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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIC EUSTAQUIO et al., Defendants and Appellants.	B261186 (Los Angeles County Super. Ct. Nos. BA420551, BA403845)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver. Affirmed in part, reversed in part, and remanded with directions.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant Eric Eustaquio.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant Luis F. Villagran.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant

Attorney General, Lance E. Winters, Assistant Attorney General, Roberta L. Davis and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Eric Eustaquio and Luis F. Villagran appeal from their convictions for assault with a semiautomatic firearm and possession of a firearm by a felon. They contend the trial court abused its discretion in refusing to conduct an in camera examination of police personnel records and in admitting evidence concerning witness intimidation and the Mexican Mafia, and the prosecution committed misconduct by describing evidence that was not admitted at trial. Villagran further contends the court abused its discretion by admitting evidence of his prior arrest, and Eustaquio contends his sentence was unauthorized and the trial court abused its discretion in denying his motion to dismiss a prior "strike" conviction for purposes of sentencing. We conclude Eustaquio's sentence was unauthorized, and the court abused its discretion in denying his motion to dismiss a prior strike. Otherwise, we affirm.

BACKGROUND

On January 14, 2014, Eustaquio and Villagran drove up to Celso Urbano while he was crossing 42nd Street in Los Angeles. In an attempt to elicit potentially rival gang information, they asked Urbano where he was from. One or both of the defendants then exited the car and shot at Urbano three or four times, striking him once in the hand. The two men ran back to the car and drove away at high speed.

Los Angeles Police Department Officers Luis Lopez and Ismael Tamayo witnessed two of the muzzle flashes and saw that

Urbano was bleeding. They pursued defendants and saw Eustaquio, the driver of the fleeing vehicle, throw something out of the passenger-side window. When they ultimately apprehended defendants, they recovered a two-way radio and a black cloth glove on the floor of the passenger side of the car. Returning to where Eustaquio had thrown something from the car, the officers recovered a semiautomatic handgun loaded with rounds that were the same brand as two spent semiautomatic shell casings recovered at the scene of the shooting. Defendants were tested for gunshot residue, but the results were inconclusive.

Defendants were charged with attempted murder (Pen. Code, §§ 664/187, subd. (a)),[1] shooting from a motor vehicle (§ 26100, subd. (c)), assault with a semiautomatic firearm (§ 245, subd. (b)), and possession of a firearm by a felon (§ 29800, subd. (a)(1)), and it was alleged the offenses were gang related (§ 186.22, subd. (b)(1)(C)) and defendants had suffered prior strike convictions (§§ 667, subds. (a)(1) & (d), 1170.12, subd. (b)) and served prior prison terms (§ 667.5, subd. (b)). Defendants pleaded not guilty and denied the special allegations.

A jury deadlocked on the attempted murder charge, resulting in a mistrial on that charge, but found defendants guilty of assault with a semiautomatic weapon and possession of a gun by a felon, and found the gang enhancements to be true. Villagran admitted the prior conviction allegations, and in a bifurcated proceeding the court found Eustaquio had suffered the alleged prior convictions.

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[1] Undesignated statutory references will be to the Penal Code.

The court sentenced Villagran to the upper term of nine years for the assault, doubled to 18 years pursuant to the "Three Strikes" law on count 6, plus a consecutive 10 years for the gang section 186.22, subdivision (b)(1)(C), enhancement, plus five years for the recidivism enhancement, for a total of 33 years. The court found Eustaquio to be in violation of parole, and sentenced him 25 years to life for the assault, plus a consecutive 10 years for the gang enhancement and five years for the recidivism enhancement.

Both defendants appeal.

DISCUSSION

I. *Pitchess*[2] Motion

Before trial, Villagran moved for production of evidence of any citizen complaints made against Officers Lopez and Tamayo concerning their bias, dishonesty, or moral turpitude. In support of the motion, defense counsel stated in a declaration that the officers indicated in their police reports that they saw muzzle flashes when Urbano was shot, heard two gunshots coming from defendants' vehicle, saw that Urbano was bleeding, and saw the driver of defendants' car throw something out of the passenger side window. Counsel declared that contrary to the report, the evidence would show "there were no muzzle gunshots or muzzle flash as described by the officers," "the officers could not have seen blood running down the hand of Mr. Urbano," and "the driver of the vehicle never made a throwing motion and no black object came out of the passenger side window." Counsel declared "[t]he evidence will show that the officers fabricated their

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 532.

observations due to their unsupported belief the occupants of the vehicle were involved in criminal activity."

The trial court denied Villagran's motion, finding that mere denial of a charge does not show good cause for production of police personnel records. Defendants contend this was an abuse of discretion.

