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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VINCENT MAURICE JOHNSON, Defendant and Appellant.	B284746 (Los Angeles County Super. Ct. No. KA109397)

APPEAL from judgments of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed in part, remanded in part.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Gregory B. Wagner, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Vincent Maurice Johnson (defendant) of injuring a spouse or cohabitant (Pen. Code, § 273.5, subd. (a))[1] and dissuading a witness from prosecuting a crime (§ 136.1, subd. (b)(2)), and the trial court sentenced him to prison for 35 years to life. On appeal, defendant challenges three of the trial court's evidentiary rulings and levels three challenges at his sentence. Only two of these claims has merit: He is entitled to a remand to have the trial court exercise its newfound discretion to strike the allegations that he has suffered two prior "serious" felony convictions under Senate Bill 1393, and he is entitled to a re-calculation of his custody credits. We otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *December 2014 domestic violence incident*

Defendant began to date Marva Doe (Marva) in 2011. He moved in with her in late 2014. Marva was aware that defendant was simultaneously dating another woman named Katherine Banks (Banks). Marva was "okay" with defendant's polyamory because defendant had an "extreme" temper and defendant's relationship with Banks meant that his "aggressiveness wasn't always just focused on [Marva]."

In late December 2014, defendant got "upset" when Marva's young daughter (from another relationship) walked past defendant without saying "hi." Soon thereafter, defendant followed Marva and the daughter into a bedroom and began to slap Marva's head and face while she shielded her daughter from the blows. When Marva fell backwards onto the bed, defendant grabbed a large box fan, hefted it over his head and brought it

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

down on Marva's body several times; because Marva lifted her knees to protect her chest, defendant ended up striking Marva's knees two or three times with the fan. Marva then stood up on the bed and jumped onto defendant's back. Defendant flipped Marva around and threw her onto the ground, where she landed on her shoulder and felt it come "out of place." Marva's daughter was in the bedroom during the melee.

B. *February 2015 domestic violence incident*

In mid-February 2015, defendant again became upset when Marva held up her hand in a "wait-a-minute motion" while trying to locate the rent check as her landlord waited at the front door. After they ate dinner, defendant told Marva to come to their bedroom. Once she walked in, defendant slapped her "over and over" in the face. When Marva fell backwards onto the bed, he "put[] his hands around [her] neck" and applied pressure, although not enough to make her black out. Defendant slapped her a few more times, then stood up and walked out of the bedroom. Less than a minute later, defendant returned to the room and again slapped her and put one hand to her neck and applied pressure. When Marva once again fell backwards onto the bed, defendant dragged her to the floor by her legs and, once she was on the floor, started to "stomp[]" on her "legs and . . . shin . . . and . . . hips and everything." Defendant again walked out of the bedroom. Minutes later, he again returned to the bedroom and began to punch with a closed fist her face, her legs, and the arm she injured in the prior incident. Defendant's punches to Marva's face caused her forehead to hit a nearby wall, causing a "knot" to form on her forehead.

C. *Defendant's jailhouse calls*

Defendant was arrested in mid-March 2015, and called Marva several times from jail.

During these calls, defendant admitted to physically assaulting Marva. In one call, he admitted that he "got frustrated and [a] couple of times . . . put [his] hands on" her, and went on to simultaneously state that he "never punched [Marva]" but also that he "socked [her] in the legs the last time." In another call, he stated that he had "put his hands on [Marva] before" and more generally admitted, "Every broad I've been with I fucked around and slapped or whatever."

Defendant made two jailhouse calls on April 1, 2015. In the first call to Marva, he instructed her that she "don't got shit to say" to "the Detective" when he calls, that she should "[s]top answering the phone," and that she should "tell them you ain't coming or you don't want to do nothing." In the second call to Banks, a few minutes later, defendant instructed Banks to call Marva. While Banks had Marva on a different line, defendant instructed Banks to tell Marva to tell the police that defendant "ain't do nothing," and "she ain't coming no matter what," and that she "don't need to answer no calls." The recording captures defendant's instructions on what Banks should tell Marva as well as Banks's repeating those admonitions to Marva.

