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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCIUS LANE DUBOISE, Defendant and Appellant.	B251490 (Los Angeles County Super. Ct. No. TA126856)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Azar Elihu, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Marcius Lane Duboise appeals from the judgment entered following his convictions by jury on count 1 – assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and count 2 – criminal threats (Pen. Code, § 422) with personal use of a deadly and dangerous weapon (Pen. Code, § 12022, subd. (b)(1)), with court findings he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and an admission he suffered a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced him to prison for 14 years. We affirm the judgment, except we reverse it in part, vacate it in part, and remand for resentencing with directions.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established on February 1, 2013, Vincent Osby jointly owned with his brother a liquor store in Lynwood. About 2:15 p.m., Osby saw appellant, inside the store, turn his back to an arcade machine and kick it as hard as he could. Osby asked appellant to leave. Appellant was with two other men. Osby testified, "[Appellant] told me 'F' me. 'I own this city. I'm Capon. I'll do what I want to do.' "

Osby again told appellant to leave. Appellant, the other two men, and Osby exited the store. Osby told appellant not to return. Osby testified appellant responded, " 'You don't know who the "F" I am. I'm Capon. I run these streets. I F'd the mayor.' " Appellant was angry. Osby testified shoes were on a nearby bicycle and Osby took one and flicked it at appellant from about six feet away, hitting him in the chest. Osby wanted appellant to leave.

Appellant pulled a folded knife out of his pocket, opened the knife, and said " 'I'm Capon.' " Osby did not feel threatened by the knife, the blade of which was perhaps three inches long, so he did not retreat. Appellant kept repeating what he had said. Appellant put the knife in his left hand and pulled a bigger knife out of his pocket. That knife was probably eight inches long with a blade about four inches long.

Osby testified when appellant pulled out the bigger knife, appellant said, " 'I'll kill you MF. You don't know who I am. I'm Capon.' " The prosecutor indicated Osby referred to MF but Osby needed to testify exactly what appellant said. Osby replied, " 'Motherfucker.' " The prosecutor then asked if appellant said, " 'I'mma kill you, motherfucker.' " Osby replied yes. During cross-examination, Osby testified appellant pulled out the bigger knife, opened it, and said " 'I'll kill you.' "

Osby also testified as follows. When appellant was holding the two knives and saying he "was going to kill [Osby], 'motherfucker,' " Osby believed appellant would carry out his threats. Osby testified appellant walked towards him "with the knife in his hand like he was gonna stick me with it." Osby backed into the store and put his hand behind his back, pretending he had a gun. Osby was afraid. Appellant stopped probably two feet from Osby. Appellant was outside the store and Osby was inside the store. Appellant took his bicycle, and appellant and the other two men walked down the street. Once Osby was in the store, he could see appellant through windows as appellant passed the store's door. Osby testified, "But at that point I was in the store. I didn't come back out." Appellant eventually left. Osby called the police.[1]

[1] That afternoon, police detained appellant in the vicinity. He was riding a bicycle, possessed the knives Osby had seen, and told police that appellant had argued with someone at the liquor store.

While waiting for police, Osby stayed inside the store behind a counter that had bulletproof glass. Osby testified he waited there because "I didn't know what [appellant] was going to do, if he is going to come back. I wasn't sure, so I waited for the police to get there at that point." Osby felt safe in that area. Because of the bulletproof glass, the store had not been robbed since 1992.

The prosecutor asked Osby how much time passed from the time he called police to the time police arrived, and Osby replied, "Pretty quick. Maybe 3 to 4 minutes." Police later took Osby to a field showup. Osby was six feet one inch tall and weighed 250 pounds. Osby did not have a gun and did not use one to protect his store.

During appellant's June 17, 2013 cross-examination of Osby, appellant asked if the store's external cameras recorded the event. Osby replied, "when I was contacted by the detective, it was like a month after.[2] And the DVR, it records over itself."[3] Osby testified he made no attempt to "preserve any of this incident." His store had been there since 1992 and there were situations all the time where guys and drunks entered the store, misbehaved, and returned the next day and apologized. The present situation was just more extreme because it was more violent. Osby had not thought about preserving the DVD or making a copy of it.

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[2] Appellant's preliminary hearing occurred on February 22, 2013. In his opening brief, appellant "presum[es]" that, before the preliminary hearing, detectives interviewed Osby and the prosecutor contacted Osby to prepare him for the preliminary hearing; therefore, Osby's trial testimony that the detective contacted Osby "like a month after" was false. Appellant cites nothing in the record that supports his presumption or that demonstrates the falsity of Osby's testimony.

[3] During a June 12, 2013 *Marsden* hearing, appellant's trial counsel represented the store's "proprietor said he would get back with the video but never got back to us." Appellant's trial counsel did not indicate whether the proprietor was Osby or his brother with whom Osby jointly owned the store.

2. *Defense Evidence.*

In defense, appellant, who had suffered 1997, 2001, and 2010 felony narcotics convictions, and a 1999 felony conviction for a crime of moral turpitude, testified as the sole defense witness as follows. On the date of the present incident, appellant tried to explain to Osby the arcade machine robbed appellant of $50. Appellant kicked the machine to show Osby the slot where coins ejected was not working properly. Osby told him to leave.

