

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE TABIOS,

Defendant and Appellant.

F061371

(Super. Ct. No. 10CM7050)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Robert Shane Burns, 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, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

On May 4, 2009, correctional officers at Corcoran State Prison, where George Tabios was serving a 15-to-life sentence for second degree murder, searched his cell, found a sharpened metal object, and transferred him to a new cell, where he injured an

officer by pulling the officer's arms into the cell so hard that a handcuff key broke. On October 27, 2009, he threw liquid at two officers cleaning up after dinner. On October 28, 2009, he kicked an officer escorting him to the nurse, causing an injury that required surgery.¹

A jury found Tabios guilty of one count of possession of a sharp instrument at a penal institution and five counts of battery by a prisoner on a nonprisoner and found three strike priors true. The court imposed an aggregate consecutive 100-to-life sentence. On appeal, he argues 11 challenges to the judgment of conviction. We affirm.

BACKGROUND

On March 25, 2010, an information charged Tabios with, inter alia, one count each of possession of a sharp instrument at a penal institution (hereinafter, "possession"; count 1; Pen. Code, § 4502, subd. (a))² and battery by a prisoner on a nonprisoner (hereinafter, "battery by a prisoner"; count 2; § 4501.5), both on May 4, 2009; two counts of battery by a prisoner (counts 4 and 5; § 4501.5) on October 27, 2009; and one count of battery by a prisoner (count 6; § 4501.5) on October 28, 2009.³ The information alleged, as serious felonies, violent felonies, or juvenile adjudications within the scope of the three strikes law, one murder prior and two attempted murder priors, all arising in 1996 from San Joaquin County case no. SC058983. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

On October 8, 2010, a jury found Tabios guilty as charged on those five counts. At a bifurcated trial immediately afterward, the jury found all three priors true as alleged.

¹ The discussion sets out additional facts, issue by issue, as relevant. (*Post*, parts 1-11.)

² Later statutory references are to the Penal Code.

³ Count 3 charged Tabios with battery by a prisoner on a nonprisoner on a different date, but the jury acquitted him of that charge. (§ 4501.5.)

On November 8, 2010, the court imposed an aggregate sentence of 100 years to life consisting of a term of 25 years to life on count 1 consecutive to Tabios's San Joaquin County sentence; a term of 25 years to life on count 2 consecutive to count 1 and his San Joaquin County sentence; a term of 25 years to life on count 4 consecutive to counts 1 and 2 and his San Joaquin County sentence; a term of 25 years to life on count 5 stayed pursuant to section 654; and a term of 25 years to life on count 6 consecutive to counts 1, 2, and 4 and his San Joaquin County sentence.

DISCUSSION

1. Equal Protection

Tabios argues that criminalizing battery by a prisoner solely as a felony but gassing as a wobbler requires reversal of all of his convictions of battery by a prisoner as equal protection violations. The Attorney General argues that he forfeited his right to appellate review by failing to raise his equal protection argument at trial and that his argument has no merit. We agree with the Attorney General.

First, Tabios did not raise his equal protection argument at trial, so he forfeited his right to appellate review of that issue.⁴ (*People v. Carpenter* (1997) 15 Cal.4th 312, 362, superseded on another ground by statute as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) Second, his argument lacks merit. The crux of his argument is that punishing section 4501.1 solely as a felony violates equal protection "because battery by gassing under section 4501.1 is a wobbler even though battery by gassing is more serious because it exposes a victim to a risk of serious communicable disease." (Fn. omitted.) As the parties agree, the rational relationship test applies to his argument, which involves "an alleged sentencing disparity." (*People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116.) A defendant does not have a fundamental interest in a specific term of imprisonment or in

⁴ Accordingly, we deny Tabios's request that we take judicial notice of a portion of the legislative history of section 4501.1.

the designation a particular crime receives. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Indeed, as the United States Supreme Court instructs, “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.” (*Wilkinson, supra*, at p. 838, citing *United States v. Batchelder* (1979) 442 U.S. 114, 124-125.) Tabios fails to show an equal protection violation.

2. *Sufficiency of the Evidence of Knowledge and Custody or Control*

Tabios argues that an insufficiency of the evidence of knowledge and custody or control requires reversal of his count 1 possession conviction. The Attorney General argues the contrary. We agree with the Attorney General.

