To support his argument that these two classes of people are similarly situated, he cites *People v. Upchurch* (1978) 76 Cal.App.3d 721 (*Upchurch*). There, the defendant, a prison inmate, smashed the state-owned television in his cell. He was charged under section 4600 with destroying prison property. At the time, however, section 4600 provided “felony punishment for a person who ‘breaks down, pulls down, or otherwise destroys or injures *any jail or prison*’” (*Upchurch*, at p. 723, italics added.) The statute did not mention prison *property*, although it did mention jail property, providing a “misdemeanor penalty for damage of \$200 or less to any ‘city, city and county or county jail property’” (*Id.* at p. 723, fn. 1.) The *Upchurch* court determined that the statute required destruction of the prison itself—its grounds, structure, or fixtures—and the defendant had destroyed only prison furniture or equipment. Thus, the crime did not fall under section 4600 and the defendant could be charged with only a misdemeanor under section 594.

Roddy’s argument is based on this application of section 594 to a defendant who destroyed prison property. He explains that under the current felony thresholds, a defendant who damages \$500 worth of prison *property* is exposed to a felony under section 594, but a defendant who damages \$500 worth of prison *structure* is exposed to only a misdemeanor under section 4600, and therefore the two defendants are similarly situated.

Section 1170, except that where the damage or injury to any city, city and county, or county jail property or prison property is determined to be nine hundred fifty dollars (\$950) or less, that person is guilty of a misdemeanor.”

This argument, however, ignores the legislative events following *Upchurch*. Later in 1978, the Legislature amended section 4600 to include the destruction of “any jail, prison, *or any public property in any jail or prison*” (Stats. 1978, ch. 1186, § 2, p. 3837, italics added.) And in 1979, section 4600 was amended to include as a misdemeanor, damage to “any city, city and county, or county jail property *or prison property* is determined to be two hundred dollars (\$200) or less” (Stats. 1979, ch. 255, § 31, p. 562, italics added.) After these amendments, section 4600 encompassed damage such as that inflicted by the defendant in *Upchurch*—damage to prison *property*—whether over \$200 (a felony) or not (a misdemeanor). Section 4600 continues to address damage to all prison property, regardless of the nature of the damaged item or the amount of the damage.⁵ Because section 594 expressly limits its own application to “cases other than those specified by state law,” the Legislature apparently intended that section 4600, not section 594, apply to the destruction of prison property. Thus, *Upchurch* does not support, and subsequent legislation refutes, the conclusion that vandals and destroyers of prison property are similarly situated for the purpose of section 594.

Roddy also argues he is similarly situated to defendants convicted under title 18 United States Code section 1361 because he vandalized federal property.⁶ The equal

⁵ In 1983, section 4600 was amended to increase the \$200 amount to \$400. (Stats. 1983, ch. 1092, § 325, p. 4061.)

⁶ Title 18 United States Code section 1361 provides: “Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, or attempts to commit any of the foregoing offenses, shall be punished as follows: [¶] If the damage or attempted damage to such property exceeds the sum of \$1,000, by a fine under this title or imprisonment for not more than ten years, or both; if the damage or attempted damage to such property does not exceed the sum of \$1,000, by a fine under this title or by imprisonment for not more than one year, or both.”

protection clause, however, was not intended to require that the state and the federal government, or one state and another state, punish the same crimes identically. Because Roddy offers no support for the proposition, we do not address it further.

Rational Basis for the Distinction

Nevertheless, if we assume for the sake of argument that defendants convicted of vandalism are similarly situated to defendants convicted of other property crimes, such as grand theft and destruction of prison property, the next question is whether there is a *rational basis* for the statutory distinction that punishes defendants convicted of vandalism more harshly than those convicted of the other property crimes.⁷

In *People v. Silva* (1994) 27 Cal.App.4th 1160, we explained the rational basis test as follows: “[T]he constitutional guarantee of equal protection of the laws ... compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.... [T]he Legislature is vested with wide discretion in making the classification and ... its decision as to what is a sufficient distinction to warrant the classification will not be overturned by the courts unless it is palpably arbitrary and beyond rational doubt erroneous.... Only invidious discrimination offends the equal protection clause; ... the Legislature need not treat similar evils identically or legislate as to all phases of a field at once ...; legislative classification is permissible when it is based upon some distinction reasonably justifying differentiation in treatment ...; a classification is not void because it does not embrace within it every other class which might be included A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it....’ [Citation.]” (*Id.* at pp. 1168-1169.)

