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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. COLE ALLEN WILKINS, Defendant and Appellant.	G040716 (Super. Ct. No. 06NF2339) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Teresa Torreblanca and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

It has long been recognized in this state that "[t]he purpose of the felony-murder rule is to deter felons from killing *negligently or accidentally* by holding them strictly responsible for killings they commit. [Citations.]" (*People v. Washington* (1965) 62 Cal.2d 777, 781, italics added.) Defendant committed a burglary of a residence under construction before workers arrived to begin their day**.** He loaded the back of his pickup truck with numerous boxed appliances and fixtures. He stuffed the cab of the truck to the windows with smaller items. In his haste to leave the scene unnoticed, he left the tailgate on the truck down and did not tie down the loot loaded into the bed of the truck despite the fact that he had ties in his truck. Sixty miles later on his drive home where he would unload the loot, the stove defendant stole fell off the back of his truck, resulting in the victim's death. The jury convicted defendant of first degree murder under the felony-murder rule. He contends, inter alia, that the evidence does not support his conviction and that the court erred when it refused to instruct the jury that a burglary is complete upon the perpetrator reaching a place of temporary safety.

Although defendant was, by all accounts, driving normally and his crime had not yet been discovered, defendant committed the acts that resulted in the death while he was at the scene of, and in the process of committing, the burglary. The acts that caused the homicide — the failure to tie down the load of stolen loot and raise the truck's tailgate — occurred at the scene of the burglary, not 60 miles later when part of the unsecured load fell off the back of the defendant's truck as he drove to where he could unload and hide the haul. As a result, it was not unreasonable for the jury to conclude the homicide and the burglary were part of one continuous transaction, inasmuch as defendant was in flight from the scene with his license plates secreted.

We also reject defendant's argument that the trial court erred in refusing his request to instruct the jury pursuant to CALCRIM No. 3261 [burglary complete upon the burglar reaching a place of temporary safety]. The Supreme Court has held the

instruction on the "continuous-transaction" doctrine is sufficient to inform the jury on the duration of a felony for purposes of the felony-murder rule and that the escape rule, which terminates a felony at the point the perpetrator reaches a place of temporary safety, defines the scope of an underlying felony for certain ancillary purposes and *not* for felony-murder purposes. (*People v. Cavitt* (2004) 33 Cal.4th 187, 208 (*Cavitt*).)[1]

Lastly, we address defendant's argument that the 25 years to life sentence imposed in this matter is cruel and unusual. Given defendant's record as set forth in a nearly one-inch thick probation report and described by the seasoned trial judge as "chilling," as well as the fact that the jury found defendant guilty of first degree murder, we reject this argument as well.

I

FACTS

Appliances at the Work Site

Defendant lived in Long Beach with Nancy Blake. On one day of the week before July 4, 2006, and one day of the week after, he worked at a home construction site in Menifee, a city in Riverside County. The homeowner had a delivery of major appliances and other items purchased from Home Depot on June 28. Defendant's cell phone records showed he was in the area of the Menifee jobsite on the delivery date. The delivery included a refrigerator, a dishwasher, a stove, a range hood, a microwave and a sink. It also included light fixtures, ceiling fans, door locks and door handles. Most of the items were stored in the kitchen area and some were in the garage.

At the end of the work day on July 6, all of the items were still in the residence when the workers locked the premises. While the owner was having breakfast

[1] The continuous transaction doctrine and the escape or flight rule, which refers to the accused reaching a place of temporary safety, are closely related, but distinct concepts. (*Cavitt, supra*, 33 Cal.4th at p. 208.) *Cavitt* provides the roadmap to successful navigation of the difficulty created by the courts' use of both concepts in connection with the felony-murder rule.

the next morning, he received a call from the carpenter working at the house telling him all of his purchases were missing. He called the police. Defendant's cell phone records showed he was in the area of the Menifee construction site during the early morning of July 7.

Defendant, Trivich, and Telephone Calls

In September 2005, sometime after their romantic relationship ended, Kathleen Trivich and defendant entered into a business relationship to buy a piece of property in Palm Springs and build on it. Trivich paid for the land and was to pay for the materials to build a house on the property. Defendant said his contribution was to "basically oversee the project." Trivich also bought a Ford F-250 truck for defendant in 2006. The truck was to be used to haul building materials. As of July 2006, no construction "whatsoever" had been completed.

On July 6, 2006, defendant left his home in Long Beach about "8:30 or 9:00" p.m. He was driving his Ford F-250 truck. Trivich was at a speech and acting class at 8:00 p.m. that night, until just after midnight. Sometime thereafter she checked her cell phone and found a message from defendant. He wanted gas money. She called defendant back on his cell phone. She agreed to give him money. She drove to Long Beach, where she put $100 or $200 in an envelope and slid it under the door to his house.

After driving to Long Beach, where Trivich went to an ATM and withdrew the money she left for defendant at his house, she again spoke to defendant on the phone. She told him she dropped the money off at his house, and defendant said he had some news for her. He said, "I've got a surprise for you. I got some really big things for the kitchen." Trivich asked him what he had, but he did not tell her. At the time of this call, defendant's cell phone was using a cell tower along the 91 Freeway.

The Freeway

Calls to the California Highway Patrol began at 5:01 a.m. on July 7, 2006. The callers said there were items in one of the lanes of the westbound 91 Freeway, right before "Kraemer and Glassell in Anaheim." One said he ran into a big box, and that he saw someone else run into it, too. About four minutes after the first call, someone reported that a tanker truck rolled over.

At trial, Danny Lay testified he was westbound on the 91 Freeway somewhere around Kraemer right before a freeway interchange at about 5:00 o'clock in the morning of July 7, 2006. He was in the second lane to the right of the carpool lane. A Ford pickup without a rear license plate was in front of him. There were "a lot of boxes in the back of the truck." When Lay was 25 to 50 yards behind the truck just east of Kraemer, "a large box fell from the right corner of the truck into the freeway." Lay had a car to his left and a car to his right, so he hit his brakes and tried to stop. He hit the box.