Appellant exited the store. Appellant said he would stay away if Osby gave appellant the money belonging to appellant. Osby hit appellant with a shoe. Appellant pulled out knives to protect himself. Osby reached for a weapon. It appeared to be a black .38-caliber revolver. Osby said appellant needed to leave before Osby shot him. Appellant replied Osby would go to jail if he shot appellant outside the store. Appellant left. He never threatened to kill Osby. Appellant denied speaking to Los Angeles County Sheriff's Deputy Arturo Ortiz.

3. *Rebuttal Evidence.*

In rebuttal, Ortiz testified on February 1, 2013, he spoke with appellant following his detention. Appellant never told Ortiz that Osby produced a .38-caliber handgun and pointed it at appellant. Appellant told Ortiz the machine stole $120 from appellant and he was trying to get it back, but appellant never said how he was trying to get it back.

We will present additional facts in our Discussion where pertinent.

ISSUES

Appellant claims (1) the prosecutor committed misconduct during jury argument, (2) the trial court erroneously failed to instruct on attempted criminal threats as a lesser included offense of count 2, (3) appellant's trial counsel provided ineffective assistance of counsel by failing to request instructions concerning Osby's alleged destruction of evidence, (4) the trial court could not properly rely on appellant's 1999 conviction as a strike, (5) the trial court erred by imposing the Penal Code section 667.5, subdivision (b) enhancement, (6) appellant is entitled to additional precommitment credit, and (7) Penal Code section 654 barred multiple punishment on counts 1 and 2.

DISCUSSION

1. *No Prosecutorial Misconduct Occurred During Jury Argument*.

During opening argument, the prosecutor made challenged comments quoted below, and we italicize comments appellant underlined when quoting them in his opening brief. Concerning Osby's credibility and testimony he was not armed with a gun,[4] the prosecutor commented, "You also heard that [Osby] was involved in the community. He's not out for himself. He's not trying to make a quick buck for himself. He is out to help the community in Lynwood. And you also heard that during the 15 or 20 years that he was the owner of this mini mart, he has never been robbed. *There's no reason why he would be armed with a gun*."

Concerning Osby's credibility and whether he inadvertently failed to preserve a video, the prosecutor commented, "Additionally, [Osby] admitted weaknesses. [He] was truthful with you. He said, 'You know what? I didn't really think about preserving the video in this case.' He didn't try to make up an excuse. He just told you, 'You know, I just didn't think.' *It doesn't sound like a guy who is out there to get the defendant. He was being truthful with you*." The prosecutor also commented police corroborated Osby's story. The prosecutor then commented, "And lastly, he was not impeached. You didn't hear any witness coming into this court and impeach Mr. Osby."

[4] Osby testified at trial he did not have a gun and did not use one to protect his store, in part because he ran a youth organization and did not want to kill anyone. Osby indicated he hit appellant in the chest with the shoe because he wanted appellant to leave, the store "started out being a family store," "a gentleman and his daughter [were] walking up the street," and Osby did not want the store to be like other stores.

During closing argument, the prosecutor commented he would have loved to have had the tape but this "isn't CSI." The prosecutor then commented, "You don't get everything. You get your common sense and you put it together with the . . . percipient witnesses. And if you believe Mr. Osby – *and I'm telling you there's no reason not to believe him*. He wasn't impeached in any way."

The prosecutor then commented, "*You don't need the tape*. You know, he came in here and he told you how it was, admitted weaknesses. Came up like a stand-up guy. *Why do you need the tape*? I would love that tape, *but you don't need it*. [Everything] we do in our daily lives, we listen to other people. We determine credibility. Every time we go to the store, we determine credibility. [*You*] *don't need tapes* for everything to make a decision. *You don't need a tape in this case to make a decision*."

Appellant claims the above comments were prosecutorial misconduct. He argues the prosecutor was improperly vouching for Osby and stating on personal belief Osby (1) was honest and credible, (2) was not armed, and (3) inadvertently lost the tape. Appellant also argues the prosecutor improperly assured the jury Osby was telling the truth when the prosecutor implied the tape would not help appellant even though the prosecutor had not viewed it. We conclude otherwise. Appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition with respect to any of the challenged comments, and a jury admonition would have cured any harm. Appellant waived any issues of prosecutorial misconduct. (Cf. *People v. Redd* (2010) 48 Cal.4th 691, 741 (*Redd*); *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

As to the merits, a prosecutor is given wide latitude during argument, and said argument may be vigorous as long as it amounts to fair comment on the evidence, including reasonable inferences drawn therefrom. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) " 'A prosecutor may make "assurances regarding the apparent honesty or reliability of" a witness "based on the 'facts of [the] record and the inferences reasonably drawn therefrom.' " [Citation.] But a "prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by

referring to evidence outside the record." [Citation.]' [Citation.]" (*Redd, supra*, 48 Cal.4th at p. 740.)

In the present case, the challenged prosecutorial comments were based on evidence and did not refer to evidence outside the record. They were fair comment on the evidence and did not constitute improper vouching for a witness's credibility. No prosecutorial misconduct occurred. Although appellant suggests there was conflicting evidence concerning whether (1) Osby was credible, (2) he threatened appellant, (3) Osby was armed with a gun, and/or (4) Osby's failure to preserve a tape was inadvertent, the prosecutor was not obligated to comment on any evidence favorable to appellant.

2. *The Trial Court Did Not Err by Failing to Instruct on Attempted Criminal Threats*.

