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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY LEROY WALLACE, Defendant and Appellant.	F042778 (Super. Ct. No. 671718-5) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Catherine G. Tennant, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 2-10 of the Discussion.

FACTUAL AND PROCEDURAL BACKGROUND

One summer evening in Fresno, Anthony LeRoy Wallace's wife of two months, Arlissa Pointer Wallace, caught him smoking crack cocaine, called him a crack head, and told him to leave the house she had bought six or seven years before the marriage and had refinanced shortly after the marriage.[1] Although she had kept the house in her name, Wallace presumably had acquired a small community property interest through mortgage payments with community property funds.

Instead of leaving, however, Wallace began tearing up the house. Frightened, Pointer kept her distance from him as she opened the living room curtains in the hope a neighbor might see and call the police. He kept breaking things. Twice she dialed 911, but twice she hung up, fearing things would get much worse if he knew she had called. He left before the police arrived. She told a police officer that the only thing he had not broken in the house was his own stereo and that everything else in the house belonged to her. A couple of hours later, alerted by a neighbor to "incredible pounding, very, very loud noise" from the house, police officers found Wallace inside the house breaking things again. Only after he challenged three armed and uniformed officers to fight did they subdue him with a taser and arrest him.

At trial, an expert witness testified to over $9,000 of damage to the house and to over $6,000 of damage to the furniture and furnishings. A jury found Wallace guilty of felony vandalism and of two misdemeanors – being under the influence and resisting, delaying, or obstructing an officer ("resisting") – and found two assault with a deadly weapon priors true as both serious felony priors and prison term priors. (Pen. Code, §§ 148, subd. (a)(1), 245, subd. (a)(1), 594, subd. (b)(1), 667.5, subd. (b), 1192.7,

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[1] For clarity, later references to husband and wife will be to Wallace and Pointer, respectively.

subd. (c); Health & Saf. Code, § 11550, subd. (a).)[2] The court sentenced him to a 25-to-life term for felony vandalism, a consecutive term of one year on each of his two prison term priors, and time served on each of his two misdemeanors. (§§ 594, subd. (b)(1), 667, subds. (b)-(j), 667.5, subd. (b), 1170.12, subds. (a)-(d).)

INTRODUCTION

Wallace argues that as a matter of law he cannot be guilty of vandalizing either community property or his spouse's separate property inside the marital home. In the published portion of our opinion, we will reject his argument and embrace the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest, whether the property is individual or marital, whether the harm occurs outside or inside the marital home. In the non-published portion of our opinion, we will address his numerous other arguments and grant relief as to two. In the first, the evidence showed, and the prosecutor argued, that Wallace committed two acts of resisting, but the record shows neither an explicit election by the prosecutor nor a unanimity instruction by the court, so we will order the resisting conviction stricken from the judgment. In the second, the court miscalculated Wallace's presentence custody credit and failed to award him the presentence conduct credit to which he was entitled, so we will modify the judgment accordingly. Otherwise we will affirm the judgment.

DISCUSSION

1. Scope of Vandalism Statute

The question before us is whether a spouse can be guilty of vandalizing community property and the other spouse's separate property inside the marital home. Wallace asks us to answer that question in the negative on the basis of "the common law rule that a person's home is his or her castle" and the language in the vandalism statute

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[2] All subsequent statutory references are to the Penal Code except where otherwise noted.

(§ 594) that a vandal can deface, damage, or destroy only property that is "not his or her own." The Attorney General asks us to answer that question in the affirmative, arguing that vandalism is not a crime that threatens property rights only in a particular place, that the criminal law protects each owner's interest in community property against nonconsensual damage by the other, and that Pointer's separate property suffered most of the harm anyway.

In *People v. Kahanic* (1987) 196 Cal.App.3d 461 (*Kahanic*), we held that the vandalism statute applies to community property on the rationale that the "essence of the crime is in the physical acts against the ownership interest of another, even though that ownership is less than exclusive." (*Id*. at p. 466.) Citing *Kahanic*, a proposed vandalism instruction from the Judicial Council's Task Force on Jury Instructions requires proof that the accused "did not own the property" or "owned the property with someone else." (See Task Force on Jury Instructions, Cal. Jud. Council, Criminal Jury Instructions (July 5, 2004 Draft) (Task Force) Inst. No. 1995, pp. 1-2.)

However, Wallace argues that with the vandalism in *Kahanic* occurring outside the marital home the case is inapposite to the issue here whether "the common law rule that a person's home is his or her castle" precludes criminal liability for vandalizing property in one's own home. He analogizes that issue to the question whether a person can burglarize his or her own home and notes the California Supreme Court relied on the common law rule to hold that the burglary statute applies only to "a person who has no right to be in the building." (*People v. Gauze* (1975) 15 Cal.3d 709, 714.) Emphasizing that "burglary and the lesser related offenses of trespass and vandalism *are* 'closely related'" (*People v. Farrow* (1993) 13 Cal.App.4th 1606, 1625-1626, citing *People v. Geiger* (1984) 35 Cal.3d 510, overruled by *People v. Birks* (1998) 19 Cal.4th 108, 112-113, 136), he argues that as one can neither burgle nor trespass in one's own home, neither can one vandalize property in one's own home.