Lay proceeded after the pickup. He turned on his flashing lights, turned his bright lights on and off repeatedly and hit his horn. The truck slowed down and both vehicles pulled off the freeway. Lay pulled up next to the passenger side of the pickup, but there were so many boxes blocking the window, he couldn't see the driver. He thinks the driver looked over at him, saw him and then "accelerated away." Lay kept flashing his lights and honking his horn, and was finally able to pull up alongside the pickup again. The driver of the pickup stopped and threatened Lay, using a vulgarity.

Lay identified defendant as the person who was driving the pickup truck. Defendant and Lay got out of their vehicles, and defendant said he was "going to kick [Lay's] ass." Lay said, "bring it on, but first something fell from your truck." Defendant looked in the back of the pickup and remarked, "Oh, my God. It's a thousand-dollar stove." Lay saw the tailgate on the truck was down. There were no ropes or tie-downs.

He also saw various sized boxes. He remembered seeing ceiling fans and a refrigerator. He asked defendant for identification. Defendant went to the glove box and appeared to look through it. He then said he must have forgotten his license, and that a friend, Kathleen Trivich, owned the truck. He identified himself as Michael Wilkins.

Charles Thomas was also on the freeway that morning, driving behind a white truck. The white truck made a "pretty severe" lane change. Thomas said "as soon as he swerved and I kind of got startled and slowed down, and then all of a sudden, I saw a white box, my headlights shined on this white box." He explained it was dark out and he wanted to move, but "there was cars and a lot of traffic." He was asked if he hit the box, and responded: "It was so fast. Yeah, I hit it. It was so fast. I didn't slam on my brakes, there was nothing I could do." He said he called 911, and that another vehicle hit the box, too, and they both pulled over to the side of the road. The other vehicle suffered a flat tire, and "had a hard time limping off."

Donald Wade was driving behind a big rig truck that morning, and "saw an automobile coming across out of the left lanes across the traffic about, looked like about 90-degree angle and he hit the truck in front of me."

James Davies, also on the freeway at the time, saw a truck as it hit the K-rail. "When I moved forward in traffic about 50 yards or so, I did see an appliance sitting in the lane." Davies pulled over to the side of the road, called 911 and spoke with a motorcycle officer who arrived at the scene.

Thomas Hipsher was driving "a big truck, tractor with two trailers" carrying a full load of powdered cement that morning as he drove along "the slow lane" at 55 miles per hour. He felt an impact and lost control of his vehicle. He suffered bruised ribs and "a lot of cuts and bruises." He never saw the car that struck him.

The Death

California Highway Patrol Officer John Heckenkemper responded to the scene shortly after 5:00 a.m. on July 7. He described the scene: "Upon my arrival, there was — traffic was obviously in disarray. There was a stove in the middle of the lanes and beyond that, just west of the stove, there was an accident involving a big rig that had overturned."

Captain paramedic John Mark of Anaheim described what he saw: "Upon our arrival, we found a large semi-truck commodity hauler on its side off the shoulder of freeway with the cab extending off the shoulder. And we recognized that there was a vehicle actually trapped between the two trailers." They could not get to the car underneath the truck until the truck was removed. Then "it took a fair amount of time to extricate the victim from the vehicle." The man inside was deceased.

The coroner testified she conducted an autopsy of David Piquette. She described numerous injuries on the body, and said the cause of death was "positional asphyxia. That caused — due to compression of neck and chest, positional asphyxia."

An accident reconstructionist testified "Piquette swerved in an area just shy of where the stove was . . . to hit the big rig where we know he did." His investigation showed the driver of the big rig "steered to the right at about the same time that a driver probably saw . . . Piquette coming from the left, and then that would be a completely natural human reaction." He said that in order to avoid hitting the stove, given the conditions, a driver in Piquette's position would have had to have been driving at 28 miles per hour, and the speed limit in the area was 65 miles per hour.

Afterward

Blake received a telephone call from defendant "around" 5:00 or 5:15 on the morning of July 7, 2006. He said he was coming home, and arrived at 5:30 or 6:00 a.m. Defendant said he needed help unloading some items. When she went outside, she saw in the truck "a lot of boxes and what looked like to be . . . a refrigerator laying down

on the bed with [a] box on top. Everything was boxed." Boxes were also piled "to the window" inside the cab of the truck.

Later that day, the two went to Palm Springs where defendant owned some property. He and Trivich planned on building a house on the property. On the evening of July 7, defendant telephoned Sean Doherty and asked if "it would be okay for him to store some appliances in [his] garage." The next day, July 8, Trivich and Doherty were in Palm Springs, where Doherty owns a home.

On July 8, defendant and Doherty spoke when they were alone. Defendant told Doherty, "I'm in trouble. Something's happened. There has been an accident." Defendant said somebody was killed. Doherty was told "something had fallen off [defendant's] truck, a stove had fallen off the truck, and somebody had swerved, or hit it and swerved and was killed."

Blake recalled that at some point on July 8, there was a conversation about what had happened on the 91 Freeway. Blake said defendant "suggested I don't speak to anyone about the accident until he could find a lawyer."

Doherty said that "maybe 8:00 or 9:00" on the evening of July 8, he, Blake, Trivich and defendant were together. Defendant was attempting to hide the fact that he had been the driver. Doherty was asked whether he heard defendant make a statement to Trivich regarding who was driving the truck. Doherty responded: "That they were — were trying to find some way to make it look like she was driving the truck versus him." He said he heard defendant "trying to convince" Trivich to lie and say she was driving the truck when the incident happened.

At some later time, Doherty took "investigators from the highway patrol" into his garage. They looked at the various items, which included a refrigerator, a dishwasher and a microwave. None of those items had been in his garage before he gave defendant permission to store things there.

California Highway Patrol Officer Joseph Kenneth Morrison drove to the construction. The distance from the construction site to the place where Piquette was killed is a little over 60 miles. The distance from where Lay said he first saw the truck carrying the appliances to the collision scene is approximately 5.6 miles.