Noting the prosecution’s reliance on a theory of constructive possession, Tabios emphasizes the absence of any evidence of how long he had been in the cell or of how long he had been the sole occupant of the cell or of whether he had ever slept in the cell or specifically in the bunk under which officers found the sharpened metal object. He notes, too, the absence of any evidence about other items, if any, officers found near the sharpened metal object, of anything officers found in the cell bearing his name, or of the characteristics, if any, linking him to either the object or the folded blanket in which the object was found. Additionally, he points to the absence of any evidence of incriminating statements by him and argues that “his decision to leave his cell for the optional haircut would be illogical and self-defeating” in light of evidence that a cell search always ensues after an inmate leaves for a haircut.

The Attorney General counters, “As the lone occupant of his cell, it was reasonable for the jury to infer knowledge and custody or control; ample evidence supports [Tabios]’s conviction.” The sharpened object “was hidden in a blanket and placed in a storage compartment that [Tabios] exclusively controlled because he was the

only occupant of the cell,” she emphasizes, from which evidence both knowledge and constructive possession were inferable.

Our duty on a challenge to the sufficiency of the evidence is to review the entire record in the light most favorable to the judgment below to determine whether there is substantial evidence – that is, credible and reasonable evidence of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. That standard of review applies to direct and circumstantial evidence alike. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251 (*Prince*).

The “critical inquiry” in a challenge to the sufficiency of the evidence is “to determine if the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 (*Jackson*)). That inquiry does not require the reviewing court to “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt” but only to ask “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Id.* at pp. 318-319, italics added.)

By the applicable standard of review, a sufficiency of the evidence of knowledge and custody or control is in the record. (*Prince, supra*, 40 Cal.4th at p. 1251.) Tabios’s insufficiency of the evidence argument simply asks us to reweigh the facts. That we cannot do. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333 (*Bolin*)).

3. Sufficiency of the Evidence of Willful Touching and Intent

Tabios argues that an insufficiency of the evidence of willful touching and intent requires reversal of his count 2 conviction of battery by a prisoner. The Attorney General argues the contrary. We agree with the Attorney General.

The crux of Tabios's argument is that insufficient evidence showed that he touched the officer, either directly or indirectly, or that he had the requisite general intent to do the act that causes the crime and that his pulling away from the handcuffs that the officer was holding fails to prove a battery by a prisoner. The only reason the officer's arms went through the food port into the cell, he argues, was that, with his left hand, the officer was holding the left handcuff and, with his right hand, he was holding the key that was still inserted into the left handcuff and that Tabios "probably" pulled away thinking that both of his wrists were free. Alternatively, he speculates, the officer's "own pulling probably caused" the injury. The officer testified that he had a cut to his right middle finger after, but not before, he started to take the handcuffs off, but he acknowledged that he did not "know exactly how" he sustained the injury.

Characterizing Tabios's argument as "specious," the Attorney General argues that the evidence shows that Tabios "pulled forward" as the officer was "attempting to uncuff him," causing the officer "to contact something that cut his finger." That, she asserts, is "sufficient for a finding of indirect battery" by a prisoner. She notes that the jury could reasonably infer that Tabios "pulled on the handcuffs purposefully" so his "speculative suggestions" to the contrary are "untenable."

Our duty on a challenge to the sufficiency of the evidence is to review the entire record in the light most favorable to the judgment below to determine whether there is substantial evidence – that is, credible and reasonable evidence of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. That standard of review applies to direct and circumstantial evidence alike. (*Prince, supra*, 40 Cal.4th at p. 1251.)

The "critical inquiry" in a challenge to the sufficiency of the evidence is "to determine if the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson, supra*, 443 U.S. at p. 318.) That inquiry does not require

the reviewing court to “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt” but only to ask “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Id.* at pp. 318-319, italics added.)

By the applicable standard of review, a sufficiency of the evidence of willful touching and intent is in the record. (*Prince, supra*, 40 Cal.4th at p. 1251.) Our review of the record in the light most favorable to the prosecution satisfies us that *any* trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson, supra*, 443 U.S. at pp. 318-319.) Again, we decline Tabios’s tacit invitation to reweigh the facts. (*Bolin, supra*, 18 Cal.4th 297 at pp. 331-333.)

4. Sufficiency of the Evidence of Intent

Tabios argues that an insufficiency of the evidence of intent requires reversal of his count 4 and 5 convictions of battery by a prisoner. The Attorney General argues the contrary. We agree with the Attorney General.

The record shows that Tabios stood in the back of his cell with his dinner tray in his hands and trash on top of the tray as two officers approached his cell after dinner to pick up his tray and his trash. After the officers opened the food port, he “rushed the front of the cell,” “stuck his hand out of the food port with a cup,” and “threw a liquid” onto both officers.