Wallace's argument ignores three key differences between vandalism, on the one hand, and burglary and trespass, on the other. First, one can commit vandalism anywhere (see § 594[3]), but one can commit burglary and trespass only by entering into a specific place (see §§ 459[4], 602). Second, one cannot commit vandalism without defacing, damaging, or destroying property (see § 594), but one can commit burglary and trespass without harming any property at all (§§ 459, 602[5]). Third, the harm that vandalism by a

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[3] Section 594, subdivision (a) provides: "Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism: [¶] (1) Defaces with graffiti or other inscribed material. [¶] (2) Damages. [¶] (3) Destroys."

[4] Section 459 provides in part: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel … , floating home … , railroad car, locked or sealed cargo container … , trailer coach … , any house car … , inhabited camper … , vehicle … when the doors are locked, aircraft … , or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

[5] Section 602 provides in part: " … [E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor: [¶] … [¶] (g) Entering upon any lands owned by any other person whereon oysters or other shellfish are planted or growing.… [¶] … [¶] (j) Entering any lands, whether unenclosed or enclosed by fence, … with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession. [¶] (k) Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed … without the written permission of the owner of the land, the owner's agent or of the person in lawful possession, and [¶] (1) Refusing or failing to leave the lands immediately upon being requested by the owner of the land, the owner's agent or by the person in lawful possession to leave the lands.… [¶] … [¶] (l) Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession. [¶] (m) Driving any vehicle … upon real property belonging to, or lawfully occupied by, another and known not to be open to the general public, without the consent of the owner, the owner's agent, or the person in lawful possession.… [¶] (n) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave.… [¶] (o) Entering upon any lands declared closed to entry … if the closed areas shall have been

spouse necessarily inflicts to community property or to the other spouse's separate property ousts the other spouse of his or her ownership interest in a way that neither burglary nor trespass necessarily does. Together, those differences foil Wallace's endeavor to broaden to vandalism the rule that applies to burglary and trespass.

Instead, on the question before us, we broaden our holding in *Kahanic* to embrace the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest, whether the property is individual or marital, whether the harm occurs outside or inside the marital home. (*Kahanic, supra,* 196 Cal.App.3d at p. 466; see, e.g., *Jackson v. United States* (D.C. 2003) 819 A.2d 963, 964-967 (*Jackson*) [spouse criminally liable for harm to marital property at marital home under statute prohibiting harm to property "not his or her own"]; *State v. Superior Court* (Ariz.Ct.App. 1997) 188 Ariz. 372 [936 P.2d 558, 559] [spouse criminally liable for harm to joint tenancy property of both spouses under statute prohibiting damage to "property of another person"]; *State v. Coria* (2002) 146 Wash.2d 631 [48 P.3d 980, 981-985] ("*Coria*") [spouse criminally liable for harm to community property at marital home under statute prohibiting damage to "property of another"]; *Hughes v. State* (Alaska Ct.App. 2002) 56 P.3d 1088, 1094-1095 [spouse criminally liable for harm to marital property at marital home under statute prohibiting damage to "property of another"]; *Ginn v. State* (2001) 251 Ga.App. 159 [553 S.E.2d 839, 840, 842] [spouse criminally

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posted with notices declaring the closure.… [¶] (p) Refusing or failing to leave a public building of a public agency during those hours of the day or night when the building is regularly closed to the public upon being requested to do so by.… [¶] (q) Knowingly skiing in an area or on a ski trail which is closed to the public and which has signs posted indicating the closure. [¶] (r) Refusing or failing to leave a hotel or motel, where he or she has obtained accommodations and has refused to pay for those accommodations, upon request of the proprietor or manager.… [¶] … [¶] (t)(1) Knowingly entering, by an unauthorized person, upon any airport operations area if the area has been posted with notices restricting access to authorized personnel only.…" Later statutory amendments made changes not relevant here. (Stats. 2002, ch. 608, § 2, eff. Sept. 17, 2002; Stats. 2003, ch. 355, § 1, ch. 361, § 1, ch. 805, § 1.3.)

liable for harm to marital property at marital home under statute prohibiting damage to "any property of another"]; *State v. Sevelin* (Wis.Ct.App. 1996) 204 Wis.2d 127 [554 N.W.2d 521, 522-523] [spouse criminally liable for harm to marital property at marital home under statute prohibiting damage to "any physical property of another"]; *State v. Zeien* (Iowa 1993) 505 N.W.2d 498, 498-499 [spouse criminally liable for harm to marital property at marital home under statute prohibiting damage to property "by one who has no right to so act"]; *People v. Schneider* (Ill.App.Ct.5th 1985) 139 Ill.App.3d 222 [487 N.E.2d 379, 379-381] [spouse criminally liable for harm to marital property under statute prohibiting damage to "any property of another"]; but see *Horn v. State* (Ala.Crim.App. 2004) __ So.2d __ [2004 Ala. Crim. App. LEXIS 88, 2004 WL 924682] [spouse not criminally liable for harm to marital property under statute prohibiting "damages to property"]; *State v. Powels* (N.M.Ct.App. 2003) 134 N.M. 118 [73 P.3d 256, 257-259] [spouse not criminally liable for harm to marital property under statute prohibiting damage to "any real or personal property of another"]; *People v. Person* (N.Y.App.Div. 1997) 239 A.D.2d 612 [658 N.Y.S.2d 372, 373] (*Person*) [spouse not criminally liable for harm to marital property under statute prohibiting damage to "property of another person"][6]; see generally Lutz & Bonomolo, *My Husband Just Trashed Our Home; What Do You Mean That's Not a Crime?* (1997) 48 S.C. L.Rev. 641, 651 ["[W]hen a husband destroys property that he owns jointly with his wife, not only