Appellant claims the trial court erred by failing to instruct on attempted criminal threats as a lesser included offense of criminal threats, a violation of Penal Code section 422 (count 2). Appellant argues there was substantial evidence he committed only attempted criminal threats because there was substantial evidence Osby did not have "sustained fear for his . . . own safety" within the meaning of the section. Appellant argues in this regard, inter alia, "Osby's fear was from the time he saw the second knife to the time he retreated behind the bullet-proof glass, which was less than a minute" and "reasonable jurors could have found that Osby's fear ended when he retreated behind the bulletproof glass." We reject appellant's claim.

Fear is "sustained" for purposes of Penal Code section 422 when it is for a period that extends beyond what is momentary, fleeting, or transitory. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Based on the jury instructions and the People's jury argument, appellant was prosecuted for criminal threats based on his oral threat to kill Osby, one version of which was, " 'I'mma kill you, motherfucker.' "

We have set forth the pertinent facts in our Factual Summary, and there was substantial evidence as follows. Appellant orally threatened to kill Osby and pulled out the larger knife. Appellant then approached Osby with the knives. There is no dispute there was sufficient evidence appellant committed assault with a deadly weapon, i.e., a

knife (count 1).[5] Appellant stopped only because Osby pretended he had a gun. Appellant was then only two feet from Osby. Once Osby was inside the store, he did not come back outside.

The jury reasonably could have concluded that, after appellant left, Osby was uncertain about what appellant would do or if appellant would return. Police did not come immediately; Osby testified police came "pretty quick[ly]," perhaps three or four minutes after Osby called. Osby waited behind bulletproof glass until police arrived. We conclude there was no substantial evidence Osby's fear was momentary, fleeting, or transitory.

We realize Osby testified he felt safe once he was behind the bulletproof glass. Osby may not have feared appellant could successfully attack Osby while Osby was behind the glass, but there was substantial evidence Osby continued to have sustained fear for his safety even while he was behind the glass, because he did not emerge from behind it until police arrived. In light of all the evidence, we conclude the trial court did not err by failing to instruct on attempted criminal threats as a lesser included offense of criminal threats (count 2) because there was no substantial evidence appellant's fear was momentary, fleeting or transitory.

3. *No Ineffective Assistance of Counsel Occurred.*

In the present case, the record does not reflect appellant's trial counsel requested a jury instruction concerning any failure by Osby to preserve any recording of the present incident. Appellant claims his trial counsel provided ineffective assistance of counsel by failing to ask the trial court for an instruction pertaining to Osby's failure to preserve any such recording. Appellant argues Osby's failure was evidence he had a motive to obstruct justice, falsely accused appellant, and wanted to get rid of him.

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[5] In *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349, the court stated, "we believe that the minute during which [the victim] heard the threat and saw appellant's weapon qualifies as 'sustained' under the statute. When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.' "

The record sheds no light on why appellant's trial counsel failed to act in the manner challenged, the record does not reflect said counsel was asked for an explanation and failed to provide one, and we cannot say there simply could have been no satisfactory explanation. (Cf. *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.) For those reasons alone, no ineffective assistance of counsel occurred. Moreover, we can conceive of reasons why appellant's trial counsel reasonably might have refrained from requesting the instruction at issue.[6]

Finally, even if trial counsel's failure to request the instruction at issue was constitutionally-deficient representation, there is no need to reverse the judgment. Even if a recording might have assisted the jury in determining the credibility of Osby and appellant, appellant admitted he previously had suffered numerous felony convictions. Appellant concedes his trial counsel closely questioned Osby "regarding the videotape" and "further stressed the importance of the tapes to the jury several times in his closing argument." The jury reasonably could have concluded much of appellant's testimony was fabricated. Any constitutionally-deficient representation was not prejudicial. (See

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[6] Appellant's trial counsel reasonably could have concluded as follows. First, it was not clear any camera recorded the incident. Second, there was substantial evidence from Osby's trial testimony the store used a camera that automatically erased previous recordings when making new ones. Osby did not testify as to the length of time between a previous recording and its erasure, whether or how an erasure could be timely stopped, whether or how a previous recording could be copied, the duration of any copying process, or the impact of any such process on the continued business operation of the camera. The feasibility of preserving a recording was unclear. Third, according to Osby's trial testimony, he never thought about the issue of preserving any recording of the incident. He viewed the present incident as a common incident of misbehavior by a customer, and Osby did not normally preserve evidence of those incidents. A detective called Osby a month after the incident. There was no evidence police ever notified Osby he needed to preserve any recording. The need to preserve a recording was unclear. Fourth, none of the authorities or instructions (e.g., CALCRIM No. 371, CACI No. 204, or BAJI No. 2.03, the last two of which are *civil* jury instructions) appellant now suggests his trial counsel could have relied upon to ask for the instruction at issue applied in this case.

People v. Slaughter (2002) 27 Cal.4th 1187, 1219; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

4. *The Trial Court Erred by Relying Upon Appellant's 1999 Conviction As a Strike*.

a. *Pertinent Facts*.

The pertinent facts in this case revolve around four areas: (1) the 1999 conviction proceedings, (2) appellant's 2008 motion to dismiss the 1999 conviction, (3) the 2008 dismissal of the 1999 conviction, and (4) the 2013 court trial on the strike allegation based on the 1999 conviction.

(1) *Evidence of the 1999 Conviction Proceedings*.

The information in this case alleged, inter alia, appellant suffered a strike based on a January 15, 1999 conviction for a violation of Penal Code section 422 in case No. BA173853. The trial court in the present case conducted, on September 9, 2013, a court trial on the strike allegation (hereafter, court trial).