Acknowledging that he charged the food port, Tabios argues that there is no substantial evidence he “knew of the particular location of the prison guards outside the cell.” Characterizing his conduct as negligence and recklessness, he insists there was insufficient evidence that a reasonable person, knowing what he knew, would find that his conduct would directly, naturally, and probably result in battery by a prisoner. The evidence shows that the officers saw him, not that he saw the officers, he argues.

The Attorney General, characterizing Tabios’s argument as “without foundation,” notes the evidence that he rushed the front of the cell, reached through the food port with a cup in his hand, and threw liquid onto both officers, striking one on the left arm and the other on the right arm, upper torso, and face shield. That, she asserts, “was sufficient to establish [his] intent.” She dismisses as “speculation” his suggestion “that perhaps he did not know of the location of the guards” and emphasizes that he rushed the front of the cell at “exactly” the moment when the officers opened the food port.

By the applicable standard of review, a sufficiency of the evidence of intent is in the record. (*Prince, supra*, 40 Cal.4th at p. 1251.) Our review of the record in the light most favorable to the prosecution satisfies us that *any* trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson, supra*, 443 U.S. at pp. 318-319.) Yet again, we decline Tabios’s tacit invitation to reweigh the facts. (*Bolin, supra*, 18 Cal.4th 297 at pp. 331-333.)

5. *Splashing of a Liquid other than a Bodily Fluid*

Tabios argues that splashing with a liquid other than a bodily fluid is outside the scope of the statute, requiring reversal of his count 4 and 5 convictions of battery by a prisoner. The Attorney General argues the contrary. We agree with the Attorney General.

Tabios argues, first, that the plain language of section 242 requires a “use of force or violence upon the person of another” but does not include an offensive touching, so the act of “being splashed” is outside the scope of the statute. Second, he argues that by the enactment of section 4501.1 the Legislature “evinced an intent to exclude being splashed by a liquid from the scope of section 4501.5.” Third, even if section 4501.5 includes an offensive touching, the evidence here of splashing “a small amount of unknown liquid” does not constitute a touching that is offensive.

The Attorney General characterizes Tabios’s arguments as “baseless.” First, she argues, a harmful or offensive touching constitutes a use of force or violence within the scope of the statute. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961, disapproved on another ground by *People v. Williams* (2010) 49 Cal.4th 405, 459.) Just as an inmate’s throwing “water, urine, scouring powder, bleach, and other substances at correctional officers” is a battery (*People v. Burgener* (2003) 29 Cal.4th 833, 868), she asserts, so is Tabios’s “throwing an unknown liquid” at correctional officers. Second, she notes, the Penal Code codifies the settled rule that acts or omissions are “punishable in different ways by different provisions of law.” (§ 654, subd. (a).) Third, she argues, splashing an unknown liquid, which could be a bodily fluid or some other dangerous substance like acid or lye, is not necessarily less serious than splashing a bodily fluid.

The Attorney General’s arguments are persuasive. Tabios’s are not. We decline to construe as outside the scope of section 4501.5 the act of splashing a liquid other than a bodily fluid onto a correctional officer.

6. CALCRIM No. 2745

Tabios argues that five flaws in the possession instruction require reversal of his conviction on due process grounds. The Attorney General argues the contrary. We agree with the Attorney General.

At the time of trial, the instruction Tabios puts at issue, CALCRIM No. 2745 (Jan. 2006), provided, in relevant part, “[A/An] _____ <insert type of weapon from Pen. Code, § 4502, not covered in above definitions> (is/means/includes) _____ <insert appropriate definition, see Bench Notes>.]” (Italics in original.) The Bench Notes to which the instruction refers provided, in relevant part, “Where indicated in the instruction, insert one or more of the following weapons from Penal Code section 4502, based on the evidence presented: [¶] ... [¶] sharp instrument ...” (Bench Notes to CALCRIM No. 2745 (Jan. 2006) p. 692.) At the time of trial, section 4502 prohibited the

possession of, inter alia, “any dirk or dagger or sharp instrument,” but defined neither “sharp instrument” nor any other prohibited weapon. (§ 4502, subd. (a), as amended by Stats. 1994, ch. 354, § 1.)⁵ As given to the jury, the court modified the instruction to read, in relevant part, “A sharpened instrument means an instrument that can inflict injury and is not necessary for an inmate to have in the inmate’s possession.”