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[6] *Jackson* slams *Person* as "an anomaly … widely criticized, even in New York." (*Jackson, supra,* 819 A.2d at p. 966.) *Coria* belittles *Person* for "fail[ing] to persuade even lower courts in New York" and notes that one case "followed *Person* with a serious grudge and a call for legislative reversal" and that another case "stat[ed] outright that it was decided wrongly." (*Coria, supra,* 48 P.3d at p. 984, citing *People v. Kheyfets* (N.Y. Sup. Ct. 1997) 174 Misc.2d 516 [665 N.Y.S.2d 802, 804-806] and *People v. Brown* (N.Y. Crim. Ct. 2000) 185 Misc.2d 326 [711 N.Y.S.2d 707, 713-714] [excoriating *Person* as "bad policy and bad law" and "capable of creating great mischief, particularly in the context of domestic violence prosecutions" since "the destruction of property is often part of an overarching pattern of serious domestic abuse and a precursor to direct violence against the person"].)

does he destroy his property, which he may have a right to destroy, but he simultaneously destroys his wife's undivided one hundred percent interest in the property, which he does not have a right to destroy."]; cf. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense* (2003) 86 Marq. L.Rev. 653, 693 ["The innocent cohabitant still has an identifiable interest in the protection that the sanctuary might offer and should not be denied its safe harbor because someone else may share in its possession. [Footnote.]"].) Accordingly, we answer in the affirmative the question before us and hold that a spouse can be guilty of vandalizing community property and the other spouse's separate property inside the marital home.

Finally, on the premise that the Family Code confers on each spouse "absolute power of disposition" of community personal property until service of a reciprocal temporary restraining order to the contrary (Fam. Code, §§ 1100, 2040, subd. (a)(2)), Wallace argues that as he and Pointer were not engaging in family law litigation, but rather were cohabiting as husband and wife, he cannot as a matter of law be guilty of vandalizing community personal property. Case law from other states applies the emerging rule to spouses cohabiting and presumably not engaging in family law litigation at the time of the vandalism (see, e.g., *State v. Superior Court, supra,* 936 P.2d at p. 559; *Coria, supra,* 48 P.3d at p. 981; *Ginn v. State, supra,* 553 S.E.2d at p. 840; *State v. Sevelin, supra,* 554 N.W.2d at p. 522) as well as to spouses no longer cohabiting and either estranged or contemplating, if not actually engaging, in family law litigation at the time of the vandalism (see, e.g., *Jackson, supra,* 819 A.2d at p. 964; *State v. Zeien, supra,* 505 N.W.2d at p. 498; *Hughes v. State, supra,* 56 P.3d at p. 1089; *People v. Schneider, supra,* 487 N.E.2d at pp. 379-380.) Wallace articulates, and we perceive, no sound reason in public policy or the law for the astounding notion that the criminal law should afford protection to some spouses but not to others. We decline to so limit our holding.[7]

[7] In violation of the rule of court requiring briefs to "state each point under a separate heading or subheading summarizing the point," Wallace argues in passing that

2. Special Instruction on Vandalism

Wallace argues the special instruction on vandalism prejudiced him. The Attorney General argues the instruction correctly states the law. The instruction informed the jury: "No act of vandalism of community property committed by one who has a property interest in the property is rendered less criminal by reason of that ownership interest. [¶] In the crime charged in Count One, Vandalism, the fact the defendant had or may have had an ownership interest in the real or personal property that was destroyed, damaged or defaced is not a defense and does not relieve him of responsibility for the crime."

First, on the premise only "a civil remedy in equity" for "breach of fiduciary duty" lies to redress harm by a spouse to community personal property because the law grants each spouse a "like absolute power of disposition" of community personal property "as the spouse has of the separate estate of the spouse" (Fam. Code, § 1100), Wallace argues the special instruction improperly informed the jury his ownership interest was "no defense." Implicit in his premise is the shocking notion that each spouse has carte blanche to deface, damage, and destroy the community personal property estate, as he or she wishes, and that the criminal law offers no remedy to society or the other spouse.

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construing the vandalism statute to include marital property would "run afoul of the constitutional prohibition against vague penal statutes." (Cal. Rules of Court, rule 14(a)(1)(B).) We have no duty to address his argument. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1661.) Even were we to consider his argument, we would not grant relief. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited *and* in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations.]" (*Kolender v. Lawson* (1983) 461 U.S. 352, 357, italics added.) "A law is void for vagueness only if it 'fails to provide adequate notice to those who must observe its strictures' *and* '"impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."' [Citations.]" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332, italics added.) The void-for-vagueness doctrine is conjunctive, not disjunctive. (*Kolender v. Lawson, supra,* 461 U.S. at pp. 357-358; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 575.) Wallace argues only the arbitrary enforcement factor, not the notice factor.

Our holding that a spouse can be guilty of vandalizing community property and the other spouse's separate property inside the marital home vitiates his premise. For want of a valid premise, his argument fails.

Second, on the premise the loss to each spouse from vandalism to community property is only half the total loss, Wallace argues that informing the jury vandalism by a spouse to community property is no "less criminal by reason of that ownership interest" could have induced a felony verdict for misdemeanor conduct if the total loss were less twice the felony threshold of $400. (See § 594, subd. (b).) An expert witness testified to over $9,000 of damage to the house and over $6,000 of damage to the furniture and furnishings. Whether by evidence of reasonable cost of repair or by inference of diminution in market value, the total loss was easily twice the felony threshold of $400. (See *People v. Yanez* (1995) 38 Cal.App.4th 1622, 1626-1627; § 594, subd. (b)(1).) On that record, error, if any, was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The record refutes his argument, so his premise is moot.