II. Procedural Background

The People charged defendant with (1) two counts of injuring a spouse or cohabitant, one for each incident, and (2) dissuading a witness from prosecuting a crime. The People alleged that defendant inflicted great bodily injury (§ 12022.7, subd. (e)) during the December 2014 incident. The People further alleged that defendant's 1999 conviction for first degree burglary

(§ 459) and his 2005 conviction for assault with a firearm (§ 245, subd. (a)(2)) constituted "strikes" within the meaning of our Three Strikes Law, prior "serious" felonies (§ 667, subd. (a)), and prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to a jury trial. A jury convicted defendant of injuring a cohabitant or spouse for the February 2015 incident and of dissuading a witness. The jury acquitted defendant of the charge and bodily injury allegation pertaining to the December 2014 incident. Defendant subsequently admitted the two prior felony convictions.

The trial court sentenced defendant to prison for 35 years to life. More specifically, the court imposed a sentence of 35 years to life on the dissuasion count, comprised of a base sentence of 25 years to life (as a "third strike" sentence), plus five years for each of the two prior serious felony convictions. The court struck the prior prison term allegations. The court imposed a concurrent eight-year sentence on the domestic violence count. Before imposing this sentence, the court denied defendant's motion to dismiss the allegations that his two prior convictions constituted "strikes."

Defendant timely appeals.

DISCUSSION

I. Evidentiary Errors

Defendant argues that the trial court made three incorrect evidentiary rulings when it (1) allowed defendant's parole officer to testify that defendant had refused to turn himself in after being informed of the charges in this case and that defendant had instead fled the state, (2) allowed the investigating officer to testify to excerpts from three jailhouse calls without requiring the People to introduce additional portions of those calls, and (3)

ruled that the People could cross-examine defendant about a call he made to Banks in which he threatened to harm her if she did not come to court to testify that *she* was the person who injured Marva. We review evidentiary rulings for an abuse of discretion. (*People v. Powell* (2018) 5 Cal.5th 921, 961.)

A. *Parole officer's testimony*

1. *Pertinent facts*

Defendant's parole officer testified that he went to defendant's house in the midmorning of the day after Marva first reported the domestic violence incidents to law enforcement. Defendant was not there. As the parole officer was in front of defendant's home, defendant called him and asked why he was there. The parole officer explained that he was there to arrest defendant for a recently reported domestic violence charge, and asked defendant to disclose his whereabouts or to turn himself in. Defendant offered to turn himself in at the parole office by 5 p.m. that day. A few minutes before 5 p.m., defendant called the parole officer, reported he was not going to turn himself in, and urged him not to "take it personal." Defendant was arrested nine days later in Spokane, Washington.

Prior to trial, the trial court overruled defendant's objection and ruled that this testimony was relevant to prove defendant's consciousness of guilt because (1) defendant had "failed to return after" "mak[ing]" "a promise" to meet the parole officer, and (2) defendant had "fle[d] the jurisdiction in order to prevent further investigation or contact with law enforcement." The court precluded the parole officer from testifying to "why [defendant was] on parole." At the close of trial, the court read CALCRIM 372, the standard consciousness of guilt jury instruction.

2. *Analysis*

The trial court did not abuse its discretion in admitting the parole officer's testimony to prove defendant's consciousness of guilt. Both defendant's refusal to surrender to the parole officer and his flight from the state are relevant to show consciousness of guilt. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1030 [evidence that a defendant hid after a crime "is relevant to show consciousness of guilt"]; *People v. Cartwright* (1980) 107 Cal.App.3d 402, 418 (*Cartwright*) [evidence that defendant "fail[ed] to respond" to police is evidence of consciousness of guilt]; *People v. Garcia* (2008) 168 Cal.App.4th 261, 283-284 [evidence of a defendant's flight "is admissible as evidence of the defendant's consciousness of guilt"].)

Defendant offers what boil down to four reasons why the trial court's decision was erroneous.

First, he argues that there was no direct proof that he left for California *after* the parole officer contacted him. Because the last time Marva saw him in California was the day before, defendant continues, he could have left *before* he got the call. However, the possibility the defendant left before the parole officer's call does not preclude admission of his out-of-state arrest to prove consciousness of guilt. That is because "the existence of alternate explanations for [a] defendant's behavior" goes to "'*weight* of the evidence showing flight, but *not* its admissibility . . . .'" (*People v. Anderson* (2018) 5 Cal.5th 372, 391-392, quoting *People v. Perry* (1972) 7 Cal.3d 756, 773-774.)