The first flaw, Tabios argues, is that the court’s modification of the instruction created an ambiguity permitting the jury to find him guilty if the item could inflict injury, even if the object was not sharp. *People v. Hayes* (2009) 171 Cal.App.4th 549 (*Hayes*), on which he relies, reversed on the rationale that the identical instructional modification in that case “created an ambiguity, exploited by the prosecutor to argue a legally incorrect theory that the jurors could find defendant guilty without finding the item was ‘sharp.’” (*Id.* at p. 552.) Two key admissions present in *Hayes* are absent here, however. An officer in that case “admitted the point of the item was rounded slightly at the tip, like the Bic pen” and also “admitted he did not use the word ‘sharp’ in his written report, which merely described the item as a black plastic weapon.” (*Id.* at p. 554.) Here, the officer testified without equivocation that when he opened the folded blanket in Tabios’s cell he found a gray piece of metal “sharpened to a point” and that such a “sharpened” piece of metal is “contraband” that inmates are not allowed to possess. *Hayes* is inapposite.⁶

The second flaw, Tabios argues, is that the use of the word “sharpened,” not “sharp,” in the court’s modification of the instruction removed from jury consideration the element of possession of a “sharp” instrument. (§ 4502, subd. (a).) The record belies

⁵ Nor, as amended after Tabios’s trial, does the statute define “sharp instrument” or any other prohibited weapon now. (§ 4502, subd. (a), as amended by Stats. 2011, ch. 15, § 485, eff. April 4, 2011, operative Oct. 1, 2011.)

⁶ At Tabios’s request, we ordered augmentation of the record with the sharpened metal object. (Peo. Exh. 1A.) Our inspection of that object only confirms that *Hayes* is inapposite and that the ambiguity Tabios theorizes is illusory.

his claim. In argument to the jury, Tabios’s attorney referred to that element as “sharpened”, and the prosecutor did not object to his word choice. In argument to the jury, the prosecutor pointed out that the object was in evidence for the jury to inspect. (Peo. Exh. 1A; cf. *ante*, fn. 6.) Although Tabios portrays the issue as more egregious here than in *Hayes* “because at least the word ‘sharp,’ as opposed to ‘sharpened,’ was included in the *Hayes* jury instruction,” the evidentiary difference between the record here and the record in *Hayes* again makes his reliance on that case misplaced.

The third, fourth, and fifth flaws, Tabios argues, are that the court’s modification of the instruction failed to inform the jury that the sharpened instrument both “could be used ‘as a stabbing weapon’” and was “capable of ready use as a stabbing weapon that may inflict great bodily injury or death.” He compares the court’s modification of the instruction with two sentences in CALCRIM No. 2745, one of which requires proof that the “defendant knew that the object (was [(a/an)] _____ <insert type of weapon from Pen. Code, § 4502, e.g., ‘explosive’>/could be used _____ <insert description of weapon’s use, e.g., ‘as a stabbing weapon,’ or ‘for purposes of offense or defense’>),” the other of which defines a dirk or dagger as, inter alia, “capable of ready use as a stabbing weapon that may inflict great bodily injury or death.” (CALCRIM No. 2745 (Jan. 2006) pp. 689-690; italics in original.) Here, the sharpened instrument, which was in evidence for the jury to inspect, was patently capable of use “as a stabbing weapon that may inflict great bodily injury or death.” (*Id.*; see *ante*, fn. 6.)

That verbiage presumably originated in the statutory definition of a dirk or dagger as “a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.” (§ 16470, added by Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012; former § 12020, subd. (c)(24), repealed by Stats. 2010, ch. 711, § 4, eff. Jan. 1, 2011, operative Jan. 1, 2012.) Although section 4502 prohibits the possession at a penal institution of, inter alia, “any dirk or dagger or sharp instrument,” CALCRIM No. 2745 uses the “great bodily injury or death” verbiage

for the “dirk or dagger” but not for the “sharp instrument.” That draftsmanship gave rise to the omission of the verbiage that Tabios argues impaired the court’s modification of the instruction.

On the record here, Tabios fails to persuade us that he was prejudiced. The standard of review of an instruction challenged on due process grounds is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 71-73 & fn. 3 (*McGuire*); *People v. Clair* (1992) 2 Cal.4th 629, 663.) Our review of the court’s modification of the instruction in the context of the entire record persuades us that there is no reasonable likelihood that the jury did so. (*McGuire, supra*, at p. 72.)

7. Instructions on Lesser Included Offenses

Tabios argues that the lack of instruction on lesser included offenses of resisting an officer, simple assault, and simple battery require reversal of all of his convictions of battery by a prisoner. The Attorney General argues that the doctrine of invited error bars his challenge and that his argument has no merit. We agree with Tabios that the doctrine of invited error does not apply but agree with the Attorney General that his argument has no merit.