Defendant's Testimony

Defendant testified in his own defense. He explained his involvement with Trivich with respect to Palm Springs: "I approached her in the late part of 2005, I don't know exactly what month it was, but basically at that time, you know, the real estate market was at its peak, things were going good. I was living in Palm Springs part time. Previous to this, Sean who testified, had mentioned that he had purchased this house for a certain amount and now his house is valued at this. I saw this as a good opportunity to possibly, you know, buy some property, build a house, sell it and, you know, hopefully make a profit from it." He added: "because she agreed to do the financial backing, I had a deal that was to basically oversee the project and make sure the house got built in a timely manner and made sure everything went according to plan."

With regard to the appliances, defendant explained that on July 6, 2006, he had oral surgery, and then believed that night he "left [his] house slightly after 10:00, 10:15, 10:20, somewhere in that timeframe" and "went to Palm Springs." Before getting to Palm Springs, he stopped at the Home Depot "over there off of the 91 and Weir Canyon I believe it is." He added: "When I got there, I pulled into the parking lot. Rick[2] was there, he was with another fellow. I did not recognize him. He had a truck load full of stuff. We talked briefly. He asked me if I was interested in the stuff, I told him I was, however, I told him I wasn't carrying that much cash on me at that time. My intention at that time was to buy the fridge and possibly the stove depending on how

[2] Defendant did not provide Rick's last name.

much he was going to charge me. [¶] He asked me if I was interested in the stuff and I said, yes, definitely. He asked me if there was anyway I can come up with the money. I told [him], yes, if he could give me another hour or so, I can go back home, retrieve some money and meet him at a later time." They agreed to a price of $1,500 for everything.

He admitted he suspected the merchandise may have been stolen, "almost too good to be true." He said: "I needed the stuff for the house to be built in Palm Springs."

Defendant said he had some tie-downs on his truck but the boxes were stacked on top of the tie-downs and he couldn't get to them. He weighed his options, "jumped on the tailgate, I moved the stuff around and, you know, honestly felt at that time with no traffic or anything like that and just the weight of the items, I didn't feel that there was a danger of anything falling off my truck. We were talking about a 185-pound stove and a 200-something-pound fridge."

On cross-examination, he admitted that in 1991 he twice stole property belonging to others with the intent to permanently deprive the owners of their property. He confirmed he had been to the Menifee jobsite twice prior to this incident.

He said he first met Rick at a jobsite "in the Temecula or Menifee area." The second time he saw Rick was in a parking lot in Temecula, when defendant was on his way to a restaurant. Rick took defendant to the back of his truck where there were "stacks and stacks of tile. I looked at them, and he had two different kinds. I asked him how much. He gave me a price. I thought the price was decent." Defendant said he purchased the tiles from Rick.

The third time defendant saw Rick was when he was walking into a 24 Hour Fitness in Temecula on July 5, 2006. Rick flagged him over to his truck. When the prosecutor reminded defendant he had already said the incident at the Home Depot was the third time, defendant said, "I'm getting confused a little bit." Defendant went on to explain that at the time he saw Rick by the 24 Hour Fitness, Rick told him he had a fridge

and a stove for $500. They made a deal, even though Rick did not have the appliances with him. When the prosecutor asked him whether or not he testified differently on direct, defendant accused the prosecutor of confusing him. Defendant said he and Rick agreed to meet the following evening at 11:00 p.m. in the Home Depot parking lot in Yorba Linda.

Defendant admitted to the prosecutor that his plan was to take all of the stolen merchandise to Palm Springs and unload it himself at Doherty's house. He also admitted that he knew he ought to have tied them down.

Defendant then told the jury that after he made his purchases in the Home Depot parking lot, he drove all the way to Palm Springs to Doherty's house, arriving at about 2:00 a.m., and realized he could not lift the items by himself. So he turned around to drive to Long Beach, starting the journey "a little after" 3:00 a.m., without even unloading the smaller items that were in the cab of the truck, or taking the time to tie anything down. He said he left the tailgate down.

Defendant said he drove toward Blake's house in the fast lane. He admitted he lied to Lay, gave him a false name and gave him a false contact phone number. He said he lied because he "wasn't covered [under] the insurance policy." He admitted the license plates and registration for the truck he was driving were in the passenger side door, even though he told Lay he did not have them. Later he added another reason he lied was because his license had been suspended.

As the prosecutor questioned defendant further, he testified that when he arrived at Blake's home, he was able to unload the items himself. Blake helped him with the smaller items, but not with the larger ones. He said he used a dolly.

II

DISCUSSION

A. *Impeachment with Prior Juvenile Adjudications*

Prior to trial, defendant moved to exclude evidence of his prior juvenile adjudications for burglary in 1988 and 1990, for kidnapping in 1992, and for rape in 1993, as well as his adult conviction for failing to register as a sex offender. He asserted this evidence was not admissible to impeach his testimony because the failure to register as a sex offender is not a crime of moral turpitude and juvenile adjudications are not convictions. The prosecutor stated his intention to introduce evidence of the conduct underlying each of the juvenile adjudications, but not to introduce evidence of the adult conviction.

The court exercised its discretion and excluded any reference to defendant's failure to register as a sex offender, the rape adjudication that presumably gave rise to the registration requirement, or the conduct underlying the rape adjudication. It also excluded any reference to the burglaries due to potential prejudice given the importance of the burglary in the present case. The court held, however, that defendant could be asked whether he committed thefts on August 21, 1991, and November 20, 1991. When asked, defendant admitted he committed a theft on each occasion.

Impeachment based upon criminal conduct is not limited to introduction of a prior felony conviction. A defendant may be impeached with past criminal conduct involving moral turpitude. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) Admission of such evidence is "subject, of course, to the restrictions imposed under Evidence Code section 352 and other applicable evidentiary limitations." (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1740.) The trial court exercises broad discretion in determining the admissibility of evidence and we review the court's ruling for an abuse of discretion. (*People v. Harris, supra*, 37 Cal.4th at p. 337.) "'[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]' [Citation.]" (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

In exercising its discretion, the trial court should take into account factors similar to those that must be considered when the admissibility of a prior conviction is

under consideration: "(1) whether the [conduct] reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of [the conduct]; (3) whether the conduct is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. [Citation.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) Defendant does not contend the conduct fails to reflect adversely upon his veracity. It does. (*People v. Gurule* (2002) 28 Cal.4th 557, 608 ["theft crimes necessarily involve an element of deceit"].) The third above listed factor is not an issue. Defendant testified. The court could have permitted the prosecution to introduce evidence that defendant committed burglaries, but did not do so because of the similarity with the present alleged conduct, instead limiting impeachment to generic thefts. The only factor at issue is remoteness.

