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

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNIEL ANDREW KEITH MARSHALL,

Defendant and Respondent.

F069945

(Super. Ct. No. BF154309A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Anne V. Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Daniel Marshall was convicted of attempted voluntary manslaughter, inflicting corporal injury on a cohabitant, and two counts of assault with a deadly weapon; he was sentenced to a total of nine years in prison. He raises claims of insufficiency of the

evidence as well as instructional and sentencing error. We reject his contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Marshall was charged in a six-count information filed in the Kern County Superior Court. The case ultimately proceeded to jury trial on four counts: attempted murder in count 1 (Pen. Code,¹ §§ 664, 187); willful infliction of corporal injury on a cohabitant in count 2 (§ 273.5, subd. (a)); assault with a deadly weapon (metal cane) in count 3 (§ 245, subd. (a)(1)); and assault with a deadly weapon (broom handle) in count 4 (§ 245, subd. (a)(1)). The information alleged in connection with count 1 that Marshall personally used two deadly or dangerous weapons within the meaning of section 12022, subdivision (b)(1), i.e., a metal cane and a broom handle, respectively. Regarding counts 1 and 2, the information further alleged that Marshall inflicted great bodily injury within the meaning of section 12022.7, subdivision (e).

The jury found Marshall not guilty of attempted murder but convicted him of the lesser-included offense of attempted voluntary manslaughter. (§§ 664, 192, subd. (a).) The jury also found true the two allegations of personal use of a deadly or dangerous weapon and the great-bodily-injury allegation attached to this count. Marshall was further convicted of inflicting corporal injury on a cohabitant; the great-bodily-injury allegation related to this count was also determined to be true. Finally, the jury found Marshall guilty of both counts of assault with a deadly weapon (involving a metal cane and a broom handle, respectively).

The trial court denied probation and sentenced Marshall to nine years' imprisonment. The court imposed the middle term of three years for the attempted-voluntary-manslaughter conviction, along with the upper term of five years for the associated great-bodily-injury enhancement. Additional one-year terms were imposed for

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

each enhancement relating to the personal use of a deadly or dangerous weapon, with one of these terms stayed pursuant to section 654. The sentences on counts 2, 3, and 4 were similarly stayed under section 654.

People's case

Keely Miana lived in a duplex apartment at 810 Pacific Street in Bakersfield. She met Marshall through a dating website in December 2013; in January 2014, Marshall moved into Miana's residence. On April 8, 2014, shortly before 2:00 a.m., Marshall beat Miana with his metal walking cane and, later, with a broom. Miana suffered an eight-centimeter-long gash that extended from the middle of her forehead into her scalp. The gash was deep enough to penetrate Miana's skin as well as underlying muscle.

Thomas Chairez, aged 18, and his girlfriend, Corrina Schrock, aged 19, lived next door to Miana in the same duplex. On April 7, 2014, around 10:00 p.m., Miana was drinking alcohol with Schrock on their shared front porch.² Miana became intoxicated, slurring her words and wobbling, and both women returned to their respective apartments. Chairez heard Marshall and Miana arguing and, shortly thereafter, the police arrived.

Officers John Otterness and Jason Mears arrived at Miana's apartment at about 12:30 a.m. They heard a woman screaming, entered the house, and found Miana in the side yard. She was lying in the dirt and was "extremely intoxicated." Marshall explained that he and Miana had argued. After ruling out any physical altercation, the officers escorted her to her bedroom. The officers admonished Miana and Marshall to stay in separate areas of the house for the remainder of the night.

After the officers left, Chairez and Schrock heard Marshall yelling at Miana. They heard Marshall say, "I'm going to kill you, bitch." Chairez went next door to check on

²Chairez testified that Schrock and Miana were drinking on the porch around 6:00 p.m. Schrock testified that she sat with Miana on the porch from about 7:00 p.m. to 10:00 p.m. while Miana drank alcohol.

Miana. Marshall came to the door and assured Chairez that Miana was fine. Marshall was holding an 18-inch-long segment of a detachable cane; he was gripping the rubber-tipped end. Marshall put the cane down and kicked it back.