The rule is settled “that a defendant may not invoke a trial court’s failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence.” (*People v. Barton* (1995) 12 Cal.4th 186, 198.) For the doctrine of invited error to apply, the record must clearly show that defense counsel made an express objection to the instructions at issue and, since important rights of the accused are at stake, that he or she acted for tactical reasons and not out of ignorance or mistake. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.) After an off-the-record instructional colloquy that lasted an hour and a half or so, Tabios’s attorney put on the

record nothing but a brief statement that the prosecutor gave him verdict forms including “all of the previously discussed lesser-includeds, which should be excluded,” and that the prosecutor replied that he “would agree with that.” On that record, the doctrine of invited error does not apply.

On all five counts of battery by a prisoner, the evidence showed that Tabios touched each officer, directly or indirectly, that he was indisputably a prisoner, and that each officer indisputably was not. He neither testified in his own defense nor called any other witness to testify in his defense. Every witness at trial testified for the prosecution. No evidence establishes that Tabios was guilty of a lesser, but not of the greater, offense.

A court must instruct on a lesser included offense only if there is substantial evidence, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the lesser offense, but speculation is insufficient to require such an instruction, which need not be given when there is no evidence that the offense is less than the charged offense. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.) The omission of sua sponte instruction on a lesser included offense in a noncapital case is an error of California law that is subject to reversal only if an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*People v. Joiner* (2000) 84 Cal.App.4th 946, 972, citing *People v. Breverman* (1998) 19 Cal.4th 142, 165, *People v. Watson* (1946) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.) In the interest of judicial efficiency, assuming arguendo that the omission of sua sponte instruction was error, our review of the entire record satisfies us that there was no reasonable probability that the error affected the outcome.

8. *Instructional Omissions*

Tabios argues that the omission of a unanimity instruction and the omission of a correctional officer’s name from the use-of-force instruction require reversal of his count

6 conviction of battery by a prisoner. The Attorney General argues the contrary. We agree with the Attorney General.

First, we address the issue of the unanimity instruction. The record shows that, after Tabios complained of chest pains, three officers went to his cell to escort him to the nurse. Without provocation, Tabios suddenly tried to break away. He kicked an officer in the left knee and, even after another officer discharged pepper spray, he continued to struggle. After everyone slipped on the pepper spray and fell to the floor, Tabios kicked the same officer on the left side of the face. The injury to the knee required surgery and the loss of seven months of work.

In opening argument, the prosecutor noted that the officer “was off work for seven months. Had to have knee surgery.” In his argument, Tabios’s attorney asserted that the officer who discharged the pepper spray testified that Tabios spun around in front of him “and kicked him, not only once, but repeatedly kicked at them and repeatedly kicked at them” even though the officer who got kicked “told us no such thing.” Asking, “Who do we believe at this point?,” he characterized the evidence as insufficient and urged the jury to acquit. In closing argument, the prosecutor rejoined, “Didn’t hear any evidence that [the officer who had to have surgery] was not kicked. In fact, he was kicked twice based on his own testimony; once in the knee, once in the face. Counsel makes mention of this fact that [the officer who discharged the pepper spray] said [Tabios] continued kicking. Apparently he did, but [the officer who discharged the pepper spray] didn’t say he continued to actually kick anybody. He was ‘kicking at,’ I think that was the term that [the officer who discharged the pepper spray] used. Counsel said that [the officer who had to have knee surgery] didn’t say that there was continued kicking. Counsel’s right. [The officer who had to have knee surgery] wasn’t asked, so there’s no divergence or difference in the testimony.”

After argument, Tabios’s counsel requested a unanimity instruction for the count 6 battery by a prisoner. He argued that the prosecutor’s comments had “proffered a theory

of multiple acts for a single count” by which the officer “was kicked first in the knee and later at some point in the face.” The court properly denied the request. Commenting on differences between the testimony of the officer who had to have knee surgery and that of the officer who discharged the pepper spray, Tabios’s attorney exhorted the jury to find reasonable doubt. In rejoinder, the prosecutor simply analyzed the testimony of both so the jury could see there was no contradiction between the two. He was not electing the kick to the face as a criminal act different from the kick to the knee on the basis of which the jury could find Tabios guilty. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) In the interest of judicial efficiency, assuming without deciding that the omission of a unanimity instruction was error, our review of the entire record satisfies us that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545.)