The conduct with which defendant was impeached occurred in 1991. The charged offense occurred in 2006, 15 years later. The prior conduct could be characterized as remote, but this remoteness does not automatically render such evidence inadmissible for impeachment purposes. (Cf. *People v. Mendoza, supra,* 78 Cal.App.4th at p. 925 ["convictions remote in time are not automatically inadmissible for impeachment purposes"].) In *People v. Green*, *supra*, 34 Cal.App.4th 165, the court found a defendant's 20-year old prior conviction was not inadmissible due to remoteness because the defendant had not led a blameless life in the interim. (*Id*. at p. 183.) Neither has defendant. After his discharge from the California Youth Authority on the August 1991 burglary that included his rape of a woman, he suffered a felony conviction as an adult for failing to register as a sex offender. The court considered the remoteness of the prior conduct and defendant's subsequent actions. Accordingly, we find the trial court did not err in permitting defendant to be impeached with the fact that he committed two prior thefts. We do not here list defendant's other subsequent transgressions as they were not made known to the court prior to the court's ruling.

B. *Jury Instructions*

Defendant argues the trial court erred when it instructed the jury on aiding and abetting and on the effect of recent possession of stolen property. He also contends the court erred when it refused his requested instruction on the escape rule. We address each argument in turn.

1. *Aiding and Abetting*

The court instructed the jury on aiding and abetting pursuant to CALCRIM Nos. 400 and 401. Defendant argues there was no evidence in the record to support the instructions.

"Trial courts only have a sua sponte duty to instruct on 'the general principles of law relevant to and governing the case.' [Citation.] 'That obligation includes instructions on all of the elements of a charged offense' [citation], and on recognized 'defenses . . . and on the relationship of these defenses to the elements of the charged offense.' [Citations.]" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.)

Here the evidence supported jury instructions on an alternative liability theory of aiding and abetting. Besides defendant's story about meeting someone named Rick and another man in Yorba Linda, defense counsel also obliquely raised the issue at trial. While cross-examining a highway patrol investigator, counsel questioned about the number of people required to load the items found at Doherty's home, and elicited the fact that lifting was done by more than one person. Additionally, there was evidence law enforcement found a fingerprint outside a laundry room window at the burglarized residence. Todd Gorman, who locked up the residence at 7:30 or 8:00 p.m. on July 6, 2006, testified the laundry room window did not latch properly. Gorman showed a

highway patrol investigator the laundry room window because he thought the burglar probably gained entry through the window. A latent fingerprint was lifted from outside the window. Defense counsel attempted to demonstrate on cross-examination of the investigator that the print was not defendant's. Although objections to his questions were sustained, defendant was in a position to argue the burglar was someone other than defendant because if the fingerprint was his, the prosecution would have introduced that evidence. Thus, there was evidence from which a jury could have inferred defendant aided and abetted another in committing the burglary.

2. *Recent Possession of Stolen Property*

Defendant next contends "the trial court prejudicially erred and denied [him] due process of law when it instructed the jury that they could find [him] guilty of burglary on the basis of evidence that did not rationally support an inference that he was guilty of that crime." The court instructed the jury: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not find the defendant committed the crime of burglary based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed burglary. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of burglary. [¶] Remember that you may not find that the defendant committed any crime unless you are convinced that each fact essential to the conclusion that the defendant committed that crime has been proved beyond a reasonable doubt."

An inference of guilt may be drawn from unexplained possession of stolen property. (*Barnes v. United States* (1973) 412 U.S. 837, 843.) "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in

addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.]" (*People v. McFarland* (1962) 58 Cal.2d 748, 754.) "As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process." (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1173.)

Here there was substantial corroborating evidence. Defendant worked at a construction site near the burglarized house. His cell phone records show he was in the area at the time the merchandise was delivered to the residence and at the time of the burglary. The night the appliances were stolen, he called Trivich and told her he "got some really big things for the kitchen." There was also evidence from which an inference could be drawn that he was in a hurry to get home with the stolen items in that he did not take the time to secure them on his truck. Plus, he testified he "needed the stuff for the house to be built in Palm Springs."

Defendant testfied he met with Rick in Temecula on July 5, at approximately 4:15 p.m., and arranged to buy a refrigerator and stove from Rick. They agreed upon a price of $500. This purported meeting took place *before* the burglary. There is no evidence Rick ever worked on at the burglarized house or knew of the appliances and fixtures it contained.

We note the last paragraph of the instruction cautions the jury to "[r]emember that you may not find that the defendant committed any crime unless you are convinced that each fact essential to the conclusion that the defendant committed that crime has been proved beyond a reasonable doubt." Nothing in this record implicates defendant's constitutional rights, lessened the prosecution's burden or permitted an inference of guilt without a rational basis. The trial court did not err when it instructed the jury on recent possession of stolen property.

3. *Denial of Request to Instruct the Jury That a Burglary is Complete When the Perpetrator Reaches a Place of Temporary Safety*

The court instructed the jury that defendant was charged with murder under the felony-murder rule based upon his alleged commission of a burglary, and that the felony-murder rule requires "the act causing the death and the burglary were part of one continuous transaction." (CALCRIM No. 540C; see Pen. Code, § 189.) The court then gave a modified version of CALCRIM No. 549, defining a continuous transaction: "In order for the People to prove that the defendant is guilty of murder under a theory of felony murder, the People must prove that the burglary and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time in more than one location. [¶] In deciding whether the act causing the death and the felony were part of one continuous transaction, you may consider the following factors: [¶] 1. Whether the felony and the fatal act occurred at the same place; [¶] 2. The time period, if any, between the felony and the fatal act; [¶] 3. Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony; [¶] 4. Whether the fatal act occurred after the felony but while the perpetrator continued to exercise control over the person who was the target of the felony; [¶] 5. Whether the fatal act occurred while the perpetrator was fleeing the scene of the felony or otherwise trying to prevent discovery or reporting of the crime; [¶] 6. Whether the felony was the direct cause of the death; [¶] AND [¶] 7. Whether the death was a natural and probable consequence of the felony. [¶] It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction."