Second, defendant contends that this evidence should have been excluded because its probative value was "substantially outweighed" by the probability that its admission would "create substantial danger of undue prejudice" pursuant to Evidence

Code section 352. More specifically, defendant argues that the evidence had minimal probative value because it was "unnecessary" in light of other evidence of his guilt and that the mention of his parole status carried with it a "potential for prejudice" because it informed the jury that he had sustained a prior conviction (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049) and because it allowed the jury to infer his bad character. The trial court acted well within its discretion in balancing these considerations differently than defendant. Defendant's parole status was part of establishing why his refusal to cooperate and flight indicated a consciousness of guilt. Further, "evidence of [a] defendant's parole status" may be admitted, notwithstanding Evidence Code section 352 where, as here, it is "highly probative of his mental state and motive." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1092.) And defendant's concern that the jury would use his parole status as impermissible character evidence was blunted by the court's preclusion of any mention of *why* defendant was on parole. Indeed, defendant's decision not to ask for a limiting instruction confirms that he, too, did not see the danger of such misuse of his parole status.

Third, defendant asserts that the trial court erred in giving the standard consciousness of guilt instruction because the parole officer's testimony should have been excluded. This assertion lacks merit because as we conclude above, the parole officer's testimony was properly admitted. The giving of the standard instruction is independently harmless because the instruction by its very terms leaves it to the jury to decide whether the parole officer's testimony proved defendant's consciousness of guilt. "In the absence of any evidence of flight after accusation," our Supreme Court has noted, "the jury would have understood that

the instruction was to that extent inapplicable. The superfluous reference to flight . . . caused defendant no prejudice." (*People v. Elliott* (2012) 53 Cal.4th 535, 584.)

Lastly, defendant argues that the admission of this evidence violated due process. Because we conclude that the trial court acted within its discretion in admitting this evidence, there was no due process violation. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.)

B. *Excerpts from jailhouse calls*

1. *Pertinent facts*

The People called the investigating officer to testify to three excerpts from three jailhouse phone calls defendant placed in late March and early April 2015. From the first call, the officer directly quoted defendant's statement to a woman other than Marva or Banks: "I ain't trippin. Bitch that put me in here will cost." From the second call two days later, the officer summarized defendant's instruction to that same woman to "put $50 on Marva's phone card" and then to tell Marva not to talk to the Detective, not to answer phone calls, not to answer knocks at the door, and not to talk to defendant's parole officer. From the third call three days later, the officer summarized defendant's comments to Banks telling her that a restraining order was "basically . . . just a piece of paper and that, if they murdered somebody, then what? Are they going to be charged with . . . murder and a violation of a restraining order?" The trial court had previously ruled that all three calls were "relevant" to show that Marva had "ratted him out" and to show his "mindset toward" Marva.

2. *Analysis*

The trial court did not abuse its discretion in allowing the investigating officer to testify to the excerpts from these three jailhouse calls. The evidence is relevant, was properly authenticated as statements by defendant by the sound of his voice, and was admissible as the statement of a party opponent under the hearsay rule.[2]

Defendant's sole challenge to the testimony is his contention that the People were required to introduce either the full recording of the taped calls or, at a minimum, the portions immediately preceding and following the excerpts introduced at trial. Defendant's challenge is inconsistent with Evidence Code section 356, which contemplates that the remedy for one party's introduction of excerpts of a conversation is for the other party to

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[2] The officer's testimony also accurately relayed the substance of defendant's statements. From the first call, the officer quoted defendant verbatim. In the second call, defendant told the woman to put $50 on Marva's phone card and to tell Marva, "Don't say shit to no detective, none of them. She ain't participating, nothing. Tell her not to accept no calls. Tell her not to answer the phone, no knock on the doors, nothing." In the third call, defendant told Banks, "I mean, what the fuck is a restraining order supposed to do? If someone is going to do something, they are going to do it regardless . . . It does nothing. If someone had the mind to do something, not me, but if somebody did it, oh, you kill the person, they had a restraining order against you so you're charged with murder and violating the restraining order or you assaulted the person, you are charged with assault and violating the restraining order. What the fuck is that shit supposed to do? It does nothing." If anything, the officer's summary eliminated much of the more inflammatory content from those excerpts.

introduce the other excerpts of that conversation "necessary to make it understood."