When discovery is sought of peace officer personnel records (a *Pitchess* motion), the party seeking the records must submit an affidavit showing good cause to produce them. (Evid. Code, § 1043, subd. (b)(3).)

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), our Supreme Court clarified the good-cause requirement for discovery of police personnel records. In addition to a specific description of the discovery sought and a demonstration of a logical link between the defense proposed and the pending charge, to satisfy "the first part of the good cause requirement" and establish "the materiality to the pending litigation of the discovery sought," the "defendant need only demonstrate that the scenario of alleged officer misconduct could or might have occurred." (*Id*. at pp. 1016, 1021.) To make this showing, the defendant must present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents," such as the police report. (*Id*. at p. 1025.) A "plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id*. at p. 1026.) The good cause requirement "is a 'relatively low threshold for discovery.'" (*Id*. at p. 1019.) In ruling on a *Pitchess* motion, the trial court does not evaluate the

credibility, believability or persuasiveness of the defendant's factual scenario. (*Id*. at p. 1026.) "A *Pitchess* motion need not . . . provide a motive for the alleged officer misconduct." (*Id*. at p. 1025.) "The statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense." (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.) We review a trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Villagran's counsel's declaration sets forth no plausible factual scenario of any sort, but merely denied that officers Lopez and Tamayo saw and heard gunshots, saw the victim bleeding, or saw one of the defendants defenestrate the weapon. The officers fabricated these observations, counsel declared, because they believed defendants "were involved in criminal activity" (presumably activity other than fleeing from police in a vehicle). (See Veh. Code, §§ 2800.1, 2800.2.) But defense counsel did not deny (nor did he acknowledge) that Urbano had been shot and was actually bleeding when police returned after arresting defendants, that cartridge casings were found at the scene, that defendants fled at high speed, or that a gun matching the casings was recovered where police saw defendants throw it. These facts establish that shots were fired, blood was spilled, the gun was at least circumstantially connected to defendants, and police knew where to look for it, making it immaterial whether the officers heard the shots or saw the muzzle flashes and blood. The only material fact in counsel's declaration was that the officers lied about seeing the gun in defendants' actual possession—before they threw it away. But the declaration set forth no "specific

factual scenario of officer misconduct that is plausible," as *Warrick* requires. It merely denied the direct evidence of possession while ignoring the circumstantial evidence. Counsel's declaration therefore failed to establish good cause. The trial court therefore properly refused to conduct an in camera hearing concerning Lopez's and Tamayo's personnel records.

Defendants rely on *People v. Johnson* (2004) 118 Cal.App.4th 292 (*Johnson*) and *Brant v. Superior Court* (2003) 108 Cal.App.4th 100 (*Brant*), neither of which assist them. In *Johnson*, the defendant was charged with two counts of attempted possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) based on a Santa Ana police officer's claim that the "defendant asked to purchase 'chiva' (slang for heroin) and 'powder' (slang for cocaine) from the officer." (*Johnson*, at p. 296.) In support of Johnson's motion for production of the officer's personnel records, defense counsel declared on information and belief that the officer's claim was untrue because, counsel stated, "defendant 'maintains that he never asked the officer for "chiva" or "powder" or negotiated for the purchase of either substance,'" and "defendant never took possession of any packages of the purported narcotics." (*Id.* at p. 303.) The trial court summarily denied the motion, but the appellate court reversed, holding the motion demonstrated good cause for an in camera inspection of responsive documents because it "set forth a sufficient factual foundation showing [the officer's] truthfulness was material to the case." (*Ibid.*)

In *Brant*, police stopped the defendant because they had observed him driving with his car stereo playing too loud. (108 Cal.App.4th at p. 103.) They discovered his driver's license was suspended, prepared a citation, and searched his vehicle, finding

the drug "Ecstasy." (*Ibid*.) Brant moved for pretrial discovery of the officer's personnel records, specifically complaints about false arrest, planting evidence, and falsifying reports. (*Ibid*.) In support of the motion, defense counsel declared the music emanating from the defendant's car was not loud, and music coming from several nearby nightclubs in the area was much louder. (*Id*. at p. 104.) The appellate court reversed, concluding counsel's declaration that the loud music police heard was coming from nearby nightclubs, not Brant's car, demonstrated good cause for discovery of complaints against the officers. (*Id*. at p. 108.)