The history of section 594 differs from the history of those property crime statutes whose felony thresholds gradually have been increased by the Legislature to account for

⁷ Roddy agrees that the rational basis test applies.

inflation.⁸ Section 594 once had a felony threshold of \$5,000, but the people of California changed that dramatically when they amended section 594 as part of

⁸ Roddy has requested that we take judicial notice of three documents: (1) the bill analysis of Assembly Bill No. 2372 by the Senate Committee on Public Safety, dated June 29, 2010; (2) the bill analysis of Senate Bill No. 1616 by the Senate Rules Committee, Office of Senate Floor Analyses, Third Reading, dated May 9, 2000, and (3) the text of Proposition 21 as it refers to section 594. The motion is granted.

The bill analysis of Assembly Bill No. 2372 by the Senate Committee on Public Safety, dated June 29, 2010, states, in part: “[¶] Existing law sets the minimum threshold for grand theft at \$400. This amount has not been indexed for inflation and has not been adjusted since 1982. Last year, we adjusted the threshold for 39 property crimes but did not adjust grand theft. Grand theft was established as a crime in 1867 for crimes involving more than \$50. That figure was first adjusted in 1923 and increased to \$200. [¶] According to the United States Department of Labor’s Consumer Price Index, the \$200 threshold established in 1923 if adjusted for inflation would be \$2,534 in 2010. The \$400 level established in 1982 would be around \$900 today. AB 2372 adjusts the threshold amount for the first time in a generation, taking into consideration these inflationary factors, and sets the amount at \$950. Leaving the grand theft threshold itself unchanged undermines the impact of the other property crimes adjustment because the crimes could alternatively be charged as grand theft. In 2009, the Department of Corrections estimated savings of \$68.4 million dollars for the 2010/11 Budget if all property crimes were adjusted for inflation. Leaving the grand theft threshold unchanged undermines these savings. The Department estimates there will be 2,152 fewer defendants sent to state prison for these property crimes by December 2011 if AB 2732 is enacted into law. [¶] ... [¶] The author’s statement notes that the grand theft amount was originally set at \$50 in 1872. The amount was raised to \$200 in 1923, an amount equal to approximately \$2,500 today. This bill raises the threshold from \$400 to \$950 to reflect the effect of inflation on the threshold since it was set in 1982. Again, as noted by the author, inflation effectively changes the nature of the crime over time, expanding the reach of a felony. [¶] In coming years, \$950 will likely not reflect the same value of property that it does today. The Legislature should perhaps consider including a provision in the grand theft law that directs the Legislature to review the effect of inflation on the threshold value for grand theft on a regular basis, such as at the end of each 10-year period.” (Sen. Com. on Public Safety, analysis of Assem. Bill No. 2372 (2009-2010 Reg. Sess.), as amended Mar. 11, 2010; also available at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2351-2400/ab_2372_cfa_20100628_141522_sen_comm.html> [as of Mar. 28, 2012].)

Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998.⁹ (Prop. 21, § 12.5, approved Mar. 7, 2000, eff. Mar. 8, 2000, operative Jan. 1, 2002; see also *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 573 (*Manduley*)).

The purpose of Proposition 21 was “to address the problem of violent crime committed by juveniles and gangs—not simply to reduce crime generally.” (*Manduley, supra*, 27 Cal.4th at pp. 575-576.) Although some of the crimes addressed by Proposition 21 are likely to be committed by an adult who is not a gang member, the crimes nonetheless are those that commonly are committed by juveniles and/or members of street gangs. (*Manduley*, at p. 578.) By significantly lowering section 594’s felony threshold from \$5,000 to \$400, Proposition 21 swept considerably more vandals into the felony category, subjecting them to harsher punishment, including the effects of the Three Strikes law.

Roddy proposes that section 594’s previous \$5,000 felony threshold demonstrates a lack of rational basis for the unequal treatment and reveals that the Legislature simply overlooked section 594 when it amended the other statutes to account for inflation. On

⁹ In 1998, section 594 stated: “(b)(1) If the amount of defacement, damage, or destruction is fifty thousand dollars (\$50,000) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than fifty thousand dollars (\$50,000), or by both that fine and imprisonment. [¶] (2) *If the amount of defacement, damage, or destruction is five thousand dollars (\$5,000) or more but less than fifty thousand dollars (\$50,000), vandalism is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars (\$10,000), or by both that fine and imprisonment. [¶] (3) If the amount of defacement, damage, or destruction is four hundred dollars (\$400) or more but less than five thousand dollars (\$5,000), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of five thousand dollars (\$5,000), or by both that fine and imprisonment. [¶] (4)(A) If the amount of defacement, damage, or destruction is less than four hundred dollars (\$400), vandalism is punishable by imprisonment in a county jail for not more than six months, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment.*” (Italics added.)

the contrary, as we have explained, the lowering of the felony threshold was a purposeful and emphatic decision—part of a scheme to punish certain crimes more harshly—that rationally was related to the legitimate state interest of reducing the incidence of certain crimes. That the Legislature has not increased the felony threshold since then, despite inflationary considerations, is not proof of a legislative oversight.¹⁰

We conclude the decision to treat defendants convicted of vandalism differently from those convicted of other property crimes was justified by a rational basis.