Evidence introduced at the court trial did not include a reporter's transcript of the 1999 plea proceeding in case No. BA173853.[7] A January 15, 1999 minute order in case No. BA173853 was admitted into evidence at the court trial. Said minute order reflects on January 15, 1999, appellant pled no contest to a violation of Penal Code section 422.

The January 15, 1999 minute order also reflects that, on that date, in case No. BA173853, the trial court suspended imposition of sentence and placed appellant on probation for one year, and a condition of appellant's probation was "[i]f the defendant obeys all laws for one year then the People will move to dismiss the case." The January 15, 1999 minute order does not specify a Penal Code section upon which the People would rely to move to dismiss the case.

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[7] An augmented reporter's transcript in this appeal contains a statement indicating the court reporter for the January 15, 1999 proceedings retired, and court reporters' notes are destroyed after 10 years; therefore, transcripts of the January 15, 1999 proceedings could not be prepared. We note this statement does not say transcripts of the January 15, 1999 proceedings were *never* prepared. It appears, as discussed below, a reporter's transcript of the 1999 proceedings may have existed at one time.

Nothing in the record indicates that, after one year following appellant's no contest plea, the People ever moved to dismiss case No. BA173853. No pertinent proceedings occurred after January 15, 1999, until the below discussed 2008 matters.

(2) *The 2008 Motion to Dismiss the 1999 Conviction*.

On October 1, 2008, in case No. BA173853, appellant filed a "notice of motion to dismiss (specific performance of plea), motion to withdraw plea/petition for *coram nobis*" (hereafter, motion). The notice of motion stated appellant would make a "motion to dismiss based on specific performance of his plea agreement or in the alternative will move for a grant of a writ of *coram nobis* or to withdraw his plea based on having pled solely on the ground that his counsel, the court and the People represented that this matter would be dismissed for all purposes one year after the entry of the plea."

Appellant's motion stated, "Mr. [Duboise] demands specific performance of the plea agreement of January 15, [1999], he entered into in this case. In the plea agreement he was specifically promised that the People would move to dismiss this case a year from the date of the entry of his plea if he obeyed all laws and did not contact the victim or witnesses in the case. [¶] If the court will not dismiss the case in a manner which renders the conviction a nullity, Mr. [Duboise] in the alternative requests to withdraw his plea. This alternative request is itself also alternatively termed a petition for writ of *coram nobis*. This is because in choosing to accept the plea agreement, Mr. [Duboise] relied on the interpretations and promises of his lawyer in warranting that the explicit statements of the court[8] and the prosecutor to the effect that the case would be dismissed were in fact what they sounded like, a promise that the case would be dismissed in all respects without the possibility that the conviction would be used against him in any way."

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8 The motion indicated the judge at the time of the 1999 no contest plea (Judge John Harris) had retired.

Appellant's motion later indicated the colloquy leading to his no contest plea evidenced the People's promise to dismiss the case induced his plea.[9] The motion also stated appellant "would have never entered a plea on this case but for the prosecutor's commitment to dismiss the case, a dismissal he felt was to be for all purposes." The motion further stated, "Mr. [Duboise]'s reliance on the representations he was made is reasonable. He was a lay person, and all three of the parties with whom he was interacting used the word 'dismiss' or 'dismissal' without any limitations. Mr. [Duboise], as a lay person, cannot be deemed to have understood anything different from what he claims, that a dismissal would be for all purposes. Even if the parties intended that the dismissal was to be something similar to a 1203.2 [*sic*] dismissal."

The motion contains an alleged declaration from appellant (not signed under penalty of perjury but apparently signed by him; hereafter, declaration). The declaration stated, "On the day my trial was to start, my lawyer told me that he had had a meeting with the prosecutor and the judge. He told me that if I pled no contest on that date, the district attorney would dismiss the case in a year if I had no negative contacts with law enforcement. As I had a child with my ex and we had been having disagreements about visitation, I did not want to take that deal if the conviction was going to stay on my

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9 The motion stated, "This inducement is reflected at several points in the plea colloquy. Immediately after stating [its] understanding that a plea was going to be entered as to the section 422 charge, the court stated: 'It is my further understanding that if the defendant obeys all laws for a period of one year after having been placed on unsupervised probation, the *People* a [year] from today *will move to dismiss the case* against Mr. [Duboise].' Plea Colloquy of January 15, 1999 at page 2, lines 10-14. Hereinafter 'Plea.' [See fn. 7, *ante*.] [¶] This understanding was echoed by Deputy District Attorney Musso. After the court's statement of the agreement quoted above, Mr. Musso indicated that he agreed, but for a statement indicating that . . . Mr. [Duboise] staying away from and not harming the victim and another civilian witness was an additional term. Plea at 2, lines 15-19. [¶] The prosecutor himself echoed Mr. [Duboise]'s expectation that the case would be dismissed by referring to the disposition as 'a probationary one, with the opportunity to the defendant to have the case dismissed if he stays away and does not harass the civilian witness' (Plea at 4, lines 4-7) and then telling Mr. [Duboise] directly, 'I don't think I mentioned that after a period of one year the case may be dismissed if you are not having problems.' Plea at 4, lines 26-28."

record for any purpose. . . . I discussed this concern with my lawyer assured [*sic*] me that the case would be dismissed and would never be used against me as long as I stayed out of trouble for one year." Appellant decided to plead no contest.