Second, we address the issue of the use-of-force instruction. (CALCRIM No. 2671.) The crux of Tabios’s argument is that the instruction named the officer who had to have knee surgery, but not the officer who discharged the pepper spray, “effectively depriving [him] of the defense of excessive use of force.” He claims that “some jurors might have decided [his] second kick at [the face of the officer who had to have knee surgery] was a reasonable response to the excessive and overly-aggressive decision of [the officer who discharged the pepper spray] to pepper spray [him] in the face.” The record belies his argument. As the direct examination of the officer who had to have knee surgery shows, the prosecutor made an election of the kick to the knee – which Tabios inflicted *before* the discharge of the pepper spray and *before* the kick to the face – as the sole criminal act on the basis of which the jury could find Tabios guilty. The prosecutor’s comments that Tabios “was kicked twice based on his own testimony; once in the knee, once in the face” and that there was “no divergence” between the testimony of the two officers was not an election of the kick to the face as an alternative criminal act on the basis of which the jury could find Tabios guilty but merely a reply to the comment

by Tabios's attorney that Tabios "kicked him, not only once." Tabios's argument is meritless.

9. Request for Romero Relief

Tabios argues that his attorney's request for the court to exercise *Romero*⁷ discretion constituted ineffective assistance of counsel. The Attorney General argues the contrary. We agree with the Attorney General.

To establish ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness. (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 (*Williams*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*)). To establish prejudice, the defendant must show that there is a reasonable probability – that is, a probability sufficient to undermine confidence in the outcome – that but for counsel's unprofessional errors the result of the proceeding would have been different. (*Williams, supra*, at p. 391, citing *Strickland, supra*, at p. 694.) Sentencing is a critical stage of the proceedings at which a defendant is entitled to effective assistance of counsel. (*People v. Cropper* (1979) 89 Cal.App.3d 716, 719; see *In re Perez* (1966) 65 Cal.2d 224, 229-230.)

"Surmounting *Strickland*'s high bar is never an easy task." (*Padilla v. Kentucky* (2010) 559 U.S. ___, ___ [176 L.Ed.2d 284, 301; 130 S.Ct. 1473, 1485] (*Padilla*)). As the high court admonishes, "Judicial scrutiny of counsel's performance must be highly deferential." (*Ibid.*, quoting *Strickland, supra*, 466 U.S. at p. 689.) A reviewing court can adjudicate a claim of ineffective assistance of counsel solely on the issue of prejudice without evaluating counsel's performance. (*Strickland, supra*, at p. 697.) In the interest of judicial efficiency, we do so here.

⁷ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Tabios argues that his attorney made “an oral request at sentencing” but filed “no written *Romero* motion,” cited no authority in support of his request, did not tell the court that his two attempted murder priors were stayed (§ 654), did not advocate “mitigating factors” about his priors (*People v. Tabios* (1998) 67 Cal.App.4th 1 (*Tabios*)),⁸ did not tell the court about inadequacies in the probation report, did not tell the court about the option to strike some but not all of his strike priors, did not correctly calculate his age on release if the court were to strike all but one of his strike priors, did not tell the court that he had no criminal record before the three priors that arose from the same case, did not tell the court about his mental health issues, and did not “hammer home” the fact that his potential exposure and his actual sentence were both longer than the human life span. “In sum,” he argues that he “was prejudiced” due to “a reasonable probability that he would have received a sentence better than 100 years-to-life in the absence of defense counsel’s failings.”

Our review of the record shows Tabios’s attorney emphasizing that Tabios, 32 years old at the time of the sentencing hearing, had “a single felony conviction” for “a single act” out of which all three priors arose “15 years ago” when he was 17 years old. Pointing out that “this is really the first time he’s been in trouble since then,” he asked for an exercise of the court’s discretion and argued that a sentence on the basis of one strike prior would put Tabios in his “mid to late 60’s before he’d first be eligible for parole” and that a sentence to the midterm on each count would put him “close to the life expectancy for [a] Hispanic male in the prison system.”

Continuing to advocate on Tabios’s behalf, his attorney characterized most of Tabios’s conduct as minor in comparison with the majority of batteries by prisoners on

⁸ Among those factors is the California Supreme Court’s disapproval of the holding in *Tabios* that, within the scope of the second degree felony murder rule, a section 246 shooting at an occupied vehicle never merges with the underlying homicide. (*People v. Chun* (2009) 45 Cal.4th 1172, 1197-1199.)

nonprisoners, argued that the cause of the knee injury could have been the officer’s fall after slipping on pepper spray, not Tabios’s kick, and that in any event the injury was not debilitating outside the scope of workers’ compensation coverage. In sum, his attorney argued that Tabios’s case was “a prime case” for an exercise of discretion by the court for the imposition of the midterm on each count.