3. Evidence and Instruction on Damages

Wallace argues his conviction of felony vandalism cannot stand because of insufficient evidence of damage and inadequate instruction on damage. The Attorney General argues the evidence was sufficient but fails to respond to the instructional error argument.

With regard to his evidentiary argument, Wallace characterizes as "a significant concession" the prosecutor's argument that he was guilty even if the jury were to find Pointer not a credible witness. To the contrary, we construe the prosecutor's argument not as an abandonment of her theory "that [Pointer] came in here and that she was not truthful" but simply as an invitation to the jury to find him guilty with or without her testimony. Consistent with her goal of persuading the jury to disregard Pointer's testimony, the prosecutor criticized Pointer as "desperate" to make the jury believe most of the damaged property was Wallace's even though she admitted she had owned the

home for six years, he had lived there only off and on for a short time, and he had not even held a steady paying job.

Both by evidence of the reasonable cost of repair and by reasonable inference of diminution in market value, a rational jury could find beyond a reasonable doubt that Wallace was guilty of felony vandalism because the damage was well over the statutory threshold. Our role in a challenge to the sufficiency of the evidence in a criminal case is limited to a determination whether, on the entire record, viewing the evidence in the light most favorable to the prosecution and presuming in support of the judgment every fact reasonably inferable from the evidence, a rational trier of fact could find the accused guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) By that standard, the evidence of damage is sufficient.

With regard to his instructional argument, Wallace posits the existence of a "correct measure of damages" for vandalism and argues the court had a sua sponte duty to so instruct. Preliminarily, he asks us to consider the Attorney General's failure to respond to his argument as a tacit admission of the merits of his argument. Despite that deficiency in the Attorney General's briefing, we decline his invitation and choose instead to evaluate his argument on the merits.

The court gave the jury a standard instruction on vandalism,[8] but Wallace argues the court also should have modified CALJIC Nos. 14.26, 14.27, and 14.28 on *theft* to instruct the jury on the measure of damages for *vandalism*. Yet he acknowledges, and we

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[8] The instruction on vandalism informed the jury: "Defendant is accused in Count 1 of having violated section 594(a) of the Penal Code, a felony. [¶] Every person who maliciously damages or destroys any real or personal property not his own, the amount of damage being over $400, is guilty of vandalism in violation of Penal Code section 594(a), a felony. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person damaged or destroyed any real or personal property belonging to another person; and [¶] 2. The person acted maliciously in doing so[;] and [¶] 3. The amount of the damage [or] destruction to the property exceeded $400.00." (See CALJIC Nos. 14.95, 16.320.)

concur, that "no California case specifically delineates the proper measure of damages to be used in determining whether the amount of damage to vandalized property meets the felony threshold." Nor does any California statute. (See § 594.) Both CALJIC Nos. 14.95 and 16.320 are silent on the measure of damages for vandalism, as is the Task Force's proposed vandalism instruction. (See Task Force Inst. No. 1995, p. 1.) By citing no authority on point for the "correct legal standard" he posits, he fails to raise a proper claim on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 266.) Likewise, as cases are not authority for propositions they do not consider, his argument by analogy to other cases that adjudicate other issues is not persuasive. (See *People v. Martinez* (2000) 22 Cal.4th 106, 118.)

4. Instruction on Lesser Included Offense

Wallace argues the court's refusal to instruct on misdemeanor vandalism prejudiced him. (See CALJIC No. 16.320.) The Attorney General argues the contrary.

A court's duty to instruct sua sponte on a lesser included offense arises only if there is substantial evidence that the accused committed not the greater offense but only the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; compare CALJIC No. 14.95 with CALJIC No. 16.320.) If the evidence shows that the accused, if guilty at all, was guilty of only the greater offense, the court has no duty to instruct on the lesser included offense. (*People v. Hawkins* (1995) 10 Cal.4th 920, 954, overruled on another ground by *People v. Lasko* (2000) 23 Cal.4th 101, 110-111; *People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1436.) That is the state of the record here. Whether by evidence of reasonable cost of repair or by inference of diminution in market value, the total loss here was easily twice the felony threshold of $400. Even if we were to assume error arguendo, the error was not prejudicial since a more favorable verdict was not reasonably probable in the absence of the error. (*People v. Breverman, supra,* at p. 165.)

5. Accomplice Instructions

On the ground that Pointer admitted her own participation in the vandalism, Wallace argues the court committed prejudicial error by not giving accomplice instructions sua sponte. The Attorney General argues that there was no error and that error, if any, was harmless.

On the record here, we need not decide if the court erred. Instead, we will assume error arguendo and address only the issue of prejudice. Failure to give accomplice instructions is harmless if sufficient corroborating evidence is in the record. (*People v. Miranda* (1987) 44 Cal.3d 57, 100, disapproved on another ground by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) The requisite corroboration can be established entirely by circumstantial evidence that standing alone merits little consideration, corroborates only a portion of the accomplice's testimony, and fails to establish every element of the offense charged. (*People v. Miranda, supra,* at p. 100.) Here, the testimony of both the neighbor and the police officer corroborated Pointer's inculpatory pretrial statements and trial testimony alike. A more favorable verdict was not reasonably probable even if the court had not committed the error we assume arguendo. (*People v. Sanders* (1990) 51 Cal.3d 471, 511; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

6. Instruction on Believability of a Witness

On the basis of past criminal conduct by two prosecution witnesses, Wallace argues the court committed prejudicial error by omitting from the instruction on believability of a witness "[p]ast criminal conduct of a witness amounting to a misdemeanor." (CALJIC No. 2.20.) The Attorney General argues that Wallace forfeited his right to appellate review and that any error was harmless.