The court denied defendant's request to instruct the jury with CALCRIM No. 3261, which defines the escape rule. That instruction provides in pertinent part: "[The crime of burglary . . . continues until the perpetrator[s] (has/have) reached a place of temporary safety. The perpetrator[s] (has/have) reached a place of temporary safety if (he/she/they) (has/have) successfully escaped from the scene[,] and (is/are) no longer being chased[, and (has/have) unchallenged possession of the property].]" The court refused this instruction per the Bench Notes following CALCRIM No. 3261. "This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing." (Cal. Crim. Jury Instns. (2011) Bench Notes to CALCRIM No. 3261, p. 990.) The Bench Note is based upon the Supreme Court's decision in *Cavitt, supra*, 33 Cal.4th 187.

The felony-murder rule is contained in Penal Code section 189, and states in pertinent part: "All murder . . . which is committed in the perpetration of . . . burglary . . . is murder of the first degree." ""The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." [Citation.] The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.' [Citation.] Policy concerns regarding the inclusion of burglary in the first degree felony-murder statute remain within the Legislature's domain, and do not authorize this court to limit the plain language of the statute." (*People v. Farley* (2009) 46 Cal.4th 1053, 1121.) "The mental state required is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation,

nor malice aforethought is needed. [Citations.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1085, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

When the felony-murder rule is invoked by the prosecution, the issue of whether the homicide occurred "in the perpetration of" the underlying felony often arises. "First degree felony murder does not require a strict causal relation between the felony and the killing. The only nexus required is that both are part of one continuous transaction. [Citations.]" (*People v. Johnson* (1992) 5 Cal.App.4th 552, 561.) The continuous transaction doctrine was adopted "'for the protection of the community and its residents.'" (*Cavitt, supra*, 33 Cal.4th at p. 207.)

The *Cavitt* court recognized that the continuous-transaction doctrine and the escape rule are "two related, but distinct, doctrines." (*Cavitt, supra*, 33 Cal.4th at p. 208.) In *Cavitt*, Cavitt and Williams plotted with Cavitt's girlfriend McKnight to burglarize the McKnight residence, tie up McKnight's stepmother, Betty, and steal Betty's jewelry. Once they were inside, Cavitt and Williams put a sheet over Betty's head, bound her wrists and ankles, and beat her. They tied up McKnight and left her at the scene to make it look as if she, too, was a victim. Cavitt and Williams then left the scene. Betty died of asphyxiation. The defendants' trial position was that McKnight intentionally killed her stepmother after they left the scene and had reached a place of temporary safety. (*Id*. pp. 193, 206.) Unlike the present case, the jury in Williams's trial was not only instructed on the continuous transaction-rule, but was also given an escape/temporary safety instruction. Williams's contention on appeal was that the trial court erred when it added to the temporary safety instruction a paragraph stating perpetrators have not reached a place of temporary safety if the victim of the burglary remains in the control of any of the perpetrators. He argued the law does not require all perpetrators to reach a place of temporary safety before the burglary is deemed completed. (*Id*. at p. 208.)

The court held that whereas the "'escape rule' defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony[3] . . . [t]he continuous-transaction doctrine, . . . defines the duration of *felony-murder* liability which *may extend beyond the termination of the felony itself*, provided the felony and the act resulting in death constitute one continuous transaction. (*Cavitt, supra,* 33 Cal.4th at p. 208, second italics added.) In rejecting Williams's argument, the court stated it "would have been sufficient to have instructed the Williams jury on the continuous-transaction doctrine alone." (*Ibid*.)

The genesis of a "continuous transaction" requirement in a felony-murder context is found in *People v. Miller* (1898) 121 Cal. 343. There, Miller tricked Mrs. Burns's sister into bringing Nellie Ryan, his former housekeeper, to Mrs. Burns's house. When Ryan arrived and discovered Miller was inside, she turned and left. Miller descended the stairs, exited the house, and immediately began shooting at Ryan, who ran across the street and entered the Child residence. Miller attempted to pursue Ryan and had his hand on the door handle of the Child residence when James Child "took hold of Miller." Miller immediately turned and shot Childs. (*Id*. at p. 345.) The court rejected Miller's contention that the trial court erred in instructing the jury regarding burglary, noting that section Penal Code 189 applied to killings "'committed in the perpetration, or attempt to perpetrate . . . burglary'" and entry with the intent to kill Ryan would suffice. (*Id*. at pp. 346-347.) The court concluded "[t]he attempt to kill Nellie Ryan and the shooting of Childs were part of one continuous transaction." (*Id*. at p. 345.)

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[3] These ancillary consequences include determining whether the defendant inflicted great bodily injury in the course of a robbery (*People v. Carroll* (1970) 1 Cal.3d 581, 584-585 [injury inflicted on a robbery victim after property asported but before robber reached place of temporary safety]), whether a kidnapping was for the purpose of committing a robbery (*People v. Laursen* (1972) 8 Cal.3d 192, 199-200 [kidnapping during escape may constitute kidnapping to commit a robbery]), and whether a firearm was used during the crime (*People v. Fierro* (1991) 1 Cal.4th 173, 225-226 [firearm used in escape constitutes use during commission of the robbery]).

Thirty-two years later, our Supreme Court decided *People v. Boss* (1930) 210 Cal. 245. In that case, Boss and Davis robbed employees of a store. (*Id*. at p. 247.) The defendants left the store and went into the street when an employee alighted from the store and gave chase across the street and toward an alley, where Boss turned, shot, and killed the employee. (*Id*. at pp. 247-248.) The defendants contended the felony-murder rule did not apply because the killing took place after the robbery had been committed. (*Id*. at p. 250.) In rejecting that argument, the court noted a court in a sister state with a similar felony-murder statute had held that "where the enterprise is one continuous act including carrying away of property, a murder committed by one of the defendants in flight 800 feet distant from the place of robbery in order to avoid apprehension is murder in the first degree." (*Id*. p. 252.)