Defendant nevertheless proffers three legal bases that, in his view, would appear to supersede Evidence Code section 356. First, he cites California Rules of Court, Rule 2.1040, which requires a party "present[ing] or offer[ing] into evidence an electronic sound . . . recording of deposition or other prior testimony" to "lodge a transcript of the deposition or prior testimony with the court." (Cal. Rules of Court, rule 2.1040, subd. (a)(1).) Even if we ignore that a Rule of Court cannot supersede a statute, Rule 2.1040 by its own terms does not apply here because a jailhouse call is not a "deposition or other prior testimony" and because the People never presented or offered a recording of the call into evidence.

Second, defendant cites due process, asserting that the People's introduction of excerpts alone violated due process because it "essentially shifted the burden of proof to the defense." It did not. Although due process guarantees that the People must prove every element of any crime beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358, 363) and prohibits a court from shifting that burden onto a criminal defendant (e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 524), defendant cites no authority for the proposition—and we are aware of none—that due process compels the People to prove their case with any particular evidence or in any particular manner. Nothing in the trial court's order precluded defendant from introducing other portions of the calls in his defense; he elected not to do so, and instead elicited the officer's admission on cross-examination that "the[] snippets" he relayed were "literally just a few seconds of a

much larger conversation." In sum, defendant's due process rights were not violated.

Lastly, defendant cites the rule prohibiting expert witnesses from invading the jury's province by opining on the ultimate question of a criminal defendant's guilt. Defendant is correct about this limitation on expert testimony (*People v. Prince* (2007) 40 Cal.4th 1179, 1227), but it does not aid defendant. Contrary to what defendant suggests, the investigating officer did not offer an expert opinion when he repeated or summarized what defendant said on the jailhouse calls. Moreover, the officer's relaying of *some* of the calls' content, but not *all* of the content, did not somehow communicate an opinion on defendant's guilt.

C. *Use of call with Banks to impeach defendant*

1. *Pertinent facts*

Prior to trial, the People sought to introduce a jailhouse call defendant made to Banks. Prior to that call, Banks had told law enforcement that she saw Marva with a black eye and wearing a sling for her arm, and that defendant had slapped and choked her (Banks). On the call, defendant (1) demanded that Banks appear in court to testify on his behalf by (a) recanting her prior statement to law enforcement and (b) testifying that *she* (and not defendant) was the one who had assaulted Marva, (2) threatened to kill Banks if she did not do as he requested, and (3) warned her that he could "still get to her" even though he was in custody. Defendant made these demands and threats using "very colorful" and "very demeaning" language.[3]

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[3] The precise content of the call is not part of the record on appeal. We quote from the trial court's summary of the call, which it reviewed.

The trial court ruled that the call was "probative" of defendant's "consciousness of guilt," but nevertheless ruled that the People could not introduce the call in its case-in-chief unless Banks testified. Because Banks had previously invoked her privilege against self-incrimination, the court's order effectively precluded the People from introducing the call during its case-in-chief. However, the court went on to rule that the call was "fair game . . . for purposes of [the] cross-examination" of defendant if he elected to testify.

After the People rested its case-in-chief, the court asked defendant whether he wished to testify. When defendant indicated he was "still undecided," the court reminded defendant of its prior rulings that he would be subject to cross-examination on sanitized versions of his two prior felony convictions as well as on his call to Banks. After consulting with counsel, defendant ultimately decided not to testify.

2. *Analysis*

The trial court did not abuse its discretion in ruling that the People could cross-examine defendant about his call threatening Banks with injury or death if she did not take the blame for assaulting Marva. A criminal defendant's "efforts to create false evidence or obtain false testimony" is classic evidence of consciousness of guilt. (*People v. Nelson* (2011) 51 Cal.4th 198, 214, fn. 9; *People v. Hunt* (1982) 133 Cal.App.3d 543, 560.) Defendant's call to Banks was also properly authenticated and, because it chiefly contained defendant's statements, was admissible under the hearsay rule.