While they were at the door, Miana rushed out and fled into Chairez and Schrock's apartment. Schrock saw that Miana was shaking and crying, bleeding from a large gash in her head, and was wearing only a tank top with no bottoms or underwear. Marshall told Chairez that Miana had hit him. Miana then exited Chairez's apartment and approached Marshall, evidently to contradict him. Marshall grabbed Chairez's porch broom and proceeded to beat Miana with it (the jury was shown a picture of the broom). Chairez testified that Marshall held the broom near the bristled end and swung it at Miana like a baseball bat. Although Miana tried to block the blows, Marshall hit her in the head a "solid eight" times. The wound on her head opened up further and bled more profusely after Miana was hit with the broom; "it was gushing blood." To stop the attack, Chairez caught the broom and punched Marshall directly in the mouth, causing him to fall. At that point, Chairez saw that Miana was "on her back and unconscious." Marshall walked down the front stairs and said, "Man, I fucked up. I think I'm going to go away for a long time."

Schrock called the police. Officers Otterness and Mears returned to Miana's apartment. Miana was sitting on the porch when they arrived. Officer Otterness noted she was bleeding from her head. He located a cane and a broom with blood on them. He also found feces on the floor of Miana's bedroom; the feces were not there the first time he was at the apartment.

Miana testified that she remembered drinking alcohol on the front porch with Schrock and then waking up in the hospital. She needed staples and stitches for her head wound and also suffered bruises to her arms.

Defense case

Marshall testified that, upon moving in with Miana, he paid the rent for their Pacific Street apartment with his Social Security disability insurance payments. In fact, he had given his Social Security debit card to Miana, who also had possession of his Medicare and identification cards. He would ask Miana for small amounts of money from his Social Security funds to buy beer and soda at the store. Miana did not work but would sit around using methamphetamine. Marshall would also use “a little bit” so as to “appease her”

After an argument over her methamphetamine use, Miana promised she would give up the drug. Consequently, on April 7, 2014, Marshall was cooking “a makeup dinner” of “homemade lasagna ... with wine and candles and ice cream” However, Miana “got out her glass pipe again and loaded it up with methamphetamine.” When Marshall protested, she told him, “You’re my hostage. You’re going to stay here.” Marshall testified that he retorted, “No, I’m not,” and went to “load up my clothes and get my service animal, at which time she took my shoes and my phone and left.... [¶] ... [¶] She [also] took my ID card and my debit card”

Marshall called the police. When two officers arrived in response to his call, Miana was in the side yard. Marshall implied Miana was intoxicated and further testified she was combative with the officers who were trying to put her to bed in the back bedroom. Marshall told the officers he “would sleep out in the front room and ... let the fire die through the night, so to speak.”

During the night, Marshall heard “some type of noise” and went into Miana’s bedroom to “check on her, make sure that she was okay.” He discovered she had defecated in the room, making “quite a mess.” He took his medication and went back to sleep in the front room until he was awakened by the “growling” of his “service animal.” He awoke to find that Miana was “straddling [him] ... facing [him] face to face trying to reach for [him]. [¶] ... [¶] ... She was going for [his] shoulders and [his] throat area”

and finally “got ahold” of him. Marshall grabbed his cane and “swung at her” until she let go of him. Marshall then ran out of the house, encountering Thomas Chairez on the front porch; Miana also came out of the house and went with Chairez into his apartment.

Chairez and Miana both came back out to the porch. Marshall testified he picked up a broom “[b]ecause I figured now I have two large people charging me, I needed something to protect myself.” He did not recall hitting Miana or Chairez with the broom. He stated that, after he had dropped the broom, Chairez “struck me, hit my nose, broke my nose.” Marshall was aware that the police had already been called, so he went down to the front gate by the sidewalk and “stood there until the police and ambulance arrived.” He never said, “I’m going to go to jail for a while for this.”

People’s case reopened

Dr. Paul Gregory Mroz testified, with reference to relevant photographs, about Miana’s injuries. He noted that Miana suffered from “a laceration from the mid upper forehead that extend[ed] into the scalp measuring what appear[ed] to be about 8 centimeters.” He said it took a two-step procedure to close the wound: “In this case, given the depth of the wound, because it went through not only the skin but also the underlying muscle, we do it in a two-layer fashion, which is to say, we suture or stitch the underlying muscle and then suture the overlying skin with a second layer of sutures.” Mroz explained that “[s]calp wounds ... can be ominous because the scalp has a lot of blood vessels compared to other tissues in the body. It’s highly vascularized; so scalp lacerations have the ... potential for bleeding profusely” upon being split open. Mroz opined that Miana’s head injury was severe enough that she could have bled to death without treatment. Mroz noted it would have taken “a significant amount of force” to cause that injury. He also observed that Miana had several bruises on her body that were consistent with being struck by a linear object such as a stick.