The court noted the existence of burglary cases holding the crime is complete upon entry, but concluded such a rule "was adopted to make punishment of this class of crime more certain. It was not intended to relieve the wrongdoer from any . . . consequences of his act by placing a limitation upon the *res gestae* which is unreasonable or unnatural." (*People v. Boss*, *supra*, 210 Cal. at pp. 252-253.) Courts in sister states similar felony-murder statutes have held the rule applies to a killing committed during the res gestae of the felony.

In addressing its felony-murder rule, the Kansas Supreme Court held "[t]he felony-murder rule applies when the victim's death occurs within the res gestae of the underlying felony. [Citation.] Res gestae has been defined as those acts done before, during, or after the happening of the principal occurrence when those acts are so closely connected with the principal occurrence as to form, in reality, a part of the occurrence. [Citation.]" (*State v. Jackson* (Kan. 2005) 124 P.3d 460, 463; see also *Bellcourt v. State* (Minn. 1986) 390 N.W.2d 269, 274 [res gestae requires killing and felony be part of one continuous transaction]; *Parker v. State* (Fla. 1994) 641 So.2d 369, 376 [felony-murder

rule applies in "'the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing'"].)

Language used by the courts may have led to confusion regarding the proper application of the two related, but distinct doctrines: "[B]ecause flight following a felony has also been considered as part of the same transaction (*People v. Fuller* (1978) 86 Cal.App.3d 618, 623, quoting *People v. Salas* (1972) 7 Cal.3d 812, 822), it has generally been held that a felony continues for purposes of the felony-murder rule 'until the criminal has reached a place of temporary safety.' (*People v. Bigelow* (1984) 37 Cal.3d 731, 753.)" (*People v. Portillo* (2003) 107 Cal.App.4th 834, 843.) In *People v. Boss*, *supra*, 210 Cal. 245, where the court spoke of one continuous act, the court also stated the robbery had not been completed because the defendants had "not won their way even momentarily to a place of temporary safety." (*Id*. at p. 250.) Even after *Cavitt*, the Supreme Court has used "temporary safety" language in connection with the felony-murder rule. "A robbery is not complete until the perpetrator reaches a place of temporary safety [citation] . . . ." (*People v. Young* (2005) 34 Cal.4th 1149, 1177, fn. omitted.)

However, as stated above, the temporary safety doctrine does not define felony-murder liability. (*Cavitt, supra,* 33 Cal.4th at p. 208.) The *Cavitt* court found that limiting the felony-murder rule to only those killings that occur prior to the felon reaching a place of temporary safety would lead to absurd and unintended results. (*Id.* at pp. 199-200.)

Reconciling *Cavitt* with cases that have discussed temporary safety as a component of the felony-murder rule, leads us to the following conclusion: for purposes of the felony-murder rule, a robbery or burglary continues, *at a minimum*, until the perpetrator reaches a place of temporary safety. That is to say a killing, even an accidental killing, committed while the perpetrator is in flight and prior to reaching a place of temporary safety, may be fairly said to be part of one continuous transaction with

the underlying felony. But reaching a place of temporary safety does not, in and of itself, terminate felony-murder liability so long as the felony and the killing are part of one continuous transaction.

The defense's requested instruction, to the extent it would be understood by the jurors as setting the point at which felony-murder liability terminates — which undoubtedly was the very reason it was requested — is an incorrect statement of the law and was properly refused by the trial court. (*Cavitt, supra*, 33 Cal.4th at p. 208.) Defendant concedes the trial court did not otherwise have a *sua sponte* duty to clarify the meaning of the term "continuous transaction." (*Id*. at pp. 203-204.)

C. *Sufficiency of the Evidence*

Defendant contends the evidence does not support his conviction for first degree murder under the felony-murder rule because (1) the evidence was insufficient to prove he committed the burglary, and (2) the evidence did not prove the burglary and the death were part of one continuous course of conduct. We disagree.

1. *Standard of Review*

"'"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence — i.e., evidence that is credible and of solid value — from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) "'On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Perez* (2010) 50 Cal.4th 222, 229.) Reversal for insufficient evidence "is unwarranted unless it appears

'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

2. *The Burglary*

"Burglary falls expressly within the purview of California's first degree felony-murder rule. Any burglary within Penal Code section 459 is sufficient to invoke the rule. [Citations.] Whether or not the particular burglary was dangerous to human life is of no legal import. [Citation.]" (*People v. Fuller* (1978) 86 Cal.App.3d 618, 623.) Although defendant was not charged with burglary, his murder conviction is based upon the felony-murder rule and the felony that triggered the rule in this case was a burglary. Defendant argues that other than the fact he was in possession of property stolen during the burglary, there is little other evidence "to support the element of entry with the intent to steal." However, as we pointed out above in discussing the instruction on the inference permissible from possession of recently stolen property, little more is needed to support a conviction. Here there was substantial corroborating evidence. Defendant worked at a construction site near the site where the items were located before the burglary. His cell phone records show he was in the area at the time the merchandise was delivered to the residence and again around the time of the burglary. The night the appliances were stolen, he called Trivich and told her he "got some really big things for the kitchen." There was also evidence from which an inference could be drawn that he was in a hurry to get away with the stolen items in that he did not take the time to secure them on his truck, even though he had ties in the truck. Additionally, defendant did not have license plates on his truck that night. The plates were inside the passenger compartment. A jury could reasonably infer defendant made an attempt to conceal identification of his truck by driving without the plates on his truck. Plus, he testified he "needed the stuff for the house to be built in Palm Springs." The evidence was more than

sufficient to support the jury's determination the loot in defendant's truck was from a burglary he committed.[4]