II. Evidence of Repair Bill

Roddy argues that the Glass Doctor repair bill (exh. 9), did not satisfy the business record exception to the hearsay rule. He asserts that without the repair bill there was insufficient evidence that the property damage was over \$400 and met the felony threshold. We agree with the People that any error in the admission of the repair bill was harmless.

When the prosecutor asked Moore, the manager for the Kings County Housing Authority, how much was paid to the Glass Doctor for the window repair, she answered, “Can I look at [exhibit 9]? I didn’t memorize it, this is from 2008. I am sorry, I didn’t memorize the amount[;] I know it is over \$500.” The prosecutor responded, “Let me ask you this. If I were to show you Exhibit 9 for identification that you have seen, would that refresh your recollection?” Moore answered, “Yes, if I could see the total amount. It would be \$543.91.”

¹⁰ Proposition 21 provides that its provisions “shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.” (Voter Information Guide, Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 39, approved Mar. 7, 2000, eff. Mar. 8, 2000, operative Jan. 1, 2002.)

Moore's testimony that she knew the amount was over \$500, even though she could not remember the exact amount, was sufficient evidence to prove the over-\$400 element of the felony. There is no reasonable probability the outcome would have been different had the repair bill not been admitted. Therefore, any error in its admission was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

III. Evidence of Roddy's Other Criminality

Roddy contends he was prejudiced by the admission of extensive evidence of his other criminality. He claims there were three errors.

Evidence of Parole Status and GPS Tracking

Roddy argues the trial court abused its discretion under Evidence Code section 352 when it admitted evidence that he was a parolee and was being tracked by a GPS monitoring device. He explains that the extensive testimony on the subject evoked an emotional bias against him.

Evidence Code section 352 allows a court, in its discretion, to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Roddy fails to acknowledge that the GPS evidence was extremely probative of his guilt. The GPS data placed him at Ashley's house, even at the location of each window that was broken. The high probative value of the GPS data was not outweighed by the probability of undue prejudice. Evidence that Roddy was on parole and was monitored like other parolees was not particularly inflammatory in context of the other evidence. For example, the jurors learned that one of Roddy's girlfriends repeatedly had been in

prison, and thus the jurors were unlikely to be surprised that Roddy also had been in prison.¹¹

The type of prejudice that Evidence Code section 352 was meant to avoid is not prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.”” (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, evidence should be excluded as unduly prejudicial when it uniquely tends to evoke an emotional bias against the defendant as an individual and *has very little effect on the issues*. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Branch* (2001) 91 Cal.App.4th 274, 286.) “[T]he statute uses the word in its etymological sense of ‘prejudging’ a person or cause on the basis of extraneous factors.” [Citation.] Painting a person faithfully is not, of itself, unfair.” (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.)

Here, we conclude the trial court did not abuse its discretion under Evidence Code section 352 when it admitted evidence of Roddy’s parole status and the GPS data.

Evidence of Sex Offender Status

Roddy maintains that the trial court abused its discretion by denying his request for a mistrial based on Adams’s mention that he was “the GPS sex offender agent.”

At the Evidence Code section 402 hearing outside the presence of the jury, Adams testified that Roddy was a parolee and he was the parole agent who tracked Roddy’s GPS ankle monitor. Adams explained that by law all “290 registrants” on active parole must

¹¹ Defense counsel herself revealed that Roddy was on parole. On cross-examination of Ashley, defense counsel asked whether Ashley had talked to a parole officer. She said she had not. Counsel asked, “At no point?” Ashley asked in response, “Whose parole officer, his?” Counsel answered, “I am just—yeah.” Ashley said, “No, I haven’t spoken to nobody.”

be supervised with a GPS monitor. The trial court asked if the requirement was statutory, and Adams answered, “Actually Jessica’s Law, Prop 83 that passed in 2006. And we have a Penal Code, I don’t remember it.” When the prosecutor asked how a parolee comes to have a GPS monitor placed on his body, Adams answered, “If he is required to register as a PC290 as a sex offender and he is on active parole, his parole conditions as well as Jessica’s Law requires that he be placed on GPS” At no point during this hearing did defense counsel raise the issue of restricting Adams’s mention of Roddy’s status as a sex offender during Adams’s trial testimony.

Later, during Adams’s trial testimony before the jury, the prosecutor asked Adams what his supervision of Roddy involved and Adams answered, “As the GPS sex offender agent I—” Defense counsel objected immediately and the trial court struck the testimony, admonishing the jury: “[T]he court would note that it struck the last question and answer, you’re to disregard the last question and answer.”