Preliminarily, as to the Attorney General's forfeiture argument, we apply the established rule allowing appellate review, even in the absence of an objection, of any instruction affecting the substantial rights of the accused and reject that argument.

(§ 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.) On the merits of Wallace's argument, the record shows Pointer testified she poked him whenever she found him loaded and once did so with a lit cigarette, leaving burn marks he probably still had on his arm, and her neighbor testified she threw a glass at Pointer during an argument. Assuming arguendo that Pointer's and the neighbor's conduct constitutes "[p]ast criminal conduct of a witness amounting to a misdemeanor" and that the court erred by not so instructing, we will address the issue of prejudice.

The jury heard Pointer and her neighbor testify not only about their past criminal conduct but also about their reluctance to testify. Pointer downplayed the damage Wallace inflicted and recanted the statements she gave at the scene. Her neighbor admitted she did not want to come to court and did so only because of a subpoena. The court instructed with other parts of CALJIC No. 2.20 specifically asking the jury to consider, inter alia, "[t]he character and quality of that testimony," "[t]he demeanor and manner of the witness while testifying," "[t]he existence or nonexistence of a bias, interest, or other motive," and "[t]he attitude of the witness toward this action or toward the giving of testimony" and generally asking the jury to consider "anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness." The evidence of Wallace's guilt was as strong as the past criminal conduct of Pointer and the neighbor was inconsequential. A more favorable verdict was not reasonably probable even if the court had not omitted the phrase at issue from CALJIC No. 2.20. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

7. Resisting, Delaying, or Obstructing an Officer

Wallace articulates several theories – four attacking the sufficiency of the evidence and two criticizing the charge to the jury – by which to challenge his resisting conviction. We will find merit in one of his theories and accordingly will order his resisting conviction stricken from the judgment.

With regard to Wallace's four insufficiency-of-the-evidence arguments, our role is limited to determining whether, on the entire record, viewing the evidence in the light most favorable to the prosecution and presuming in support of the judgment every fact reasonably inferable from the evidence, a rational trier of fact could find the accused guilty beyond a reasonable doubt. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) By that standard, we will evaluate the two incidents of conduct the prosecutor characterized as resisting in her argument to the jury.

In the first incident, a uniformed officer arriving at the home heard "[l]ots of banging noises" inside for three to five minutes, looked through the window to see Wallace "throw something against the wall and tip something over," and ordered him to come out with his hands up, but he refused and walked in the opposite direction. In the second incident, after securing the house key from Pointer, three uniformed officers entered the home, approached Wallace with drawn weapons (a handgun, a less-lethal shotgun, and a taser), and ordered him to roll over and put his hands behind his back, but he refused and challenged the officers to fight.

Wallace's initial two insufficiency-of-the-evidence arguments characterize the first incident as "failing to come out of his residence upon command" and the second incident as "failing to respond with alacrity to police orders." The record of the second incident shows that he agitatedly took the classic stance signifying a challenge to fight, waved his hands toward his body, and taunted the officers, "'Come on,'" and that he desisted from that conduct only after an officer shot him with a taser. That conduct constitutes resisting (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329-1330), so his argument about the first incident is moot.

The premise of Wallace's final two insufficiency-of-the-evidence arguments is that the record is devoid of evidence the officers were engaging in "the discharge or attempt to discharge any duty" of their employment. (§ 148, subd. (a)(1).) His first argument on that premise is that evidence of compliance with the knock-notice rule is

lacking. (See § 844.) As a codification of the common law knock-notice rule, the statutory knock-notice rule “may reasonably be interpreted as limited by the common law rule[] that compliance is not required if the officer’s peril would have been increased.” (*People v. King* (1956) 140 Cal.App.2d 1, 8.) Before entering the home the officers heard and saw violent conduct inside, so the inference reasonably arises from the record that compliance would have increased the officers’ peril by giving Wallace the opportunity to position himself for an ambush inside the home. Compliance was not required.

Wallace’s second argument on that premise is that evidence of compliance with the statute requiring arresting officers to provide information to the arrestee is lacking. (§ 841.) The statute requires the person making the arrest to state the intention to arrest, the cause of the arrest, and the authority for the arrest but is expressly inapplicable if “the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense.” (*Ibid*.) An officer testified to having heard and seen Wallace engage in violent conduct, so the requirements of the statute were inapplicable.

Since none of Wallace’s insufficiency-of-the-evidence arguments has merit, we turn to his contention that the court’s failure to give a sua sponte unanimity instruction requires reversal. In argument to the jury, the prosecutor referred to both incidents in her bid to prove he “willfully resisted, delayed, or obstructed a peace officer”:

“[B]efore they entered, [one officer] had given commands to [Wallace] to come out of the home with his hands up. At that point [the officer] testified that – that he made eye contact with [Wallace] .…[who] looked at him, turned around and went back further into the home.

“At that point the three officers went into the home with [weapons drawn] .… They announced who they were, the police, submit to arrest, roll over, put your hands behind your back. At no time did [Wallace] comply to [*sic*] any of these requests.”