3. *Continuous Transaction*

The burglary took place in Riverside County. The death occurred in Orange County on the 91 Freeway, about 60 miles from the burglary. The incident that claimed Piquette's life was caused by a stolen stove falling from the back of defendant's truck into the lanes of traffic. At the time of Piquette's death, the burglary had yet to be discovered. In support of his argument that the evidence does not demonstrate the death and the burglary were part of one continuous transaction, he asserts that (1) at 1:00 a.m. he told Trivich he had acquired large kitchen appliances and the cell phone records indicate he was traveling west to east (toward Palm Springs) at the time; (2) the death occurred four hours later, when defendant was travelling in the opposite direction, away from Palm Springs; and (3) defendant had reached a place of temporary safety and lingered there before getting on the 91 Freeway and heading back to Long Beach. He contends these facts demonstrate he (1) already had the loot when he spoke with Trivich four hours before Piquette's death; (2) he then drove to Palm Springs with the loot; and, (3) and remained in Palm Springs for some time before bringing the loot back toward Long Beach and arriving in Orange County where the collision occurred. He argues that as a result, there is no evidence to support a conclusion the "the death occurred during efforts to escape the burglary or that the accident resulted from an attempt to conceal the

[4] Defendant argues evidence that "merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." That is true enough, but the cases he relies upon are inapposite. In reversing the conviction in *People v. Briggs* (1967) 255 Cal.App.2d 497, the court pointed out the importance of the fact that "[n]othing from the burglary . . . was found in the possession of defendant." (*Id.* at p. 501.) And in *People v. Rascon* (1954) 128 Cal.App.2d 118, the court noted that there was no evidence whether any of the stolen property had been found. (*Id.* at p. 122.) Defendant, on the other hand, possessed all the loot from the burglary.

property which was openly on display in the bed of the pickup truck."

"In light of the deferential standard of review that applies to this sufficiency of evidence claim, we must reject his interpretation of the evidence." (*People v. Smith* (2005) 37 Cal.4th 733, 744.) The jury could have reasonably concluded defendant left his residence in Long Beach intending to drive to Menifee to steal the appliances and that he made the telephone call to Trivich for gas money because he would need gas to drive the appliances from Long Beach, where he would get the money from Trivich, to the project in Palm Springs. The cell phone records demonstrate he was driving west to east at the time of the telephone calls. That fact, however, does not mean he was headed to Palm Springs. Menifee is south of the 91 Freeway, off of Interstate 215. Driving from Long Beach, defendant would have taken the 91 Freeway east to Interstate 215 south. The July 7, 4:30 a.m. cell phone record show his phone was pinging a cell phone tower between Interstate 215 and the 91 Freeway. The jury could have concluded he was on his way back from Menifee at that time and rejected defendant's testimony that he went to Palm Springs that morning, just as it rejected his testimony that he bought the stolen property at a Home Depot and did not commit the burglary.

Defendant, in an apparent rush to flee the scene of the burglary, loaded up his pickup truck with the loot and left the tailgate down. He did not tie down the refrigerator, stove, and other appliances although he had ties in the truck. He then fled the scene and while he was on his way back to Long Beach to unload the loot, the stove fell off the back of his truck and Piquette died as a result. The homicide occurred while defendant was in immediate flight from the burglary to the location where he would unload the loot. The burglary and the homicide were part of a continuous transaction. "'Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.' [Citation.]" (*People v. Farley, supra,* 46 Cal.4th at p. 1121.)

Here, the act that caused the homicide — the failure to tie down the load of stolen loot — occurred at the scene of the burglary, not 60 miles later when part of the unsecured load fell off the back of defendant's truck as he drove to where he could unload and hide the loot. Accordingly, we find sufficient evidence to support the murder conviction.

D. *Due Process*

Defendant argues that use of the felony-murder rule on the facts of this case denied him due process of law and rendered his trial fundamentally unfair. He argues that because he was not escaping or being pursued by anyone at the time of the killing, the felony-murder rule should not apply and the only conduct being deterred by application of the rule "was a lack of care in securing the load in the bed of the truck." Having found the evidence supports the conviction, we find no due process violation. As stated above, the purpose of the felony-murder rule is to prevent accidental or negligent killings in the perpetration of certain felonies, including burglary, by holding felons strictly responsible for killings them commit. "'The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.' [Citation.] Policy concerns regarding the inclusion of burglary in the first degree felony-murder statute remain within the Legislature's domain, and do not authorize this court to limit the plain language of the statute." (*People v. Farley, supra,* 46 Cal.4th at p. 1121.)

This is not a case where the homicide occurred because defendant committed some minor traffic violation 60 miles from the location where he had earlier

committed a burglary and which only coincidentally connected the homicide and burglary together. Piquette's death was caused by defendant's negligent act committed *while he was actively* engaged in committing the burglary.[5] Had he used the ties he had in the truck and/or closed the tailgate on his truck, rather than leaving the scene in a rush to avoid detection, the homicide would not have occurred. To that end, the purpose of the felony-murder rule — to deter accidental or negligent killings is met and application of the felony-murder rule did not deny defendant due process.

E. *Cruel and Unusual Punishment*

Defendant's last argument is that his punishment constitutes a violation of the state and federal constitutional prohibitions upon cruel and unusual punishment. The Attorney General counters defendant waived this argument by failing to raise the issue in the trial court.

The Eighth Amendment to the United States Constitution declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The cruel and unusual punishment clause is made applicable to the states through the due process clause of the Fourteenth Amendment (*Robinson v. State of California* (1962) 370 U.S. 660, 666-667) and "to sentences for terms of years." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 72.) "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for a crime should be graduated and proportioned to [the] offense.' [Citation.]" (*Graham v. Florida* (2010) __ U.S. __, [130 S.Ct. 2011, 2021].) The high court has held that "three factors may be relevant to a determination of whether a sentence is so disproportionate that it

[5] Burglaries, may be more appropriate. Considering the amount of items stolen and loaded into his truck, including a refrigerator, stove, fixtures, and the kitchen sink, defendant would have had to have made multiple entries into the house, all with the intent to steal.

violates the Eighth Amendment: '(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.' [Citation.]" (*Ewing v. California* (2003) 538 U.S. 11, 22.)