Officer Jason Mears responded to Miana’s apartment with Officer Otterness on the night in question. Mears recalled that, during the first contact with Miana, she was

intoxicated but was a “happy drunk.” She was not combative; rather she could “barely walk” and was talking with a “heavy slur.” When the officers returned to the residence, Miana “was on the front porch bleeding extensively from her forehead” Mears described the scene on the porch: “[T]here was blood all over the porch, there was a portion of a cane Mr. Marshall had earlier in the evening the first time we went there, there was also a green broom with a white handle that ... had a dent in it covered in blood also on the front porch.” Mears said that certain interior areas of the house also had “blood all over” the place.

DISCUSSION

I. Sufficiency of evidence claims

The jury convicted Marshall of attempted voluntary manslaughter in count 1 and found true the enhancement allegation that he personally used a broom handle as a deadly or dangerous weapon during the offense. (§ 12022, subd. (b)(1).) The jury also convicted Marshall of assault with a deadly weapon in count 4 based on his use of the broom handle. (§ 245, subd. (a)(1).) Marshall argues the evidence underlying both the assault conviction, as well as the sentencing enhancement attached to the attempted-voluntary-manslaughter conviction, was insufficient as a matter of law because he wielded a broom not a broom handle and did so in a manner that was neither deadly nor dangerous. The People argue the assault conviction and the enhancement are supported by substantial evidence. We agree with the People.

In reviewing a challenge based on sufficiency of the evidence to support a conviction, our consideration is limited to the question of whether the conviction is supported by substantial evidence, i.e., evidence that is “reasonable in nature, credible, and of solid value.” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) More specifically, “[i]n reviewing the sufficiency of the evidence, we must determine ‘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.’”

(*People v. Davis* (1995) 10 Cal.4th 463, 509.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) If the jury’s findings are reasonable under a substantial evidence standard, reversal is not warranted, notwithstanding the possibility that the “circumstances might also reasonably be reconciled with a contrary finding” (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) We apply the same standards in reviewing a sufficiency of the evidence challenge to a sentencing enhancement as pertain to a similar challenge to a conviction. (*People v. Hajek* (2014) 58 Cal.4th 1144, 1197, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192.)

Section 245, subdivision (a)(1), prohibits the commission of “an assault upon the person of another with a deadly weapon or instrument other than a firearm.” Here the jury convicted Marshall, pursuant to section 245, subdivision (a)(1), of assault with a deadly weapon based on his use of the broom in the attack. Next, section 12022, subdivision (b)(1), provides that a “person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony” shall be punished by an additional term of imprisonment. Here, the jury found pursuant to section 12022, subdivision (b)(1), that Marshall personally used a broom as a deadly weapon in committing attempted voluntary manslaughter.

As used in section 245, subdivision (a)(1), a “deadly weapon” is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.” [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the

nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

In determining whether an instrument that is not inherently deadly assumes this characteristic, the following factors are probative: (i) the nature of the weapon, (ii) the manner of its use, (iii) the location of the injuries inflicted, and (iv) the extent of these injuries. (*People v. Russell* (1943) 59 Cal.App.2d 660, 665; 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 46, p. 838.) However, neither physical contact nor injury is required for a conviction. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086.) Further, a weapon or object found to be a “deadly weapon” for purposes of section 245, subdivision (a)(1), also qualifies as a deadly weapon under section 12022, subdivision (b). (*People v. McGee* (1993) 15 Cal.App.4th 107, 115 [if deadly weapon was used for purposes of § 245, subd. (a)(1), then deadly weapon was also used within meaning of § 12022, subd. (b)].)