Defense counsel moved for a mistrial, stating she noticed several jurors writing down the information that Adams was in charge of the sex offender program, which she argued essentially disclosed that Roddy was a sex offender. Counsel explained she had “bifurcated any priors at all,” and she believed the information would taint the jury.

The prosecutor responded:

“We are opposed to it. First of all, the issue of bifurcating priors has nothing to do with this. This particular witness as far as he got as far as my comments he identified himself as the GPS sex offender parole agent I believe or something very similar to that, and he never made any comments about Mr. Roddy, he [just gave] a title that he himself has in terms of his experience with GPS. The Court has already imposed a curative remedy, which that testimony has been stricken and no other attention has been brought to it. But even if we were to indulge [defense counsel’s] contention that the jury is going to extrapolate this on Mr. Roddy, I think they already have since they know he is wearing an ankle monitor.”

After hearing these arguments, the trial court suggested the parties might draft further admonition to the jury, but both declined, believing it would only draw further

attention and exacerbate the problem. The prosecutor stated he had admonished Adams not to use the term “sex offender,” and to refer to his clients as “criminal offenders” or “parolees.”

Later, after the prosecution rested, the trial court stated: “Then we had the issue of the mistrial motion that the Court ruled was going to be denied without prejudice. The Court is inclined to now note that it is going to be denied.” At this point, defense counsel renewed her objection, and the following occurred:

“[DEFENSE COUNSEL]: Basically the parole officer stated that [Roddy] is a sex offender[;] that is extremely prejudicial.

“THE COURT: He actually didn’t say [Roddy] was a sex offender[;] he was the officer responsible for sex offenders.

“[DEFENSE COUNSEL]: Correct, I noted multiple of the jurors writing that information down and being that I bifurcated that from the trial it is a huge issue. It also becomes an issue because—

“THE COURT: Let me ask, [defense counsel], did you make any in limine motions with reference to any issue before this court?

“[DEFENSE COUNSEL]: “I basically bifurcated—

“THE COURT: The answer was no in limine motions?

“[DEFENSE COUNSEL]: No, I bifurcated, your Honor.

“THE COURT: Did you make any in limine motions?

“[DEFENSE COUNSEL]: No.

“THE COURT: You bifurcated the issue of the prison prior as well as the strike prior?

“[DEFENSE COUNSEL]: Correct.

“THE COURT: Okay, thank you. All right, with reference to the issue of the mistrial motion, [prosecutor], do you want to be heard?

“[PROSECUTOR]: Your Honor, just briefly. You know, [defense counsel] I think is trying to piggy back her bifurcation issue which has to

do with us proving prison priors and strikes which is a sentencing enhancement for her failure to make a motion ... in limine to admonish the witness not to say that. As the Court said[,] he didn't say Mr. Roddy was a sex offender, he stated that is his job title. That doesn't necessarily mean anything about Mr. Roddy. [¶] At any rate that has been stricken from the record and the jury had been specifically instructed to disregard that. I would submit.

“THE COURT: And also counsel were invited to supply the Court with further admonitions if they chose to do so. The Court did admonish[] the jury to disregard the question and the answer that involved the statements that the parole officer was responsible for GPS on registered—on sex offender issues. Counsel provided the Court with—is counsel ... planning on providing the Court with any admonishment further to the jury either when they come back or at the time that the instructions are given?

“[DEFENSE COUNSEL]: No, your Honor, that would [be] more harmful than helpful at this point.

“THE COURT: Okay.

“[PROSECUTOR]: No.

“THE COURT: All right, thank you.”

“There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial. [Citations.] [¶] Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court. [Citation.] “A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.” [Citation.]” (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581; see also *People v. Avila* (2006) 38 Cal.4th 491, 573.)

We agree with the trial court’s intimation that defense counsel should have raised the issue of Roddy’s status as a sex offender at a prior time, if not in limine, then at least when that testimony became a reality during the Evidence Code section 402 hearing. But we also conclude that the comment was harmless. Roddy admitted committing the crime; he told Ashley he did it because she was with another man; he said he would pay for the damage because he paid for things he did; and the GPS data established he was present at Ashley’s windows during the proper timeframe. Even if the jurors could not wipe the brief mention of “sex offender” from their minds, and even if they assumed Roddy was a sex offender, the evidence of Roddy’s guilt of vandalism was so overwhelming that the verdict could not have been affected by the comment. (*Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

Evidence of Possession of Firearm—Ineffective Assistance of Counsel

Roddy contends that defense counsel was ineffective for eliciting testimony from Mitchell that Roddy had been charged not only with vandalism but also with possession of a firearm. Roddy explains that exposing the jury to this more serious criminality served no conceivable tactical purpose and caused him prejudice.

The testimony Roddy challenges was elicited by defense counsel during cross-examination of the prosecution’s rebuttal witness, Mitchell. Defense counsel asked Mitchell about the incident when he saw Swafford in the parole office lobby and she made the comment that she took the rap for Roddy. The following occurred:

“[DEFENSE COUNSEL:] Do you know the date of this comment?”