Defendant offers three reasons why the trial court nevertheless erred in conditionally admitting the call.

First, he asserts that he would have confined his direct testimony to the incidents involving Marva, so the call to Banks would have fallen outside the permissible scope of cross-examination. To be sure, cross-examination is limited to "matter[s] within the scope of [a witness's] direct examination." (Evid. Code, § 773, subd. (a).) But it is well settled that a defendant's testimony on direct examination that "amount[s], by inference, to a *denial* of the charge" places evidence "constitut[ing] circumstantial evidence of guilt"—which includes evidence of a defendant's consciousness of guilt—within the permissible scope of cross-examination. (*People v. James* (1976) 56 Cal.App.3d 876, 888-890 (*James*); *Cartwright*, *supra*, 107 Cal.App.3d at p. 415.) At the time the trial court ruled, it had ample reason to find that defendant was likely to deny the assault charges if he testified; after all, defendant had tried to get Marva not to cooperate with the prosecution and told Banks to take responsibility for assaulting Marva. Defendant's likely denial of the charges put Banks's call comfortably within the permissible scope of cross-examination.

Second, defendant seems to suggest that the call should have been excluded under Evidence Code section 352 because the call (1) had little or no probative value because it merely showed defendant's temper, which is not an element of the assault or dissuasion charges, (2) was unduly prejudicial because it constituted evidence of another crime, which painted him as a "bad actor." This argument ignores the probative value of the call as evidence of his consciousness of guilt. The argument also ignores the trial court's instruction explaining how consciousness of guilt evidence is to be used, thereby minimizing collateral misuses of the evidence. At bottom, defendant is inviting us to

reweigh the Evidence Code section 352 considerations differently than the trial court. This is beyond our purview.

Lastly, defendant contends that admitting this call violates his Sixth Amendment right to confront the witnesses against him because Banks's invocation of her privilege against self-incrimination rendered her unavailable for cross-examination. This contention makes no sense. What made the call relevant was *defendant*'s statements, not Banks's reaction to them. Defendant always had the right to tell his side of the story by taking the stand. His decision to make himself unavailable by invoking his constitutional right not to testify did not somehow create a confrontation clause problem.

Because we conclude that the trial court did not abuse its discretion in admitting Banks's call as impeachment evidence should defendant testify, we have no occasion to reach the precursor question whether defendant's decision not to testify forfeited the issue.

In light of our conclusion that the trial court committed no evidentiary error, we necessarily reject defendant's subsidiary argument that he was harmed by the cumulative effect of the court's evidentiary errors. (Accord, *People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

II. Sentencing Errors

Defendant argues that the trial court committed three sentencing errors: (1) it erred in denying his motion to dismiss the allegations that his prior strike convictions constituted "strikes"; (2) it did not consider whether to strike his prior "serious" felony allegations; and (3) it miscalculated his custody credits.

A. *Motion to dismiss strike allegations*

1. *Pertinent facts*

a. Adult criminal history

Defendant was convicted of first degree burglary in 1999, and was sentenced to two years in state prison. He was released on parole in August 2000, and after being re-incarcerated twice for two different parole violations, was ultimately discharged from parole in August 2004.

Nine months later, defendant was arrested for attempted murder, but in September 2005 entered a plea to assault with a firearm and was sentenced to 10 years in state prison. While in prison, defendant was disciplined for engaging in mutual combat in 2011, using marijuana on two occasions in 2012, getting too familiar with female prison staff, engaging in "sexually stimulating" conduct with a female visitor in 2006, smuggling tobacco in his anus in 2010, hiding three cell phones in his jail cell in 2012, and having a bad demeanor or refusing to follow orders in 2005 and 2006.

Defendant was ultimately paroled in August 2014, and committed the charged offenses six months later and while still on parole.

b. Defendant's motion

Prior to sentencing, defendant moved the trial court to dismiss the allegations that his 1999 and 2005 convictions constituted strikes. He argued that he fell outside the spirit of the Three Strikes Law because (1) the "facts of the present case" are not particularly egregious, (2) his "prior strike[]" convictions are "old," and (3) his "prison record . . . does not warrant a life sentence."