Examples of objects that are not deadly per se, but were found to be deadly weapons for purposes of section 245, subdivision (a)(1), based on the manner in which they were used, include a pillow (*People v. Helms* (1966) 242 Cal.App.2d 476, 486-487); a finger nail file (*People v. Russell, supra*, 59 Cal.App.2d at p. 665); and a straight pin embedded in an apple (*In re Jose R.* (1982) 137 Cal.App.3d 269, 276). Similarly, items that were found to support a section 12022, subdivision (b), enhancement include a pencil (*People v. Page* (2004) 123 Cal.App.4th 1466, 1472); pepper spray (*People v. Blake* (2004) 117 Cal.App.4th 543, 559); and a short stick (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 837).

Here, the record reveals substantial evidence from which a rational trier of fact could have found that Marshall used the broom as a deadly weapon. Although a common broom is not per se a deadly weapon, the manner in which Marshall employed the broom rendered it one in this instance. Thomas Chairez testified that he saw Marshall grab the broom, swing the handle like a baseball bat, and hit Miana in the head “a solid eight”

times. Chairez testified that Miana's head wound "reopened more and started bleeding more" after Marshall repeatedly struck her in the head with the broom handle. The fact that the handle of the broom was used to deliver multiple blows to Miana's head, such that the latter was "gushing blood," reasonably supports an inference that it was used in a manner likely to produce death or great bodily injury. Furthermore, the jury could reasonably conclude that Marshall deployed the broom handle forcefully because Miana, who was still ambulatory after the initial beating with the cane, temporarily lost consciousness after being hit with the broom handle.

The extent and location of Miana's injuries also tend to support the jury's findings. Dr. Mroz testified that Miana's head wound was long and deep, requiring two layers of sutures to close it up. Doctors first stitched the gash in the muscle layer and then sutured the gash in the skin. He opined that, had Miana not received prompt treatment, she could have bled to death. He further explained that Miana's head injury reflected the application of a significant amount of force. Finally, there was a lot of blood on the front porch where Marshall beat Miana with the broom, and both Corrina Schrock and Officer Otterness observed blood on the broom handle as well.

Marshall argues the evidence militates against a finding that he used the broom as a deadly weapon since, during the incident, Miana was "neither helpless nor had comparatively less power." However, this argument is untenable as the record reveals that Miana was in a vulnerable state: She was highly intoxicated, could barely walk, had lost control over her bowels, was unaware of her nakedness, was screaming for help, and was forced to seek help from her neighbors.

Finally, Marshall's reliance on *People v. Beasley*, *supra*, 105 Cal.App.4th at pages 1086 through 1088, is misplaced. In *Beasley*, the defendant's conviction for assault with a deadly weapon "rest[ed] upon Beasley striking [the victim's] arms and shoulders with [a] broomstick." The court concluded the evidence was "insufficient to show that Beasley used the broomstick as a deadly weapon" because the jury had no

information regarding the composition and heft of the broomstick; Beasley did not strike the victim's head or face but used it only on her arms and shoulders causing simple bruising; and there was no evidence as to the degree of force with which Beasley deployed the broomstick. (*Id.* at p. 1088.) Here, in contrast, the record shows that Marshall hit Miana multiple times in the head with the broom handle causing her head injury to bleed profusely and rendering it potentially fatal; Miana lost consciousness after being struck, suggesting the blows were relatively forceful; and the jury had knowledge of the type of broom at issue (the jury was shown a photograph of the broom and was told it had an aluminum handle). To be sure, Miana was beaten with a cane in addition to the broom; however, given the circumstances of the broom attack, the jury could reasonably infer that the broom was employed as a deadly weapon.

II. Jury instructions regarding definition of deadly weapon

Marshall argues the trial court's instructions regarding the definition of a "deadly weapon," for purposes of the assault-with-a-deadly-weapon charges in counts 3 and 4 and the sentencing enhancement in count 1, were erroneous. He contends the instructions failed to "direct the jury to consider whether the manner of [Marshall's] use of the cane or broom and Miana's actions in attacking [him] made the objects into deadly weapons." The People respond that the instructions were proper. We detect no error in the relevant instructions.