“[MITCHELL:] No, it was the day that she had initially got out from the parole violation.

“[DEFENSE COUNSEL:] So you don’t know the date?”

“[MITCHELL:] Not the exact date.

“[DEFENSE COUNSEL:] Did you document the date?”

“[MITCHELL:] No, I did not.

“[DEFENSE COUNSEL:] Okay, so you didn’t think it was important enough to document it at that point, correct?

“[MITCHELL:] No, it wasn’t.

“[DEFENSE COUNSEL:] Now, we’re talking close to a year-and-a-half and you remember this today?

“[MITCHELL:] Yes.

“[DEFENSE COUNSEL:] Okay, did you relay this at any other point?

“[MITCHELL:] To?

“[DEFENSE COUNSEL:] To the District Attorney’s Office, to anybody, did you have it written anywhere?

“[MITCHELL:] No, I didn’t have it written anywhere, I was approached by one of the investigators about this case.

“[DEFENSE COUNSEL:] When were you approached?

“[PROSECUTOR]: I am going to object to relevance, your Honor.

“THE COURT: Overruled.

“[MITCHELL:] The date the investigator spoke with the [other] investigator on the phone and they were familiarizing me with his case again.

“[DEFENSE COUNSEL:] They were familiarizing you with it?

“[MITCHELL:] Yeah.

“[DEFENSE COUNSEL:] How were they familiarizing you?

“[MITCHELL:] They were asking me do I know Dale Roddy and about the case of the windows being broke out and that stuff.

“[DEFENSE COUNSEL:] This was an investigator from the District Attorney’s Office?

“[MITCHELL:] Yes.

“[DEFENSE COUNSEL:] Okay, and how long ago was this?

“[MITCHELL:] I would say two weeks ago.

“[DEFENSE COUNSEL:] Two weeks ago?

“[MITCHELL:] Two weeks ago or so.

“[DEFENSE COUNSEL:] So at that point you weren't familiar with the case, but the District Attorney's Office helped you to be familiar with it?

“[MITCHELL:] I wasn't familiar with what was going on with the case, I was familiar about Dale Roddy about that arrest and what had happened during that arrest.

“[DEFENSE COUNSEL:] Let me ask you, when he was arrested what was he arrested for?

“[MITCHELL:] He was arrested for—I believe he was arrested for that vandalism of breaking the windows out.

“[DEFENSE COUNSEL:] Now, I am going to show you a parole revocation report.

“[MITCHELL:] Uh-huh.

“[DEFENSE COUNSEL:] And—actually I am going to show you the booking report that shows what he was arrested for. See if this refreshes your recollection as to whether he was arrested on a vandalism or something else.

“[MITCHELL:] No, all I see is the—

“[DEFENSE COUNSEL:] Pardon?

“[MITCHELL:] Do you want me to say what I see?

“[DEFENSE COUNSEL:] Yes.

“[MITCHELL:] *I see just see the possible firearm*, the violation of parole and the [section] 3056 parole hold placed on him.

“[DEFENSE COUNSEL:] Okay, so he was not arrested on the vandalism?

“[MITCHELL:] No, I didn’t book him.

“[THE PROSECUTOR]: Can I see that?

“[MITCHELL:] I didn’t book him.

“[DEFENSE COUNSEL:] So you just stated he was arrested on the vandalism, correct?

“[MITCHELL:] When I received the phone call that they were going to arrest him and there was a lot of officers out there and other agents and I got a call from one of the agents that had asked me did I know him, I said, yeah, I know him real well, and well we’re going over there to arrest him and per Agent Adams wanted him arrested for vandalism.

“[DEFENSE COUNSEL]: Objection, hearsay[,] move to strike, narrative.

“THE COURT: You asked him, ‘So you just stated he was arrested on vandalism, correct?’

“[DEFENSE COUNSEL]: He was not arrested on vandalism.

“THE COURT: He was not arrested on vandalism.

“[DEFENSE COUNSEL]: Correct.” (Italics added.)

Then, on redirect examination by the prosecutor, the following occurred:

“[PROSECUTOR:] Are you familiar with CDC 1676 form?

“[MITCHELL:] Yes, I am.

“[THE PROSECUTOR:] All right, I am going to show you a document.

“[MITCHELL:] Yeah, this is a 1676, CDC 1676 form.

“[PROSECUTOR:] Who does that concern?

“[MITCHELL:] Roddy, Dale Roddy.

“[PROSECUTOR:] How many charges are on that form?

“[MITCHELL:] Two charges are on that form.

“[PROSECUTOR:] What are they for?”

“[MITCHELL:] Vandalism mischief and *possession of a firearm*.”

“[PROSECUTOR:] Okay nothing further.” (Italics added.)