The declaration later stated, "If I had not believed that the case would be dismissed for all purposes and would not remain on my record as represented to me by my lawyer, the judge, and the prosecutor, I would not have pled no contest to the charge. I was never told by my lawyer or anyone else that the matter would be dismissed in any manner that would not be a dismissal for all purposes, and I was not aware that there was such a thing in California as a dismissal that would allow the case to still be considered a conviction for any purpose after the date of dismissal. [¶] I did not have any contact with the victim or commit any new crime for more than a year after the date I entered my plea of no contest." The motion does not expressly specify a Penal Code section upon which dismissal of the case would be based.

(3) *The* 2008 *Dismissal of the 1999 Conviction.*

During the 2013 court trial, the court took judicial notice of a reporter's transcript of December 12, 2008 proceedings in case No. BA173853. The transcript reflects on December 12, 2008, the trial court (Judge Gary Hahn) in case No. BA173853, in the presence of appellant and counsel for both parties, indicated appellant had filed a "petition" relating to that case. (The petition was the motion.) The court asked the prosecutor if he had "[a]nything [he wished] to add . . . to that," and the prosecutor replied no.

The court then stated, "I have read and considered it. It was a very fine, well written motion. I'm going to grant it. The plea is withdrawn, and the case dismissed. That doesn't exist anymore." The trial court at the December 12, 2008 proceedings did not expressly specify a Penal Code section upon which the court relied to dismiss the case.

The December 12, 2008 minute order was admitted into evidence at the court trial. The minute order states, "Probation is ordered terminated pursuant to section 1203.3 Penal Code. Plea of guilty or conviction is set aside. A plea of not guilty is entered. Case is dismissed pursuant to section 1203.4 Penal Code." (Some capitalization omitted.) The minute order then states, "Count (01): is dismissed: dismissed pursuant to [Penal Code section] 1203.4[.] Notice of motion to dismiss (specific performance of plea), withdrawn plea/petition for *coram nobis* filed on 10-01-08 is heard." (Italics added, some capitalization omitted.)

(4) *The 2013 Court Trial.*

At the September 9, 2013 court trial, the court, and counsel for the parties, indicated they had a copy of the December 12, 2008 reporter's transcript. Appellant's counsel represented, concerning the 1999 conviction, "Mr. Duboise's opinion is that it doesn't exist. It can't . . . be used against him in any fashion." Appellant's counsel indicated appellant's plea in the 1999 case had been withdrawn, the case had been dismissed, and appellant's counsel wanted the present trial court to reduce the 1999 conviction to a misdemeanor. Appellant's counsel suggested it was because of an inadvertent ministerial error the 1999 conviction had not been reduced to a misdemeanor during the 1999 plea proceedings. At the court trial, the prosecutor represented the 1999 conviction "was straight out dismissed" and the prosecutor objected to any reduction of the 1999 conviction to a misdemeanor.

The trial court in the present case later stated concerning case No. BA173853, "It was dismissed pursuant to Penal Code section 1202.4 [*sic*]. No, it was dismissed pursuant to Penal Code section 120 – I think it's 0.4, according to the plea."[10] The trial court then stated, "It is the court's understanding that it does not appear to have been reduced to a misdemeanor, and the court disagrees with the defense that that is normally done. Even in the 1203.4 motions to dismiss, quite often the case is dismissed without

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[10] At no time in this case did Penal Code section 1202.4 pertain to dismissals, and at no time in this case did a Penal Code section 1200.4 exist.

being reduced to a misdemeanor." The trial court further stated, "It was not reduced to a misdemeanor in this case, and although the case was dismissed, it is my understanding that under the current law, that it still can be used as a strike enhancement . . . ." The prosecutor agreed with the court, and the court later received evidence of the 1999 conviction as previously discussed. After presentation of evidence and argument, the parties submitted the matter and the court found true the allegation appellant suffered a strike based on the 1999 conviction for a violation of Penal Code section 422.

b. *Analysis.*

Appellant claims the trial court in the present case could not rely on his 1999 conviction as a strike because, on December 12, 2008, the trial court in case No. BA173853 dismissed that case pursuant to Penal Code section 1385. We agree.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767 (*Shelton*).) Using the paradigm of contract law, "courts should look first to the specific language of the agreement to ascertain the expressed intent of the parties. [Citations.] Beyond that, the courts should seek to carry out the parties' reasonable expectations. [Citations.]" (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120, fn. omitted.) "'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]' " (*Shelton*, *supra*, 37 Cal.4th at p. 767.)

Appellant's 1999 conviction was based on a plea bargain pursuant to which, in essence, he pled no contest with the understanding (1) the court would place him on probation for a year on the condition, inter alia, he obey all laws, and (2) if he complied with that condition, the People would move to dismiss the case. The issue is the nature of the agreement, if any, concerning future use of the 1999 conviction in the event, pursuant to the agreement, the People moved to dismiss the case.

Respondent concedes "the propriety of the use of the [1999] conviction as a prior strike for sentencing enhancement purposes turns on appellant's . . . claim that the conviction was dismissed under [Penal Code] section 1385 rather than [Penal Code] section 1203.4 in 2008." That is, there is no dispute the 2008 dismissal of the 1999 conviction was pursuant either to section 1385 or section 1203.4.