A. Background

As set forth above, the information charged Marshall with two counts of assault with a deadly weapon and alleged, in connection with the attempted-murder charge in count 1, that he personally used a cane and a broom handle as deadly or dangerous weapons. At the jury instruction conference, the trial court indicated, with respect to the assault charges, that it would instruct the jury pursuant to CALCRIM No. 875. Regarding the personal-use-of-a-weapon allegations, the court declared its intention to instruct the jury under CALCRIM No. 3145. Defense counsel did not object or request

modifications to either instruction. Subsequently, the court noted it would insert the definition of “deadly weapon” from CALCRIM No. 3145 into CALCRIM No. 875. Defense counsel again did not object.

The court then instructed the jury pursuant to CALCRIM No. 875 as follows: “The term *deadly weapon other than a firearm* is any object, instrument, or weapon that is inherently deadly or dangerous or that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.”

Next, the court instructed the jury pursuant to CALCRIM No. 3145 as follows: “A *deadly or dangerous weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury. [¶] In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed.”

During closing argument, the prosecutor addressed the definition of a “deadly weapon” as follows:

“The third and fourth count[s are] assault with a deadly weapon. One is for the cane, one is for the broom. I think the only issue you might have in that case—or in those charges is whether or not a cane is a deadly weapon or a broom is a deadly weapon. And a deadly weapon has to be able to cause great bodily injury.

“Showing People’s 2 [a photograph of the cane].

“Well, now you know that’s a deadly weapon. That cane definitely caused great bodily injury. He also hit her in the head with a broom, an aluminum broom. You have to decide if that also could cause great bodily injury.

“And Corrina testified that [Miana] had kind of stopped bleeding and then [Marshall] started beating her head again, and she was bleeding again, gushing blood out on the front patio.

“It’s up to you guys to decide the facts in this case.

“On Counts 1 and 2 [*sic*], there’s—there are allegations that the defendant personally used a deadly weapon. There’s one for the cane and one for the broom. And obviously he personally used them. He walked to the door with the bottom half of the cane in his hand. He admits that he hit her with the cane. Both neighbors saw him swinging the broom. Thomas saw the broom making contact with [Miana’s] head. You just have to decide—really, it’s the broom. I don’t think—I think the decision is pretty clear on the cane that it’s definitely a deadly weapon. You have to decide if he could have done the same thing with the broom handle.”

B. Discussion

Marshall faults the court’s instructions under CALCRIM Nos. 875 and 3145 as being inadequate but fails to specify what alternative language the court, in his view, was required to include in the instructions. Rather, Marshall offers a rambling rationale for the purported deficiency in the instructions: “Here, the jury needed to consider the situations in which the partial cane and broom were used before they could conclude the objects were dangerous weapons. Specifically, the jury needed to consider whether Miana was helpless at the time each one was wielded. If not helpless, did she have comparatively less power than appellant sufficient to render the object deadly?”

Marshall’s challenge to CALCRIM Nos. 875 and 3145 as given by the court is forfeited on account of his failure to object to these instructions in the trial court. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260 [forfeiture rule applied when defendant failed, in trial court, to object to jury instruction on grounds urged on appeal].) Alternatively, if Marshall is arguing that the trial court should have given a pinpoint instruction informing the jury to consider Miana’s strength relative to that of Marshall’s, that claim too is forfeited. (*People v. Jones* (2014) 223 Cal.App.4th 995, 1001 [failure to request pinpoint instruction forfeits claim on appeal].) In any event, we reject his contentions on the merits.

The trial court’s definition of “deadly weapon” was a correct statement of the law under *People v. Aguilar, supra*, 16 Cal.4th at pages 1028 through 1029. In *Aguilar*, the California Supreme Court defined a “deadly weapon” as “any object, instrument, or

weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ [Citation.]” (*Ibid.*) Aguilar also makes clear that, “[i]n determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]” (*Id.* at p. 1029.) Here, CALCRIM No. 875 as given included the admonition, “[n]o one needs to actually have been injured by defendant’s act. But if someone was injured, you may consider that fact, *along with all the other evidence*, in deciding whether the defendant committed an assault, and if so, what kind of assault it was.” (Italics added.) Furthermore, CALCRIM No. 3145 informed the jury, “[i]n deciding whether an object is a deadly weapon, *consider all the surrounding circumstances*, including when and where the object was possessed.” (Italics added.) Marshall’s assertion that the court was required to modify these instructions, which comport with *Aguilar*, specifically to inform the jury to consider whether Miana was helpless and relatively powerless in relation to him is unpersuasive. His citation to *People v. Freeman* (1927) 86 Cal.App. 374, 376, does not further his argument as *Freeman* stands for the general principle that various objects “may, in appropriate circumstances, become a deadly weapon” and does not mandate inclusion of specific language in jury instructions in the vein posited by Marshall.³