At the sentencing hearing, the trial court acknowledged its discretion to dismiss the allegations, set forth the applicable criteria for doing so, and tentatively denied defendant's motion. In setting forth its tentative ruling, the court found that defendant did not fall "outside the spirit of the [Three] Strike[s] law" because defendant committed multiple, "unprovoked" assaults on Marva and thereafter "continuously" told Marva not to cooperate with law enforcement while reminding her he was expecting to bail out of custody, and because his criminal history was "extensive" and "pretty violent." Defendant then addressed the court, saying that Marva never felt threatened by him and that he would have testified but for the trial court's ruling allowing the People to cross-examine him with his call to Banks. The trial court found unpersuasive defendant's attempts to recast the assaults as "more of a misunderstanding," and adopted its tentative ruling as its final ruling.

2. *Analysis*

A trial court has the discretion to grant a motion to dismiss a strike allegation. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 161-162.) In deciding whether to exercise that discretion, the court is to "'consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) We review a trial court's denial of such a motion for an abuse of discretion. (*Id.* at pp. 373-374.)

The trial court did not abuse its discretion in denying defendant's motion to dismiss his prior strike allegations. The trial court acknowledged its discretion, understood and recited the pertinent factors, and carefully balanced those factors in coming to its conclusion.

Defendant offers four categories of arguments as to why this ruling was an abuse of discretion.

First, defendant argues that the trial court was wrong to say that he had committed multiple assaults on Marva because the jury acquitted him of the December 2014 assault, leaving only the February 2015 assault. The court's consideration of conduct of which he was acquitted violates *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), defendant continues, and means the court relied upon an "impermissible" factor, which amounts to an abuse of discretion (*Carmony*, *supra*, 33 Cal.4th at p. 378 ["an abuse of discretion occurs where the trial court . . . considered impermissible factors"]). Our Supreme Court has rejected the premise of defendant's argument. In *In re Coley* (2012) 55 Cal.4th 524, 558, the court held that a trial court does not violate *Apprendi* by considering acquitted conduct when ruling on a motion to dismiss prior "strike" convictions because a jury's finding that the People did not prove conduct beyond a reasonable doubt does not preclude the court from concluding that the People proved that conduct by a preponderance of the evidence. In his reply brief, defendant makes the fallback argument that the People did not prove the December 2014 assault by a preponderance of the evidence, but there is substantial evidence in the record to support the trial court's finding that the assault occurred.

Second, defendant asserts that the trial court did not properly weigh the pertinent factors. More specifically, defendant asserts that his current conviction for dissuading a witness is not "appreciably worse than the typical" offense because it was "just a phone call" without any threat of bodily harm, because Marva once told the cops she "wasn't sure . . . someone would come after [her]," and because he urged Marva not to talk to the police only because he was hurt and confused. These assertions do not demonstrate that the trial court abused its discretion. To begin, the assessment of whether a defendant falls "outside the . . . spirit" of the Three Strikes Law focuses on whether the defendant's current and past crimes are *less egregious* than typical, and not—as defendant seems to suggest—whether his crimes are *no more egregious* than typical. What is more, defendant's dissuasion of Marva was not *less* egregious than typical: Although he avoided express threats of bodily harm, his repeated assertions of soon being out on bail, as the trial court noted, carried with them an *implied* threat of the ability to exact retribution if Marva did not do as he said.[4] Marva's report to the police that she was not sure defendant would come after her at most addresses whether his dissuasion was effective, not whether he engaged in it. And defendant's motive for dissuading Marva from assisting law enforcement does not somehow mitigate that conduct. Defendant also notes that his convictions date back to 1999 and 2005, but ignores that except for a nine-month period in 2004 and 2005, defendant has either been in custody or on parole. Where, as here, a defendant

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[4] That the trial court considered the circumstances of defendant's present crimes refutes his contention that the court's decision impermissibly relied solely on his prior convictions.

is a lifelong and constant criminal, the age of his convictions is of little import. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 317.) At bottom, defendant is asking us to weigh these considerations differently than the trial court. But doing so is outside the limited scope of our review. (E.g., *People v. Myers* (1999) 69 Cal.App.4th 305, 309 ["'we do not reweigh the circumstances of the case to determine whether, in our opinion, the trial court should have . . . exercise[ed] its discretion to strike a prior conviction.'"].)