Penal Code section 1385, subdivision (a) provides, "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." Penal Code section 1203.4 permits a trial court to dismiss a case after the defendant has fulfilled the defendant's probation conditions. It is an expungement proceeding. (See *People v. Laino* (2004) 32 Cal.4th 878, 885; *People v. Boyd* (1979) 24 Cal.3d 285, 294.) The defendant is permitted to withdraw his or her no contest plea and enter a plea of not guilty, the court dismisses the information, and the defendant is "released from all penalties and disabilities" (§ 1203.4, subd. (a))[11] resulting from the offense of which the defendant was convicted.

We look initially to the 1999 plea bargain to determine under which section, 1385 or 1203.4, the 1999 conviction was dismissed in 2008. First, according to the January 15, 1999 minute order, appellant pled no contest with the understanding if he obeyed all laws for one year, the People would "move to dismiss" the case. The phrase "dismiss the case" in the minute order is without qualification. One definition of "dismiss" is "to put out of judicial consideration."[12] The phrase "dismiss the case" in the January 15, 1999 minute order reasonably implied the 1999 would not be used as a strike in the future.

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[11] The pertinent subdivisions of Penal Code section 1203.4 in 1999 and 2008 are substantively the same, except the 2008 versions have been renumbered, and except as indicated *post*.

[12] Merriam-Webster's Collegiate Dictionary (10th ed. 1995) page 334.

In *People v. Barro* (2001) 93 Cal.App.4th 62 (*Barro*), the court held "dismissal under [Penal Code] section 1385 of the charge underlying a prior conviction which would otherwise qualify as a strike precludes the use of that prior conviction as a strike under the Three Strikes law." (*Id.* at p. 64.) On the other hand, a dismissal pursuant to Penal Code section 1203.4 does not prevent future use of the dismissed prior conviction as a strike. (*People v. Diaz* (1996) 41 Cal.App.4th 1424, 1429-1430; Pen. Code, § 1203.4, subd. (a).) Given the unqualified use of the term "dismissed" in the plea bargain and the fact that, as between section 1385 and 1203.4, only a dismissal under section 1385 would preclude future use of a dismissed prior conviction as a strike, the reasonable expectation of the parties at the time of appellant's 1999 no contest plea was the promised dismissal would be pursuant to Penal Code section 1385.

This is corroborated by the fact the January 15, 1999 minute order reflects the "People" were to move to dismiss the case. Penal Code section 1385, subdivision (a) provides, "The judge . . . may, . . . *upon the application of the prosecuting attorney*, . . . order an action to be dismissed." (Italics added.) On the other hand, Penal Code section 1203.4, subdivision (a) says "The *probationer* may make the application and change of plea . . . ." (Italics added.) Subdivision (c)(2) refers to a "defendant" who "petitions" for relief under subdivision (a).[13] Subdivision (e) precludes relief under section 1203.4 unless the prosecuting attorney is *given* notice of a "petition for relief." Nowhere does the section indicate the *People* can move for dismissal. The fact the 1999 plea bargain called for the *People* to move to dismiss the case points to a dismissal that was not pursuant to section 1203.4.

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[13] Appellant's October 2008 motion was a "petition," but did not purport to be a petition under Penal Code section 1203.4. Instead, it was an alternative petition for a writ of error *coram nobis*. The reference to subdivision (c)(2) above is to the subdivision as it existed in 2008, and subdivision (c)(2) did not appear in the 1999 version of the section.

That the reasonable expectation of the parties was that any dismissal of the 1999 conviction would preclude its use as a strike, and therefore would be a dismissal pursuant to Penal Code section 1385, is confirmed by the subsequent conduct of the parties and the court. First, appellant, in his October 2008 motion, including in his supporting declaration, made it abundantly clear it was his position that, at the time of the 1999 no contest plea, appellant, his counsel, the prosecutor, and the court understood dismissal of the 1999 conviction pursuant to the plea bargain would preclude its use as a strike.

Second, at the December 12, 2008 dismissal proceedings, the court asked the prosecutor if he had "[a]nything [he wished] to add . . . to that." That is, the court invited comment by the prosecutor upon appellant's motion. Although the prosecutor at the 2008 proceedings was not the same prosecutor who was present during the 1999 conviction proceedings, the prosecutor at the 2008 proceedings presumably had read appellant's motion.

This was a motion that maintained that, during the 1999 plea proceedings, "[appellant's] counsel, the court and the People represented that this matter would be dismissed *for all purposes one year* after the entry of his plea." (Italics added.) The motion asked the court on December 12, 2008, to "dismiss the case in a manner which renders the conviction a *nullity*." (Italics added.) The motion indicated that during the 1999 plea proceedings, appellant's counsel confirmed to appellant the statements of the prosecutor and court were "what they sounded like, a promise that the case would be *dismissed in all respects without the possibility that the conviction would be used against him in any way*." (Italics added.) Appellant said his counsel assured him "the case would be dismissed and would never be used against me as long as I stayed out of trouble for one year."

Nonetheless, when, during the December 12, 2008 proceedings, the court invited comment by the prosecutor upon appellant's motion, the prosecutor denied he had anything to add. That is, the prosecutor did not dispute appellant's representations, in his motion, concerning the plea bargain.