³Since we have rejected Marshall’s claim on the merits, we also reject his argument that counsel was ineffective in failing to object to CALCRIM Nos. 875 and 3145 as given by the court. We similarly reject his related claim that counsel was ineffective “for failing to request a pinpoint instruction modifying CALCRIM Nos. 875 and 3145” to admonish the jury to consider whether Miana was in a helpless state. The record is clear that, on account of extreme intoxication, Miana was in a vulnerable condition when Marshall attacked her. Furthermore, Officer Mears refuted Marshall’s contention that Miana was combative, and Thomas Chairez testified Marshall had no visible injury to support his claim that Miana had attacked him. In light of this record, Marshall has not demonstrated he was prejudiced by counsel’s failure to object to the instructions as given and/or obtain a pinpoint instruction.

III. Sentencing issues

The trial court sentenced Marshall to the middle term for attempted voluntary manslaughter and the upper term for the associated great-bodily-injury enhancement under section 12022.7, subdivision (e).⁴ Marshall now argues the record indicates the court did not understand it was within its discretion to sentence Marshall to the low term for attempted voluntary manslaughter and the low or middle term for the great-bodily-injury enhancement. Marshall bases this contention on the trial court's observation at the sentencing hearing that the facts of the case "limit what I can do by way of sentencing." In the alternative, Marshall argues the trial court "abused its discretion by imposing the upper term for [the] great bodily injury [enhancement]" attached to the attempted-voluntary-manslaughter conviction. We reject Marshall's contention that the trial court misunderstood the scope of its sentencing discretion as well as his alternative argument that the court abused its discretion in imposing the upper term for the sentencing enhancement.

A. Background

Prior to imposing sentence, the trial court noted, "My tentative is to follow and adopt the recommendations and findings contained in the probation report." Defense counsel responded, "Based on the Court's tentative ... I will submit on probation's recommendation." The probation officer, in the probation report, recommended the middle term of three years for the attempted-voluntary-manslaughter conviction and the upper term of five years on the related great-bodily-injury enhancement. The probation officer identified Marshall's limited criminal record as a circumstance in mitigation and the fact that he was on misdemeanor probation at the time he committed the instant offenses as a circumstance in aggravation. Regarding the sentencing enhancement, the

⁴Section 12022.7, subdivision (e), provides for additional punishment of three, four, or five years for the infliction of "great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony"

report noted that the upper term was warranted because “the defendant assaulted the victim on two separate occasions and a neighbor physically intervened to cease the assaults.”

Adopting the probation officer’s recommendation, the trial court sentenced Marshall to a total of nine years in prison, imposing the middle term of three years for the attempted-voluntary-manslaughter conviction, the upper term of five years on the great-bodily-injury enhancement, and one year for each “use of a deadly weapon” enhancement (one of which was stayed under § 654).

In imposing the sentence, the trial court stated as follows:

“All right. With respect to defendant’s letter, Mr. Marshall, I accept the sincerity and believe the sincerity that you have expressed.

“I also have reviewed and considered the letter submitted by the victim in this case and accept that she has, in fact, forgiven you.

“That doesn’t change the fact that this was a particularly aggravated assault. It resulted in great bodily injury, and it was carried out with a deadly weapon. And those facts limit what I can do by way of sentencing.

“I find in mitigation that the defendant has a limited prior record of criminal conduct.

“I find the circumstance in aggravation that defendant was on misdemeanor probation when the crime was committed. And I would also add the Court’s observation that the attack in this case was unusually vicious and resulted in great bodily injury.”

Defense counsel did not object to the court’s reasoning or the ultimate sentence imposed.