In light of the strength of the case against Roddy, defense counsel’s revealing to the jury that Roddy was charged with another crime was harmless under any standard. (*Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.) Also, as mentioned above, evidence of Roddy’s arrest for firearm possession already was before the jury by way of the testimony of defense witness Swafford.

Having found no resulting prejudice, we need not address whether the performance of counsel was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Hester* (2000) 22 Cal.4th 290, 296-297 [if on review we find that alleged incompetence of counsel was not prejudicial, we need not address whether counsel’s actions were deficient].)

Cumulative Effect of Evidentiary Errors

Roddy asserts that even if the foregoing claims of evidentiary error do not amount to reversible error individually, their cumulative effect does. Because we have found either no error or harmless error in each instance, Roddy’s contention that he prejudicially suffered from the cumulative effect of errors must fail.

IV. Supremacy Clause

Roddy contends that section 594, to the extent it addresses vandalism to federal property, violates the supremacy clause and is preempted by title 18 United States Code section 1361, and thus his conviction must be reversed.

The principles of supremacy are well-settled. “The supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. State law that conflicts with a federal statute is “without effect.” (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516) It is equally well established that “[c]onsideration of issues arising under the Supremacy Clause ‘start[s] with the

assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.” (*Ibid.*)” (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949 (*Jevne*)). “[I]t has always been understood that the several states are independent sovereigns possessing inherent police power to criminally punish conduct inimical to the public welfare, even when that same conduct is also prohibited under federal law.” (*In re Jose C.* (2009) 45 Cal.4th 534, 544 (*Jose C.*), fn. omitted.)

The California Supreme court has identified “four species of federal preemption: express, conflict, obstacle, and field. [Citation.] [¶] First, express preemption arises when Congress ‘define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.’ [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when “‘under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” [Citations.] Finally, field preemption, i.e., ‘Congress’ intent to pre-empt all state law in a particular area,’ applies ‘where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress “left no room” for supplementary state regulation.’ [Citation.]” (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935-936, fn. omitted.)

Roddy maintains that section 594 is preempted by field, obstacle, and conflict preemption. As we will explain, we conclude he has failed to demonstrate any type of preemption.

Field Preemption

Roddy argues Congress intended to occupy exclusively the field of policing property damage because the federal statutory scheme is extensive and because the federal government, not the state, has an interest in policing damage to federal property.

Roddy does not persuade us that the existence of title 18 United States Code section 1361 and other federal statutes on the subject of property damage supports the inference that Congress intended to supersede the state's historic police power to punish criminally vandalism committed against property situated within the state's borders. Nor does he persuade us that the state has no interest in punishing vandalism committed against property situated within its borders. Roddy has not shown the required clear and manifest purpose of Congress to supersede the state's power to create and enforce a criminal statute against vandalism of federal property, even though the same conduct is prohibited under federal law. (See *Jose C.*, *supra*, 45 Cal.4th at p. 544.)

Obstacle Preemption

Roddy argues section 594 functions as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. He explains that the federal objective of title 18 United States Code section 1361 is to impose an over-\$1,000 felony threshold, and section 594's \$400 felony threshold thwarts that objective. He also asserts that section 594 does not further a legitimate state interest because the state has no interest in policing federal property and no interest in imposing a harsher punishment for damage to federal property than that imposed by the federal government itself.

In this analysis, we ask whether section 594 mirrors federal objectives and furthers a legitimate state interest. (*Jose C.*, *supra*, 45 Cal.4th at p. 554.) Clearly, the objective of title 18 United States Code section 1361 is to protect federal property and to punish those who intentionally damage it—not to ensure that the state does not punish the crime more harshly than the federal government. Plainly, section 594 mirrors the federal objectives of protecting federal property and punishing those who intentionally damage it. Indeed,

Congress's objectives are promoted by the state's assistance in policing federal property located within the state's boundaries.

Moreover, section 594 also furthers the legitimate state interests in policing crimes committed against property that lies within the state, imposing a punishment appropriate to the state's circumstances and needs, and protecting the public from criminal conduct. "The preservation of the safety and welfare of a state's citizenry is foremost among its government's interests, and it is squarely within the police power to seek to rehabilitate those who have committed misdeeds while protecting the populace from further misconduct. As [section 594] does this in a fashion that mirrors and is wholly consistent with federal aims, it poses no obstacle to federal policy and is not preempted." (*Jose C.*, *supra*, 45 Cal.4th at p. 555.)

Conflict Preemption

Lastly, Roddy argues section 594 conflicts with title 18 United States Code section 1361 because they have different felony thresholds. He is incorrect. This is not what is meant by conflict preemption. The type of conflict contemplated by this term is a conflict that makes it "impossible for a private party to comply with both state and federal requirements" (*Jevne*, *supra*, 35 Cal.4th at pp. 949-950)—that is, to "comply[] simultaneously with state and federal law" (*Jose C.*, *supra*, 45 Cal.4th at p. 551)—not a conflict that makes it impossible for state and federal officials to impose an identical punishment.