Third, during the December 12, 2008 proceedings, the trial court did not dispute appellant's representations, in his motion, concerning the plea bargain. And that motion called for the court to dismiss the 1999 conviction *as specific performance of 1999 plea bargain.* The trial court, on December 12, 2008, simply commented appellant's motion was well-written and granted it.[14] Indeed, the trial court stated, "That doesn't *exist* anymore."[15] (Italics added.) Fourth, even during the court trial, the prosecutor stated, the 1999 conviction had been "straight out dismissed." We conclude the trial court, on December 12, 2008, dismissed case No. BA173853 pursuant to Penal Code section 1385.

The problem in this case stems from two facts. On the one hand, (1) the 1999 plea bargain (as reflected in the January 15, 1999 minute order), (2) appellant's October 2008 motion to dismiss, (3) the reporter's transcript of the December 12, 2008 dismissal proceedings, and (4) the prosecutor's above quoted comment during the September 9, 2013 court trial, demonstrate the dismissal of case No. BA173853 was pursuant to Penal Code section 1385. On the other hand, the minute order of the December 12, 2008 dismissal proceedings indicates, and the comments of the trial court at the court trial suggest, dismissal was pursuant to Penal Code section 1203.4.

Whether recitals in clerk's minutes, or statements in a reporter's transcript, prevail depends upon the circumstances in each case. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) In light of the clear expressions dismissal would preclude use of the 1999 conviction as a strike, i.e., clear expressions dismissal would be pursuant to Penal Code section 1385, versus a clerk's entries in the December 12, 2008 minute order indicating

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[14] The trial court implicitly accepted appellant's representation in his declaration he had obeyed all laws during the year after his no contest plea. During the December 12, 2008 proceedings, the People indicated they had nothing to add, and never suggested appellant had violated any laws or terms of his probation.

[15] The trial court did not require the People to make a motion to dismiss pursuant to Penal Code section 1385. Instead, the trial court, on its own motion, dismissed the case pursuant to that section.

dismissal was pursuant to Penal Code section 1203.4, we conclude the clear expressions prevail over the minute order.

Moreover, those clear expressions prevail over the vague comments of the September 9, 2013 trial court suggesting dismissal was pursuant to Penal Code section 1203.4. That suggestion is consistent with the trial court's ultimate conclusion the 1999 conviction could be used as a strike. However, the only documents available to the trial court on September 9, 2013, when it made that suggestion, were the January 15, 1999 minute order, appellant's motion to dismiss, and the December 12, 2008 reporter's transcript and minute order, i.e., documents clearly indicating dismissal would be pursuant to Penal Code section 1385.

Penal Code section 1385, subdivision (a) requires that when an action is dismissed pursuant thereto, "The reasons for the dismissal must be set forth in an order entered upon the minutes." Of course, the December 12, 2008 minute order indicated dismissal was pursuant to Penal Code section 1203.4, not section 1385. However, based on the previous analysis, the minute order was in error. Moreover, in this case, dismissal pursuant to section 1385 did not require compliance with that section's requirement of a statement of reasons in the minutes, because the dismissal implemented a plea bargain. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 153, fn. 5.) We hold the 1999 conviction may not be used as a strike because case No. BA173853 was previously dismissed pursuant to Penal Code section 1385 (*Barro, supra*, 93 Cal.App.4th at p. 68);[16] therefore, we will reverse the true finding as to strike allegation and dismiss it with prejudice. We will also

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[16] We asked for supplemental briefing on the impact, if any, of *Garcia v. Superior Court* (1997) 14 Cal.4th 953, and especially *People v. Level* (2002) 97 Cal.App.4th 1208, on appellant's argument. Respondent, relying on *Level*, maintains that, because appellant's 1999 conviction was based on a plea bargain, he is estopped to challenge it. Respondent's reliance on *Level* is misplaced because, in *Level*, unlike in the present case, the defendant received the benefit of his bargain. Appellant did not receive that benefit because part of his bargain was the People would move to dismiss the case pursuant to Penal Code section 1385 and that did not happen. In light of our analysis, there is no need to reach the issue of whether the 1999 conviction was reduced to a misdemeanor with the result it could not be used as a strike.

vacate appellant's sentence and remand for resentencing. (Cf. *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455-1458; *People v. Savala* (1983) 147 Cal.App.3d 63, 66-70.) We express no opinion concerning what appellant's sentence should be following remand.

5. *Imposition Of The Penal Code Section 667.5, Subdivision (b) Enhancement Was Proper*.

The information alleged, inter alia, "as to count(s) 1 and 2 pursuant to *Penal Code section 667.5(b)* that [appellant], has suffered the following prior conviction(s)." (Italics added.) The information then alleged two prior convictions (one in 1997, the other in 2001), a May 7, 2010 conviction in case No. TA111128 for a violation of Health and Safety Code section 11351.5, "and that a term was served *as described in Penal Code section 667.5* for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term." (Italics added.) Penal Code section 667.5, subdivision (b), in relevant part, requires a one-year enhancement "for each prior separate prison term."

At the September 9, 2013 court trial on the prior conviction allegations, and after appellant consulted with his counsel, appellant's counsel represented appellant would "admit the one-year prior[]." The prosecutor advised appellant he had a right to a court trial "regarding your prior convictions that you suffered in the past pursuant to Penal Code section 667.5(b), one-year priors." (*Sic*.)