“*Strickland* does not guarantee perfect representation, only a “reasonably competent attorney.”” (*Harrington v. Richter* (2011) ___ U.S. ___, ___ [178 L.Ed.2d 624, 645; 131 S.Ct. 770, 791] (*Richter*), quoting *Strickland, supra*, 466 U.S. at p. 687.) “It is not enough ‘to show that the errors had some conceivable effect on the outcome of the proceeding.’ Counsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” (*Richter, supra*, ___ U.S. at p. ___ [178 L.Ed.2d at p. 642; 131 S.Ct. at pp. 787-788] , quoting *Strickland, supra*, 466 U.S. at pp. 687, 693, cit. omitted.) By the “highly deferential” standard of review (*Padilla, supra*, 559 U.S. at p. ___ [176 L.Ed.2d at p. 301; 130 S.Ct. at p. 1485], quoting *Strickland, supra*, 466 U.S. at p. 689), Tabios fails to show a reasonable probability – that is, a probability sufficient to undermine confidence in the outcome – that but for counsel’s unprofessional errors the result of the sentencing hearing would have been different (*Williams, supra*, 529 U.S. at p. 391, citing *Strickland, supra*, 466 U.S. at p. 694).

10. Denial of Romero Relief

Tabios argues that the court’s denial of his request for *Romero* relief requires a remand for a new sentencing hearing due to the court’s application of an incorrect legal standard, failure to exercise informed discretion, and lack of awareness of the scope of judicial discretion. The Attorney General argues the contrary. We agree with the Attorney General.

The parties agree that a court has statutory authority, either on its own motion or by request of the prosecutor, and in “furtherance of justice” (§ 1385, subd. (a)), to strike

allegations or findings of strike priors within the scope of the three strikes law (*Romero, supra*, 13 Cal.4th at pp. 529-530) and that on appeal the deferential abuse of discretion standard governs review of a court's failure to strike a strike prior (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)). The parties disagree on whether the court committed an abuse of discretion by not striking any of Tabios's strike priors.

In reviewing for abuse of discretion, the appellate court is guided by two fundamental precepts. First, the burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. In the absence of such a showing, the appellate court presumes that the trial court acted to achieve legitimate sentencing objectives and will not set aside the trial court's discretionary imposition of a particular sentence. (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) Second, the trial court's ruling is not reversible merely because reasonable people might disagree. The appellate court has no authority to substitute its judgment for that of the trial court. (*Id.* at p. 377.) "Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*)

At the sentencing hearing, the court found that the possession of the sharpened instrument and the assault on the officer who had to have knee surgery were "significant" and "serious" offenses and that some of the other batteries were not as serious as many other batteries by prisoners on nonprisoners. If the court were the Legislature, the court opined, some of the less serious batteries might not warrant a 25-to-life sentence, but the standard of review in *Romero* is whether the defendant "led his life in such a fashion that the court should treat the priors as if they didn't exist," not whether the court agrees with the length of the sentence.

Elaborating, the court noted the "nature and seriousness" of Tabios's priors, one for murder and two for attempted murder, together with the "serious criminal activity" of "the possession of the weapon in his cell as well as the assault on the sergeant suffering a

severe knee injury, whether it was the result of a direct blow from [Tabios] or because of him falling and injuring himself during the scuffle which [Tabios] created.” Together, those offenses persuaded the court not to treat the priors “as if they did not exist.” The court declined to strike his strike priors.

Tabios argues that the court erred. Our Supreme Court held, he notes, that in ruling on whether to strike a strike prior a court “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 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, italics added.) He argues, inter alia, that the court considered the “nature and seriousness” but not the “circumstances” of his priors, failed to take note of stays on his attempted murder priors (§ 654), failed to address the impact of each 25-to-life term on his “prospects,” and used the word “serious” differently than the statutory definition of “serious felony” (§ 1192.7, subd. (c)).

The Attorney General argues that Tabios “quibbles with semantics” and raises “baseless” and “specious” arguments. We agree. For his murder of one person and his attempted murders of two other people, he was sentenced to prison, where he committed a series of crimes ending in a severe injury to a correctional officer. By the deferential abuse of discretion standard, the record persuades us that the court’s ruling was neither irrational nor arbitrary. (*Carmony, supra*, 33 Cal.4th at p. 377.)

11. Constitutionality of Aggregate Sentence of 100 Years to Life

Tabios argues that his aggregate sentence of 100 years to life constitutes cruel and/or unusual punishment. The Attorney General argues that he forfeited his right to

appellate review by failing to raise his cruel and/or unusual punishment argument at trial and that his argument has no merit. We agree with the Attorney General.