Third, defendant argues that the voter initiatives like Propositions 36, 47 and 57 have categorically reduced the penalties attaching to crimes in California, such that what it means to be "outside the spirit" of the Three Strikes Law has changed and older precedent defining that concept narrowly "belongs to another time, another era." Defendant is wrong. Proposition 36 partially revised our Three Strikes Law; significantly, however, it left intact the precedent interpreting when a case falls outside its spirit. (*Kusior v. Silver* (1960) 54 Cal.2d 603, 618 ["failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect"].) Defendant further argues that these reforms are aimed in part at reducing the costs of incarceration by reducing the population of prisoners, but our Supreme Court has observed that "the purpose of saving money does not mean we should interpret [these propositions]"—let alone *other* laws—"in every way that might maximize any monetary savings." (*People v. Morales* (2016) 63 Cal.4th 399, 408.) In short, defendant's entreaty to re-write the Three Strikes

Law is better addressed to our Legislature or the voters, not to this court.

Lastly, defendant posits that the trial court's decision was not "fully informed" because the only probation report available to the court was one completed prior to trial, and which did not contain information regarding defendant's marital and parental status, his employment, his finances, or anything about his health or substance abuse. This argument is legally and factually unfounded. The cases requiring a trial court's decision to be "fully informed" refers to the court's awareness of its discretion to dismiss the allegations, not its possession of all information potentially available about a defendant. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Further, a defendant with prior "strike" convictions is not entitled to *any* probation report (§ 667, subd. (c)(2); cf. § 1203, subd. (b)(1)), let alone a supplemental report. What is more, it was *defendant*'s burden, as the movant, to submit information in support of his motion to dismiss (*People v. Lopez* (1997) 52 Cal.App.4th 233, 251); the fault for not making this information known to the court lies with defendant, not anyone else. And much of the information defendant claims was missing—chiefly, his marital and parental status—were otherwise elicited at trial.

B. *Remand under S.B. 1393*

On September 30, 2018, the Governor signed Senate Bill 1393, which amends section 1385 to eliminate the prohibition on dismissing prior "serious" felony conviction allegations under section 667, subd. (a). (§ 1385, subd. (b) (2018 ed.); Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 2.) Because this new law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless

the Legislature has expressed a contrary intent. (*People v. Francis* (1969) 71 Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2 740, 744-745.) Our Legislature has expressed no such intent in Senate Bill 1393. Because defendant's convictions will not be final by the time Senate Bill 1393 takes effect on January 1, 2019, he is entitled to have the trial court exercise its newfound discretion whether to strike the two prior "serious" felony allegations unless the court, during the original sentencing, "clearly indicated . . . that it would not . . . have stricken" those allegations if it had been aware of having the discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, there is no such indication. The court made no express statements to that effect, and its decision to run the assault count concurrently and to dismiss the prior prison term allegations shows that the trial court was not intent upon imposing the maximum sentence. On these facts, a remand is appropriate.

C. *Custody credits*

The trial court awarded defendant 1,023 days of custody credits, comprised of 890 days of actual credit and 133 days of good time/work time credit, which comes to 15 percent of the days of actual credit. Defendant argues that this was incorrect. The People agree, and so do we. The 15 percent rate is reserved for defendants whose present offense is a "violent" felony (§ 2933.1), subd. (a); *People v. Henson* (1997) 57 Cal.App.4th 1380, 1385-1390), but defendant's dissuasion offense does not so qualify. (§ 667.5, subd. (c); cf. *id.*, subd. (c)(20).) Accordingly, defendant is entitled to good time/work time credits equal to his custody credits. Because he is entitled to 897 days of actual credit, he should have also been granted 896 days of conduct credits for a total of 1,793 days of custody credit.

DISPOSITION

The case is remanded for resentencing to allow the trial court to consider whether the enhancements under section 667, subd. (a)(1) should be stricken pursuant to Senate Bill 1393. The trial court is also directed to modify the judgment to award defendant 896 days of presentence conduct credit, in addition to 897 days of actual time served, for a total of 1,793 days of presentence credit. Upon resentencing, the trial court is directed to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
ASHMANN-GERST