Here, it is entirely possible for a private party to comply with both the state and federal laws requiring the party to abstain from vandalizing federal property. The difference in punishment for failure to comply is not the issue. As our Supreme Court has explained: "Congress may pass a law barring a particular act and imposing a specific punishment, and a state legislature may pass a state law barring the same act and imposing a different specific punishment" (*Jose C.*, *supra*, 45 Cal.4th at p. 545, fn. omitted.)

V. Cruel and Unusual Punishment

Roddy contends his 25-year-to-life sentence for \$543.91 worth of property damage constitutes cruel and/or unusual punishment under the federal and state Constitutions. He asserts that the sentence was based on an out-of-step \$400 felony threshold and an out-of-step Three Strikes scheme. We disagree.

Federal Constitution

The Eighth Amendment prohibits imposition of a sentence that is “grossly disproportionate” to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20-21 (*Ewing*) [sentence of 25 years to life for stealing three golf clubs, each worth \$399, under California’s Three Strikes law did not violate federal prohibition on cruel and unusual punishment]; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.) The protection afforded by the Eighth Amendment is narrow, however, and it applies only in the “exceedingly rare” and “extreme” case. (*Ewing*, at p. 21.) Even if the current felony is not a serious one, a Three Strikes sentence can be “justified by the State’s public-safety interest in incapacitating and deterring recidivist felons, and ... [the defendant’s] own long, serious criminal record.” (*Id.* at pp. 29-30, fn. omitted.) In the rare case where gross disproportionality can be inferred from the gravity of the offense and harshness of the penalty, the reviewing court will then make a comparison of sentences imposed for other offenses in the same jurisdiction and a comparison of sentences imposed for commission of the same crimes in other jurisdictions. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1005 (conc. opn. of Kennedy, J.) [sentence of life in prison without possibility of parole for possessing 672 grams of cocaine was not cruel and unusual punishment]; *People v. Meeks* (2004) 123 Cal.App.4th 695, 707 [“it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play”].)

Gravity of Offense and Harshness of Penalty

“The gravity of offenses can be assessed by comparing the harm caused or threatened to the victim or society and the culpability of the offender with the severity of the penalty. [Citation.]” (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1088 (*Haller*)). But “[r]ecidivism justifies the imposition of longer sentences for subsequent offenses. [Citation.]” (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825.) When we weigh the gravity of a defendant’s offense, we must place on the scales not only his current felony, but also his history of felony recidivism. (*Ewing, supra*, 538 U.S. at p. 29.) “Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature’s choice of sanctions. In imposing a three strikes sentence, the State’s interest is not merely punishing the offense of conviction, or the ‘triggering’ offense: ‘[I]t is in addition the interest ... in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.’ [Citations.] To give full effect to the State’s choice of this legitimate penological goal, our proportionality review of [a defendant’s] sentence must take that goal into account.” (*Ibid.*) The primary goals of recidivist statutes are to “deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person’s most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.... [T]he point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.” (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 (*Estelle*) [life sentence for stealing \$120.75 and having

prior convictions for fraud involving \$80 worth of goods and passing a forged check for \$28.36 was not cruel and unusual punishment].)

Roddy urges us to compare the insignificance of his vandalism—only three broken windows worth \$543.91—with the magnitude of his sentence. But this argument fails to recognize that Roddy’s current offense is not viewed in isolation. Roddy’s sentence was not punishment for committing vandalism. It was punishment for committing a felony and doing so as a recidivist offender.

Roddy had engaged in criminal activity for 27 years, beginning as a juvenile when he committed second degree burglary in 1981 and disturbing the peace in 1983. As an adult, his convictions included petty theft and misdemeanor battery in 1986, petty theft with priors and second degree robbery in 1987, rape by force or fear and lewd and lascivious acts with a child under 14 years of age in 1989, lewd and lascivious acts with a 15-year-old child in 1999, misdemeanor battery upon a person from a past relationship in 1998, and failure to register as a sex offender in 2006. He violated probation once and parole five times. He reported having 16 or 17 children, six or seven whose names he could not remember, and stated he was paying no child support to their mothers.

Roddy stresses that his crime was nonviolent and resulted only in property damage. But in reality, his crime was a cruel and aggressive act of dominance over the woman who was carrying his child. He purposely rendered her home unsafe and uninhabitable, and he told her she deserved worse, suggesting he should have harmed her physically.