When an accusatory pleading charges the accused with a single criminal act, and the evidence at trial tends to show more than one such act, either the prosecutor must elect a specific act to prove the charge to the jury, or the court must instruct the jury to unanimously agree that the accused committed the same specific act. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The Attorney General asserts the prosecutor elected a specific act by directing the jury's attention to the second incident after only mentioning the first incident.

Even if one were to so parse the prosecutor's argument, the record nonetheless lacks the requisite showing either that she informed the jury "that a finding of guilt could only be returned if each juror agreed that the crime was committed at that time" or that the court "instructed on unanimity." (*People v. Melhado, supra,* 60 Cal.App.4th at p. 1536.) With neither an explicit election nor a unanimity instruction in the record, a guilty verdict could have ensued with some jurors voting to find Wallace guilty on the basis of the first incident and others voting to find him guilty on the basis of the second. Impacting his constitutional right "to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged," the error was not harmless beyond a reasonable doubt. (*People v. Jones* (1990) 51 Cal.3d 294, 305; *People v. Metheney* (1984) 154 Cal.App.3d 555, 563, fn. 5, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) We will order his resisting conviction stricken from the judgment.[9]

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[9] Our holding moots the argument that the prosecutor presented her case on alternate theories, only one of which was legally incorrect (see *People v. Green* (1980) 27 Cal.3d 1, 69, overruled on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225, 239, and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, as stated in *People v. Morales* (2001) 25 Cal.4th 34, 42, fn. 4), and the argument that the court's refusal of instructions and failure to instruct sua sponte "on the criteria necessary to determine the lawfulness of the arrest" were prejudicial (see CALJIC Nos. 16.105, 16.106, 16.107).

8. **Marsden** ***Motion and Assistance of Counsel***

Wallace argues that the court committed prejudicial error by refusing to hear his *Marsden* motion at his arraignment and that the attorney who later represented him at trial rendered ineffective assistance of counsel. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).) The Attorney General argues the contrary.

The record shows Wallace addressed his *Marsden* motion not to the attorney who had represented him at his preliminary hearing (but who no longer represented him) and not to the attorney who was representing him at the arraignment but to the attorney who was to represent him at trial and to the law firm that employed all three attorneys. After he acknowledged he had not even met the attorney who was to represent him at trial, the court denied his motion as "premature until such time as he has an opportunity to talk to [her]" since "[s]he hasn't failed to do anything yet."

"When a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate." (*People v. Webster* (1991) 54 Cal.3d 411, 435.) Wallace's *Marsden* motion did not assert inadequate representation either by the attorney who had represented him at his preliminary hearing or by the attorney who was representing him at the arraignment, so the law firm that employed all three attorneys stood not in the shoes of either of those attorneys but only in the shoes of the attorney whom he had never met and who had not yet represented him. On a record of *no* representation, the "specific examples" of "inadequate representation" that a court must consider in a *Marsden* inquiry neither *did* nor *could* exist. (*Ibid*.) Nor *had* or *could* Wallace have "'become embroiled in such an irreconcilable conflict that ineffective representation [was] likely to result.'" (See *People v. Fierro* (1992) 1 Cal.4th 173, 204, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 854, overruled on another ground by *People v. Crayton* (2002) 28 Cal.4th

346, 361-365.) As the law neither does nor requires idle acts (Civ. Code, § 3532), so the court, on the record here, had no duty to hear his *Marsden* motion at his arraignment.[10]

Wallace argues four theories of ineffective assistance of counsel. First, on a record of no evidence of compliance with the knock-notice rule and in reliance on *Duke v. Superior Court* (1969) 1 Cal.3d 314, he argues his attorney's failure to seek to suppress evidence constitutes ineffective assistance of counsel. *Duke* is inapposite since the officers in that case "did not comply with the requirements of section 844 *and did not possess any excuse for failing to comply with that section*." (*Id*. at pp. 324-325, italics added.) Here, since compliance with the knock-notice rule would have increased the officers' peril, the statute excused them from compliance. On that record, a motion to suppress evidence on the basis of non-compliance would have been futile. As the law neither does nor requires idle acts, so an attorney has no duty to make a futile request. (Civ. Code, § 3532; see *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Second, Wallace argues his attorney's failure to object to qualification of the licensed contractor as an expert and to his expert testimony on damages as "inexpert," "irrelevant," and "wrong" constitutes ineffective assistance of counsel. Specifically, he argues the "only qualification" of the expert was that of a "'general contractor in the building industry.'" To the contrary, the record shows the expert performed "appraisals or estimates for insurance purposes," all on the basis of "industry standards for insurance work and insurance repair," some on the basis of photographs alone, as a routine part of

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[10] In declining to hear Wallace's *Marsden* motion at arraignment, the court expressly advised him of his right to make his motion after he had "an opportunity to talk" with the attorney who was to represent him at trial. On the first day of trial, he made, and the court denied, a *Marsden* motion, the denial of which he does not challenge on appeal. After trial, Wallace admitted he made his *Marsden* motion at arraignment because the judge, the prosecutor, and the attorney who was to represent him at trial were all women: "There's too many females here. You need to bring me a man. Let me fight with a man." Neither Wallace's appellate counsel nor the Attorney General brought those admissions to our attention.

his business. On the authority of case law holding that the measure of damages for *theft* is fair market value, he argues the expert's testimony about a different measure of damages for *vandalism* was irrelevant. (See *People v. Simpson* (1938) 26 Cal.App.2d 223.) Property damaged by vandalism is often repairable, but property lost to theft often is not, so positing fair market value as the only measure of damages for the home is nonsensical.