B. Discussion

Marshall did not object to the court’s sentencing decision and, accordingly, his sentencing claims are forfeited. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113 [failure to object timely forfeits review of claims concerning “discretionary sentencing choices—

those ‘which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner’”].) His claims also fail on the merits.⁵

Marshall first argues that his sentence is invalid because the trial court’s comment to the effect that the “facts limit what I can do by way of sentencing” indicates the court did not understand the scope of its sentencing discretion. “Where a trial court imposes sentence without an accurate understanding of its sentencing discretion, remand for resentencing is appropriate.” (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1248.) Marshall has not demonstrated that the trial court had a flawed understanding of its sentencing discretion. Taken in context, the trial court’s statement that the “facts limit what [it] can do by way of sentencing” does not indicate the court believed its sentencing discretion was limited or curtailed in any way. Rather, the court properly indicated that its sentencing decision would be based on the applicable facts.

Next, Marshall’s alternative argument that the trial court abused its discretion in imposing the upper term on the great-bodily-injury enhancement is also unavailing. A trial court’s broad discretion in imposing a sentence “must be affirmed unless there is a clear showing the sentence choice was arbitrary or irrational.” (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) “In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Here, the trial court identified a number of aggravating circumstances, including that Marshall was on misdemeanor probation when he committed the instant crimes and

⁵Since we have determined that Marshall’s sentencing claims lack merit, we also reject his claims of ineffective assistance of counsel based on counsel’s failure to object to the court’s sentencing decision.

that “the attack in this case was unusually vicious.”⁶ In light of these aggravating factors, the court’s imposition of the upper term for the great-bodily-injury enhancement was proper. (*People v. Jones* (2009) 178 Cal.App.4th 853, 866 [“[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions.”]; *People v. Black* (2007) 41 Cal.4th 799, 815 [“[T]he presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence.”], overruled on another ground in *Cunningham v. California* (2007) 549 U.S. 270; Cal. Rules of Court, rule 4.421(a)(1) [viciousness is aggravating factor]; Cal. Rules of Court, rule 4.421(b)(4) [defendant’s probationary status at time of commission of offense is aggravating factor]; *People v. Cortez* (1980) 103 Cal.App.3d 491, 496 [defendant’s probationary status was properly considered as factor in aggravation at sentencing].)

Finally, Marshall argues the court’s sentencing decision was improper under *People v. Brown* (2000) 83 Cal.App.4th 1037. In *Brown*, the defendant, a female police officer, had an affair with a male officer; when he called it off, she shot him multiple times. (*Id.* at p. 1044.) The defendant was convicted of attempted voluntary manslaughter with personal use of a firearm; she was sentenced to the low term for the offense and the upper term on the enhancement. (*Id.* at pp. 1039, 1041.) She challenged the sentences on the basis of the disparity between the respective terms imposed for the offense and the enhancement. (*Id.* at pp. 1041, 1044-1045.) The *Brown* court explained, with reference to the sentencing statute and applicable court rule, that the court acted within its sound discretion in imposing the low term for the substantive offense and the

⁶The trial court also noted that the attack resulted in great bodily injury, however, that characteristic of the attack does not justify imposition of the upper term for the sentencing enhancement for infliction of great bodily injury. (See *People v. Lincoln* (2007) 157 Cal.App.4th 196, 203-204 [inherent feature of enhancement is not permissible basis to impose high term for same enhancement].)

upper term for the attendant enhancement. (*Id.* at pp. 1045-1046.) We detect no error in the trial court’s sentencing decision under *Brown*.

IV. Abstract of judgment

The People request correction of the abstract of judgment in this matter. In addition to imposing the middle term of three years for the attempted-voluntary-manslaughter conviction and the upper term of five years for the associated great-bodily-injury enhancement, the court imposed one-year terms on each of two enhancements for personal use of a deadly or dangerous weapon (i.e., for use of the cane and the broom, respectively) that were also attached to count 1. The sentence on the enhancement of the personal use of a deadly or dangerous weapon based on Marshall’s use of the broom was stayed. The abstract of judgment omits any reference to this enhancement and the stayed sentence related to it. We direct the trial court to correct the abstract of judgment to reflect accurately the sentencing terms imposed in this case. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court with jurisdiction over matter may order correction of abstract of judgment to reflect accurate oral judgment of sentencing court].)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the error in the abstract of judgment as explained above and to forward the corrected abstract to the appropriate correctional authorities.

Smith, J.

WE CONCUR:

Hill, P.J.

Franson, J.