Since Tabios did not raise his cruel and/or unusual punishment argument at trial, he forfeited his right to appellate review of that issue. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029.) Even so, in the interest of judicial efficiency, we will address his argument to preclude a later claim of ineffective assistance of counsel. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993.)

For his federal constitutional challenge, Tabios relies, inter alia, on *Graham v. Florida* (2010) 560 U.S. ____ [176 L.Ed.2d 825; 130 S.Ct. 2011] (*Graham*) and *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*). Observing that the “age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” *Graham* held “that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.” (*Graham, supra*, at p. ____ [176 L.Ed.2d at p. 845; 130 S.Ct. at p. 2030].) Tabios is not a juvenile offender. When he committed the crimes at issue here, he was an adult in his thirties. *Graham* is inapposite.

Noting “that a criminal sentence must be proportionate to the crime for which the defendant has been convicted,” *Solem* held that a sentence of life without the possibility of parole for defendant’s seventh nonviolent felony (the crime of passing a worthless check) was cruel and unusual punishment. (*Solem, supra*, 463 U.S. at p. 290.) The high court observed that “a court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” (*Id.* at p. 292.) *Solem* commented, “Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.” (*Id.* at p. 290, fn. omitted.)

Elaborating, the high court noted, “In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.” (*Id.* at p. 290, fn. 16.)

The continuing vitality of *Solem* is doubtful. In the Third Circuit’s words, *Harmelin v. Michigan* (1991) 501 U.S. 957 “attacked” *Solem*’s reading of the Eighth Amendment, characterized the case as “‘simply wrong’ on the ground that “‘the Eighth Amendment contains no proportionality guarantee,’” and affirmed a sentence of life without the possibility of parole for a first-time offender convicted of possession of 672 grams of cocaine. (*United States v. Frazier* (3d Cir. 1992) 981 F.2d 92, 95, quoting *Harmelin, supra*, at p. 965 (plur. opn.); see *id.* at pp. 1008-1009.)

Portraying *Solem* as “scarcely the expression of clear and well accepted constitutional law,” the plurality opinion cited with approval two high court cases that had “explicitly rejected” *Solem*’s “three-factor” test. (*Harmelin, supra*, 501 U.S. at p. 965.) Concurring, Justice Kennedy wrote, “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” (*Id.* at p. 1001.)

In a later application of the gross disproportionality principle, the United States Supreme Court held that a sentence of 25 to life for felony grand theft for an offender with a robbery and three residential burglary strike priors” is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.” (*Ewing v. California* (2003) 538 U.S. 11, 30 (plur. opn.)) Tabios fails to discuss the plurality opinion and merely quotes a dissenting opinion. By parity of reasoning with the plurality opinion, Tabios’s aggregate 100-to-life sentence for a series of crimes ending in a severe injury to a correctional officer, after his imprisonment for committing a murder and two attempted murders, is not grossly disproportionate and does not violate the Eighth Amendment.

For his state constitutional challenge, Tabios relies, inter alia, on *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*), which holds that punishment “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity” violates article I, section 17 of the California Constitution. (*Id.* at p. 424, fn. omitted.) *Lynch* articulates three techniques to help determine if a sentence constitutes cruel or unusual punishment – (i) “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society,” (ii) a comparison of “the challenged penalty with the punishments prescribed in the *same jurisdiction for different offenses* which, by the same test, must be deemed more serious,” and (iii) “a comparison of the challenged penalty with the punishments prescribed for the *same offense in other jurisdictions* having an identical or similar constitutional provision.” (*Id.* at pp. 425-427, italics in original.)

The grave danger that possession of a sharpened instrument in a prison poses to officers and inmates is obvious. Tabios’s criminality precipitated the officer’s severe knee injury, whether from Tabios’s kicking him or from the officer’s falling to the floor. Along with his commission of a murder and two attempted murders, the series of crimes he committed in prison manifests his continuing danger to society as a violent criminal. Recidivist punishment is “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.” (*Rummel v. Estelle* (1980) 445 U.S. 263, 284.) The determinations of “the 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.” (*Id.* at p. 285.) California statutes imposing harsher recidivist punishment on recidivists have long withstood constitutional challenge. (*People v. Weaver* (1984) 161 Cal.App.3d 119, 125-126, and cases cited.) Tabios’s sentence is not cruel or unusual punishment under the state Constitution. (Cal. Const., art. I, § 17.)

DISPOSITION

The judgment is affirmed.

Gomes, J.

WE CONCUR:

Levy, Acting P.J.

Detjen, J.