Instead, as the expert testified here, positing "construction, such as finished carpentry, painting, [and] drywall repair," as the measure of damages for the home is reasonable. A witness can testify as an expert if special knowledge, skill, experience, training, or education qualifies him or her as an expert on the subject. (Evid. Code, § 720, subd. (a).) Any admissible evidence, including the expert's own testimony, may show special knowledge, skill, experience, training, or education. (Evid. Code, § 720, subds. (a), (b).) Expert testimony is admissible if the subject is sufficiently beyond common experience to assist the trier of fact. (See Evid. Code, § 801, subds. (a), (b).) Here, as qualification of the expert and admission of his testimony are within the court's "considerable latitude," there is no showing of the """manifest abuse of discretion""" necessary to disturb the court's ruling on appeal. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207, abrogated on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) On that record, Wallace fails to meet his burden of showing his attorney's performance "fell below an objective standard of reasonableness" and prejudiced his defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

Third, Wallace argues his attorney's failure to request instruction on the measure of damages for vandalism, on accomplices, and on past criminal conduct constitutes ineffective assistance of counsel. With case law, statutory law, and instructions from CALJIC and the Task Force alike all silent on the measure of damages, his attorney's failure to request instruction on that topic hardly fell below an objective standard of

reasonableness. (See part 3, *ante*, at pp. 10-12.) Assuming arguendo the court erred by not giving accomplice instructions sua sponte, his attorney's failure to request instruction on that topic did not prejudice him since a more favorable result was not reasonably probable even if the court had so instructed. (See part 5, *ante*, at p. 13.) Likewise, assuming arguendo the court erred by failing to instruct on "[p]ast criminal conduct of a witness amounting to a misdemeanor," his attorney's failure to request instruction on that topic did not prejudice him since a more favorable result was not reasonably probable even if the court had so instructed. (See part 6, *ante*, at pp. 13-14.) On none of those theories does he meet his burden of showing ineffective assistance of counsel. (*Strickland v. Washington, supra,* 466 U.S. at pp. 687-688; *People v. Ledesma, supra,* 43 Cal.3d at pp. 216-217.)

Fourth, Wallace argues his attorney's failure to advise him of the $400 threshold for felony vandalism constitutes ineffective assistance of counsel. A copy of CALJIC No. 16.320 with a handwritten note – "This is my hope" – is in the confidential probation officer's file, but nothing identifies the author of the note. (CALJIC No. 16.320 (6th ed. 1996) pp. 486-487.) The instruction incorrectly states vandalism is a misdemeanor if the amount of defacement, damage, or destruction is "*over* $400" (CALJIC No. 16.320 (CALJIC (6th ed. 1996) p. 486), italics added), and the Use Note differently, but equally incorrectly, states "[o]nly injury or destruction *less than $5000* is a misdemeanor" (Use Note, CALJIC No. 16.320 (6th ed. 1996) p. 487, italics added), but the statute states vandalism is a misdemeanor if the amount of defacement, damage, or destruction is *less than* $400 (§ 594, subd. (b)(2)(A), italics added). Together, the instruction and the Use Note contradict the statute, defy common sense, and confirm the adage: A camel is a horse designed by a committee.

The CALJIC Committee's calamitous misadventure with CALJIC No. 16.320 raises questions here about who knew what when. At the hearing on his new trial motion, Wallace testified he asked his attorney why she was not "trying [to] debate this

estimate under [$]5,000" if "under $5,000 can be designated constituted [*sic*] as a misdemeanor." He testified that she gave him an instruction showing he was "only going to face a misdemeanor" and that he asked, "Why would I accept six years if this was a misdemeanor[?]" He testified, "I was just totally mislead [*sic*] by the jury instruction and the notion that this is how the law is supposed to work." His attorney testified she never gave him a copy of CALJIC No. 16.320 and never advised him to reject his six-year offer.

In declarations on the motion, Wallace and his attorney both stated she told him the court was going to instruct with CALJIC No. 16.320. He stated he would have taken a plea bargain if he had known the jury was not going to receive that instruction. He stated she told him the jury was required to return a misdemeanor verdict. She testified she never told him that. She stated in her declaration that she gave him "the attached copy of said jury instruction," but no instruction was attached. At the hearing, the court marked as CALJIC No. 16.320 an instruction she testified was a product of his research, not hers, but the instruction never went into evidence and is not in the record, which sheds no light on whether the instruction is the same as, or different from, the one with the handwritten note in the confidential probation officer's file.

On a record so confusing, incomplete, and inconsistent, Wallace fails to show ineffective assistance of counsel on appeal. (*Strickland v. Washington, supra,* 466 U.S. at pp. 687-688; *People v. Ledesma, supra,* 43 Cal.3d at pp. 216-217.) An ineffective assistance of counsel argument often is more appropriate on habeas corpus than on appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) As that is so here, we reject his argument but intimate no opinion on the merits.

9. Strike Priors and Constitutionality of Sentence

Wallace argues that the court committed an abuse of discretion by declining to strike his strike priors and that his 27-to-life sentence constitutes both cruel and unusual

punishment under the federal constitution and cruel or unusual punishment under the state constitution.