Comparing Roddy’s current crime and his criminal history with those of the defendants in *Ewing* and *Estelle*, we cannot say that Roddy’s sentence is grossly disproportionate to his criminal culpability so as to constitute cruel and unusual punishment in violation of the Eighth Amendment. Roddy’s long criminal career, his repeated failures on probation and parole, and his commission of the current crime as a

way to punish and dominate his pregnant girlfriend all suggest he is not able to control his criminal conduct and further support the need for a strict sentence.¹²

Because we conclude Roddy's sentence is not grossly disproportionate to the gravity of the offense, we need not discuss Roddy's arguments about intrajurisdictional and interjurisdictional comparisons regarding his federal claim, although we will discuss them regarding the broader California constitutional claim. We conclude Roddy's sentence does not violate the United States Constitution's prohibition against cruel and unusual punishment.

California Constitution

Article I, section 17 of the California Constitution prohibits cruel *or* unusual punishment. 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.) Under the California Constitution, we apply a three-pronged analysis to determine whether a particular sentence is disproportionate to the offense for which it is imposed: (1) an examination of the nature of the offense and the offender; (2) a comparison of the sentence with punishments for different offenses in the same jurisdiction; and (3) a comparison of the sentence with punishments for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*.) A defendant must overcome a “considerable burden” to show the sentence is disproportionate. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) “Findings of disproportionality have occurred with exquisite rarity in the case law.” (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

¹² Roddy also reiterates that the amount of damage he caused supported only a misdemeanor vandalism charge before the enactment of Proposition 21. And he asserts that the legislative histories of the felony thresholds of other property crimes eviscerate any policy of treating vandalism of this amount as a felony. We already have addressed these arguments sufficiently.

Offense and Offender

First, “[i]n examining “the nature of the offense and the offender,” we must consider not only the offense as defined by the Legislature but also “the facts of the crime in question” (including its motive, its manner of commission, the extent of the defendant’s involvement, and the consequences of his acts); we must also consider the defendant’s individual culpability in light of his age, prior criminality, personal characteristics, and state of mind.’ [Citation.]” (*People v. Uecker* (2009) 172 Cal.App.4th 583, 600 (*Uecker*).

For the reasons we already have explained, Roddy’s current offense and criminal history support a more severe penalty. Roddy’s substantial criminal background makes him “precisely the type of offender from whom society seeks protection by the use of recidivist statutes.” (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415, overruled on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8.) “There is no indication [Roddy] desires to reform or to change his criminal behavior.” (*Ingram*, at p. 1415.) “Fundamental notions of human dignity are not offended by the prospect of exiling from society those individuals who have proved themselves to be threats to the public safety and security.” (*Id.* at p. 1416.) In light of the nature of the offense and the offender, Roddy’s sentence does not shock the conscience or offend notions of human dignity. (*Lynch, supra*, 8 Cal.3d at p. 424.)

Intrajurisdictional Comparison

Roddy explains that his 25-year-to-life sentence is indisputably severe, being exceeded in California only by life without the possibility of parole or death imposed for first degree murder. His argument fails. It is his recidivism, in combination with his current crimes, that places him under the Three Strikes law. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 400, disapproved on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.)

For purposes of determining the proportionality of Roddy's sentence, we do not compare his sentence to the sentence imposed on a first-time offender. "[I]t is proper to punish a repeat offender more severely than a first-time offender. The proper comparison would be to a recidivist [in Roddy's position], whose punishment would be the same as [Roddy's.]" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512.) Roddy's punishment is based on his status as a third-strike offender. "[T]he 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.]" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136-1137.)

Interjurisdictional Comparison

Roddy claims that California's Three Strikes law is the harshest in the country, and that the \$400 felony threshold for vandalism is also among the harshest in the country. "[T]he fact that [Roddy's] current offense[] might not qualify for recidivist sentencing in other states does not render the California punishment cruel or unusual. 'That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California 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." [Citations.]' [Citations.]" (*Haller, supra*, 174 Cal.App.4th at p. 1094.) "Simply because California's law might be among the harshest, it does not make it unconstitutional. 'Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct.' [Citation.]" (*Uecker, supra*, 172 Cal.App.4th at p. 601.)

We have reviewed and analyzed the three factors and conclude Roddy's sentence does not violate the California proscription against cruel or unusual punishment.

VI. Conduct Credits

Roddy contends, and the People concede, that his presentence conduct credits were calculated improperly under section 2933.1 rather than section 4019 because his current offense was not a serious or violent felony. The parties agree that Roddy should have received 715 days of presentence credits. We will direct the superior court to modify the abstract of judgment accordingly.

DISPOSITION

The judgment is affirmed. The trial court is instructed to modify the abstract of judgment to reflect (1) 715 days of presentence conduct credit and (2) four prior prison term enhancements connected to the vandalism conviction (designated count 1A) and not the firearm conviction (designated count 1B). The trial court is instructed to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. We take judicial notice of the documents listed in footnote 8.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

LEVY, J.