In connection with the Eighth Amendment argument, defendant argues only that his sentence is grossly disproportionate with his offense as to be prohibited. We do not find a sentence of 25 years to life for a first degree murder under the felony-murder rule to be grossly disproportionate under the Eight Amendment.

Article I, section 17, of the California Constitution proscribes "[c]ruel or unusual punishment." A prison sentence runs afoul of article I, section 17, 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." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.)

In his brief, defendant points out two of the techniques courts use in deciding whether or not a punishment complies with the requirements set forth in *Lynch*. (*Lynch, supra,* 8 Cal.3d at pp. 425-427.) Courts have examined the nature of the offense and/or the nature of the offender with particular regard to the degree of danger both present to society and compared the challenged penalty with the punishments prescribed for more serious offenses in the same jurisdiction. (*Ibid.*)

"[C]ourts must also view 'the nature of the offender' in the concrete rather than the abstract: although the Legislature can define the offense in general terms, each offender is necessarily an individual. Our opinion in *Lynch*, for example, concludes by observing that the punishment in question not only fails to fit the crime, 'it does not fit the criminal.' (8 Cal.3d at p. 437.) This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his

age, prior criminality, personal characteristics, and state of mind." (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

In *Dillon,* the defendant was convicted of first degree felony-murder, and the court found the punishment for first degree murder to be cruel and unusual. (*People v. Dillon, supra,* 34 Cal.3d at pp. 450, 489.) But Dillon involved a 17-year-old high school student who functioned "'like a much younger child,'" and "'pulled the trigger so many times because [he] was so scared.'" (*Id.* at pp. 451, 483.) Not so in the instant matter where defendant is an adult who, from the totality of circumstances in the record before us, appears to have carefully planned his felony. Plus, his significant criminal record indicates he poses a continuing and serious threat to public safety.

The probation report prepared by the Orange County Probation Department is almost one-inch thick. It shows this is not a case of a troubled youth who went temporarily off course and led an exemplary life until the instant crime.

Defendant was born in 1976. A petition alleging that when he was 11 years old, a girl teased him and he "produced a knife and stabbed her leg," was sustained. The report continues that when he was 13, "a man apprehended the defendant after he attempted to steal a bicycle. The incident was reported to the police and officers searched the defendant. He had a bank card that was taken during a residential burglary the previous day. He also violated his probation by failing to report as directed and by staying away from home overnight without permission." Also when he was 13, a petition alleging burglary of three residences was sustained. Included in the loot taken was a gun and ammunition.

When defendant was 14 years old, two petitions were sustained. In one, he violated probation. The other was another residential burglary during which another gun and ammunition were stolen.

Another petition was sustained when defendant was 15. The report states he "threw his mother on the ground, straddled and attempted to choke her. He also

punched holes in the walls of their home, threatened to 'bash' his mother's head with a baseball bat and held a knife near her face while moving it in a stabbing motion."

Still while he was 15 years old, another petition was sustained. The report reads: "According to the police report, the defendant and a companion approached a man who was parking his car. The defendant held a .12-gauge shotgun against the man's head and told him to leave the car. He and his companion forced the man into the car trunk, and then drove the car for a mile before releasing the man. The car was discovered approximately two hours later and it was crashed into a curb with the engine running. Police found the defendant and three companions in a van. The defendant had shotgun shells in his possession, and the gun was located in a nearby trash can."

While he was still 15, defendant was sentenced to 33 years and eight months in the California Youth Authority. The report states "the defendant entered a woman's residence while she bathed. He struck her face, knocked her on the floor and placed a pillow over her head. He tore off her panties, and then threatened to kill her if she looked at him. He unsuccessfully attempted intercourse, asked for her purse and pretended to leave her residence. He returned a few minutes later, raped and threatened to kill her again. The victim required 100 stitches and plastic surgery to treat her facial injuries." The police reported that defendant admitted he raped the woman, and that he stated he was "angry and wanted to hurt someone."

Defendant was released from CYA several months prior to his 25th birthday and sent to a halfway house where he remained for 15 months. At age 26, he was convicted of violating Penal Code section 290 when he moved and did not register as a sex offender.

When defendant was 28, he was convicted of violating Vehicle Code section 23152, subdivisions (a) and (b), driving under the influence. He was convicted of the same thing when he was 29 and served time in jail. With regard to that incident, the report reads: "According to the police report, officers were dispatched to the scene of a

hit-and-run collision. Dispatch advised that a white pickup truck struck some bushes near the guard shack at the Crystal Cove Promenade and the driver was last seen running in a westbound direction. The driver was described as being very intoxicated." A few weeks later, defendant was arrested again for driving under the influence while traveling from Laguna Beach to Palm Springs.

The Department of Motor Vehicles records show defendant's bail was forfeited in 2002. He had his jail sentences suspended twice the same year. In 2004 and 2005, he was jailed again. His driver's license was revoked in 2004, 2005, and suspended again "effective April 27, 2006 for DUI or Drugs." The probation report states: "There were two accidents reflected on his driving record where he was declared the party found most at fault." Records from the Orange County jail show defendant had a "major violation for mutual combat."

The prosecutor's report to the probation department describes defendant as "a truly dangerous individual." He noted that defendant was "only able to remain free of new law violations for less than 18 months when he willfully failed to register as a sex offender pursuant to Penal Code section 290. The violation for failure to register takes on a more ominous significance when coupled with the allegations from an acquaintance from Long Beach who indicated that [defendant] put something into her drink during a social night out with friends in a bar and had subsequently raped her."

When the court sentenced defendant, the judge stated: "In relation to the sentencing issue, the court would note that the pages of the sentencing report are chilling in terms of your record. I recognize that . . . your father was in state prison. You're not unique to this court in terms of defendants who've had a parent in state prison. [¶] It's clear to this court, you're an extremely dangerous individual."

In viewing defendant in the concrete, rather than in the abstract, we find no merit in defendant's argument and conclude that in this case, the punishment fits the crime and the defendant. He was not subjected to cruel nor unusual punishment.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.