The court's ruling declining to strike Wallace's strike priors is reviewable under the deferential abuse of discretion standard of review. (*People v. Carmony* (2004) 33 Cal.4th 367, 371 (*Carmony*); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); § 1385.) Two fundamental precepts guide that review. First, the party attacking the sentence has the burden of clearly showing the sentencing decision was irrational or arbitrary. (*Carmony,* at p. 376.) In the absence of that showing, we will presume the court acted to achieve legitimate sentencing objectives and will allow the sentencing decision to stand. (*Id*. at pp. 376-377.) Second, as we have no authority and no justification to substitute our judgment for that of the sentencing court, we must not reverse a sentencing decision merely because reasonable people might disagree. (*Id*. at p. 377.) "Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid*.)

Since all discretionary authority is contextual, we cannot determine if the court acted irrationally or arbitrarily in declining to strike a strike prior without considering the legal principles and policies that should have guided the court's actions here. (*Carmony*, at p. 377.) The intent of the three strikes law was to restrict the court's discretion in sentencing repeat offenders. (*Ibid*.) To achieve that end, the three strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement from which the court can depart only for articulable reasons that can withstand appellate scrutiny and that can warrant sentencing as if the three strikes law were inapplicable. (*Ibid*.) The three strikes law establishes sentencing norms, carefully circumscribes the court's power to depart from those norms, imposes stringent standards requiring explicit justification of any decision to depart from those norms, and creates a

strong presumption that any sentence that conforms to those norms is "both rational and proper." (*Carmony*, at pp. 377-378.)

By that deferential standard of review, nothing in the record here even intimates a possibility of relief. Both strike priors were for assault with a deadly weapon. (§ 245, subd. (a)(1).) In one, he wrapped a towel around his common-law wife's neck, stabbed her six times in the throat, and caused wounds that, though arguably superficial, nonetheless could have induced the meningitis that led to "brain damage and a coma" and ultimately to her death. In the other, after his shoulder was nicked by a piece of broken window glass a man kicked at him, he threw a metal pole at the man, striking him in the forehead above the eye and causing a wound that required 50 stitches to close. He was still on parole for that offense at the time of the vandalism at the marital home. As the court stated in declining to strike his strike priors, "It's basically nonstop." The court committed no abuse of discretion.

In determining whether punishment is constitutionally excessive, the courts examine the nature of the offense and offender, the penalty the same jurisdiction imposes for other offenses, and the punishment other jurisdictions impose for the same offense. (*Solem v. Helm* (1983) 463 U.S. 277, 290-291, overruled on another ground by *Harmelin v. Michigan* (1991) 501 U.S. 957, 964-965; *In re Lynch* (1972) 8 Cal.3d 410, 425-427.) A punishment that involves "unnecessary and wanton infliction of pain" or that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment. (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) A punishment "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity" violates article I, section 17 of the California Constitution. (*In re Lynch*, *supra*, 8 Cal.3d at p. 424, fn. omitted.)

Wallace's punishment with a 27-to-life sentence is neither. He argues that his latest crime shows, despite evidence of provocation, "greater self-control" than in the past because he "channeled his anger toward inanimate objects" and did not retaliate with

violence against Pointer. Even so, in addition to his two assault with a deadly weapon strike priors, he has a 16-year history of offenses including yet another assault with a deadly weapon, a willful infliction of corporal injury, a receiving stolen property, and a felony failure to appear. His record shows, as the court noted, "[c]onstant violations of parole, sent back time and time again." Just the year before the vandalism here, he had a domestic disturbance that ended in a trespass conviction and another violation of parole.

California statutes imposing harsher punishment on recidivists have long withstood constitutional challenge. (See *People v. Weaver* (1984) 161 Cal.App.3d 119, 125-126, and cases cited.) The primary goals of a recidivist statute "are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285.) Defining that point in one's life and setting that time are both "matters largely within the discretion of the punishing jurisdiction." (*Id*. at p. 285.)

Since recidivism and multiplicity of offenses pose a manifest danger to society, Wallace's harsh punishment neither shocks the conscience nor offends fundamental notions of human dignity. (See *People v. Karsai* (1982) 131 Cal.App.3d 224, 242, disapproved on another ground by *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) "That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.) For "every offense, there necessarily is one or more of the states which punishes said offense most harshly." (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 365.) Neither the federal nor the state constitution requires California to conform the Penal Code "'to the "majority rule" or the least common denominator of penalties nationwide.'" (*People v. Martinez, supra,* 71 Cal.App.4th at p. 1516, quoting *People v. Wingo* (1975) 14 Cal.3d 169, 179.) In short, Wallace's sentence constitutes neither cruel and unusual punishment under the federal Constitution

or cruel or unusual punishment under the state Constitution. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17; see *Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63; *People v. Martinez, supra,* 71 Cal.App.4th at pp. 1516-1517.)

10. Presentence Credits

Wallace argues, the Attorney General agrees, and we concur the court erred by miscalculating his presentence custody credit and by failing to award him the presentence conduct credit to which he was entitled. (§§ 2900.5, 4019.) Accordingly, we will modify the judgment to show 269 (instead of 268) days of presentence custody credit, 134 (instead of zero) days of presentence conduct credit, and 403 (instead of 268) total days of presentence credit. (See *People v. Smith* (1989) 211 Cal.App.3d 523, 525-528.)

DISPOSITION

The resisting conviction is ordered stricken from the judgment, which is modified to show 269 days of presentence custody credit, 134 days of presentence conduct credit, and 403 total days of presentence credit. The matter is remanded with directions to the court to issue and forward to the appropriate persons an abstract of judgment amended accordingly. Wallace has no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.) Otherwise the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Levy, Acting P.J.

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Cornell, J.