After appellant was advised of his rights, the following occurred: "[The Prosecutor:] Do you give up those rights and admit that you suffered a conviction back on May 7, 2010, Los Angeles Superior Court in case number TA111128 for violation of Health and Safety Code section 11351.5? Do you admit or deny that prior conviction, sir? [¶] The Defendant: Admit." Appellant also admitted the other two prior convictions. Appellant's counsel joined in the waivers and stipulation, and the court stated without objection, "[appellant] has admitted to three one-year priors pursuant to Penal Code section 667[, subdivision] (b)." (*Sic*.) Appellant's sentence included one-

year for the Penal Code section 667.5, subdivision (b) enhancement based on case No. TA111128. The court struck the remaining "one year priors."

Appellant claims imposition of the Penal Code section 667.5, subdivision (b) enhancement based on case No. TA111128 was improper because he did not admit he served a separate prison term for that prior conviction. We reject the claim. Appellant correctly concedes during the September 9, 2013 court trial, he admitted he suffered the prior conviction in case No. TA111128. Appellant, who was represented by counsel, thereby admitted as great a charge as was contained in the information, which effectively alleged he served a separate prison term for that prior conviction. Accordingly, appellant admitted he suffered the prior conviction in case No. TA111128 and served a "separate prison term" therefor within the meaning of Penal Code section 667.5, subdivision (b). The trial court properly imposed the one-year enhancement based on that prior conviction. (Cf. *People v. Cardenas* (1987) 192 Cal.App.3d 51, 61 (*Cardenas*); *People v. Welge* (1980) 101 Cal.App.3d 616, 623-624; see *People v. Ebner* (1966) 64 Cal.2d 297, 303-304; *People v. Martinez* (1985) 175 Cal.App.3d 881, 894-895.)[17]

6. *Appellant Is Entitled to Additional Precommitment Credit*.

Appellant was arrested on February 1, 2013, and remained in custody until the court sentenced him on September 9, 2013, a total of 221 days, inclusive. On September 9, 2013, the trial court awarded appellant a total of 253 days of precommitment credit, consisting of 220 days of custody credit and 33 days of conduct credit.

Appellant claims he is entitled to 221 days of custody credit and 221 days of conduct credit. We partially agree. He is entitled to 221 days of custody credit. (*People*

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[17] *People v. Golde* (2008) 163 Cal.App.4th 101 (*Golde*), cited by appellant, does not compel a contrary conclusion. *Golde* concluded an admission to a prior conviction for negligent discharge of a firearm did not establish personal use of the firearm, a requirement for the prior conviction to qualify as a strike. However, *Golde* did not discuss *Cardenas* or the other cases cited above. In the present case, the information effectively alleged appellant served a separate prison term for the prior conviction in case No. TA111128. *Golde* did not discuss whether the information in that case alleged personal use of the firearm. Cases are not authority for propositions not considered.

v. Smith (1989) 211 Cal.App.3d 523, 525-527; Pen. Code, § 2900.5, subd. (a).) There is no dispute appellant is entitled to conduct credit as calculated under Penal Code section 4019, effective October 1, 2011. He is entitled to 220 days (not 221 days) of conduct credit. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 588; Pen. Code, § 4019, subds. (b), (c); see *In re Marquez* (2003) 30 Cal.4th 14, 25-26.) Appellant is thus entitled to one additional day of custody credit and 187 additional days of conduct credit.[18] The trial court must amend its September 9, 2013 sentencing minute order, and the abstract of judgment, accordingly. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466; *People v. Solorzano* (1978) 84 Cal.App.3d 413, 415, 417.)

7. *Penal Code Section 654 Prohibits Multiple Punishment on Counts 1 and 2*.

Appellant's sentence included eight years on count 1 with a concurrent four years on count 2, plus one year for the Penal Code section 12022, subdivision (b)(1) enhancement as to count 2.[19] Respondent concedes Penal Code section 654 barred punishment on count 2 (which, as between counts 1 and 2, has the lesser sentence). We accept the concession. (See *People v. Bradley* (2003) 111 Cal.App.4th 765, 769, fn. 3.)

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[18] Penal Code section 2933.1, subdivisions (a) and (c), when applicable, limit a precommitment conduct credit award to 15 percent of the custody credit award. The fact 33 is 15 percent of 220 suggests the trial court applied the 15 percent limitation of subdivisions (a) and (c). Respondent concedes that limitation is inapplicable because neither of the present offenses is a violent felony for purposes of Penal Code section 667.5, subdivision (c), a requirement for application of that limitation. We accept the concession. Respondent, without citation to case authority, argues the 20 percent limitation of Penal Code section 1170.12, subdivision (a)(5) applies. We reject that argument because that limitation applies to postcommitment credits, not precommitment credits. (*People v. Henson* (1997) 57 Cal.App.4th 1380, 1385, fn. 5; *People v. Caceres* (1997) 52 Cal.App.4th 106, 110.)

[19] The court sentenced appellant to prison for eight years on count 1 (the four-year upper term, doubled pursuant to the Three Strikes law) with a concurrent four years on count 2 (the two-year middle term, doubled pursuant to the Three Strikes law), plus five years for the Penal Code section 667, subdivision (a) enhancement and one year for the Penal Code section 667.5, subdivision (b) enhancement.

DISPOSITION

The judgment is affirmed, except (1) the true finding as to the allegation appellant suffered a strike based on a January 15, 1999 conviction for criminal threats in case No. BA173853 is reversed and the allegation is dismissed with prejudice, (2) appellant's sentence is vacated, and (3) the matter is remanded for resentencing consistent with this opinion, including parts 4 through 7 of the Discussion. The trial court is directed to correct its sentencing minute order accordingly and to forward to the Department of Corrections an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.