Brant is distinguishable because there, defense counsel did more than merely deny what police reported, he offered a plausible counter-scenario: the music police heard came from surrounding nightclubs, not Brant's car. In *Johnson*, a simple denial that Johnson had asked for drugs plausibly established that he had not attempted to possess a controlled substance. Here, defendants' bare denial of what police had reported failed to establish plausible misconduct. If the officers lied about seeing defendants throw the gun from their vehicle, then one of two scenarios had to be true: Either the people who actually abandoned the gun coincidentally did so along defendants' escape route, police somehow knew where to look for it; or the police somehow obtained the weapon used to shoot Urbano and planted it along the escape route. Defendants do not contend either scenario occurred, and in any event both are implausible.

II. Evidence of Villagran's Prior Arrests

During direct examination of Officer Guillermo Espinoza, the prosecution's gang expert, the prosecutor asked Espinoza how he knew Villagran was a gang member. Espinoza replied that he had had numerous contacts with Villagran and had "arrested him

numerous times." The trial court overruled Villagran's objection to the testimony, but outside the presence of the jury the court admonished the prosecutor to ask Espinoza not to reference prior arrests. Then the following discussion took place:

Defense counsel: "Are we going to say advise the jury in some respect?"

The Court: "I'll strike it and I'll advise the jury. I didn't want to –"

Prosecutor: "Do you want to draw attention to it?"

The Court: "I'll certainly strike it from the record. You can tell me after lunch if you want me to admonish them."

No further discussion was had concerning Espinoza's reference to Villagran's arrests, and defense counsel never asked for a further instruction or admonition. The trial court did not order the testimony stricken or admonish the jury not to consider it.

Later, when Espinoza was relating the contents of a field interview card, he testified, "The date on this one is January 14, 2010, approximately 6 PM 41st Street and Vermont and also states his gang membership to Street Villains and he was arrested." The court struck what it called "the last portion" of the statement and admonished the jury that anything stricken from the record was not evidence and could not be considered.

Still later, Villagran's counsel stipulated in the presence of the jury that Villagran had been previously convicted of a felony prohibiting the possession of a firearm.

Villagran argues the court prejudicially erred when it permitted the prosecution to admit evidence of his prior arrests. We disagree.

Evidence of an accused's prior arrests is inadmissible. (*People v. Medina* (1995) 11 Cal.4th 694, 769.) It was therefor error for the trial court to overrule Villagran's objection to Espinoza's reference to his prior arrests.

But the error was nonprejudicial under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is required under the federal Constitution unless the error was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error requires reversal only if it is reasonably probable that the error had an effect on the verdict].) The jury was informed through unchallenged gang expert testimony that Villagran was a gang member who had had numerous contacts with police. Further, Villagran's defense attorney stipulated in open court to a prior conviction, which necessarily entailed a prior arrest. Espinoza's passing reference to Villagran's prior arrests was cumulative to his extensive involvement with police and admission that he had been arrested in the past. We therefore conclude no probability exists that a result more favorable to Villagran would have been reached but for admission of the evidence.

III. Witness Intimidation

Urbano's testimony at trial differed somewhat from his testimony at the preliminary hearing. On cross-examination, Villagran's attorney attempted to discredit Urbano by highlighting the discrepancies. Or redirect examination, the prosecution asked Urbano whether someone had tried to dissuade him from testifying at the preliminary hearing. Over the defense's objection, Urbano testified as follows:

Prosecution: "[Before the preliminary hearing,] [d]id somebody—were things said to you that discouraged you from testifying?"

Urbano: "Like not directly but subliminally. They were right next to me but they were like they were right next to me and stuff like that. They were just like . . . ."

Prosecution: "Did they actually say something out loud to you that—"

Urbano: "Yeah."

Prosecution: "About testifying."

Urbano: "Yeah."

[¶] . . . [¶]

Prosecution: "Did that scare you?"

Urbano: "Yes."

Prosecution: "That was just right before you came to testify?"

Urbano: "Yes."

The speakers were never identified, and what specifically they said to Urbano was never described.

Defendants contend the trial court erred in admitting the evidence of witness intimidation because it was more unduly prejudicial than probative. We disagree.

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) Nevertheless, relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (Evid. Code, § 352.) In this context, unduly prejudicial evidence is evidence that would

cause the jury to "prejudge" a person on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) We review the trial court's decision on whether evidence is relevant and not unduly prejudicial for abuse of discretion. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, evidence that Urbano feared to testify at the preliminary hearing was relevant to his credibility, which had been challenged by the defense on the ground that his testimony was inconsistent. Defendants argue Urbano's testimony about intimidation was prejudicial to them because it bolstered his testimony that they were the perpetrators. This is probably true. But the test is not whether the evidence was prejudicial—prosecution evidence is usually prejudicial to a defendant—but whether it was *unduly* prejudicial. The trial court could reasonably conclude that Urbano's fleeting, vague testimony about intimidation had no unduly prejudicial impact on defendants. He never identified who spoke to him before the preliminary hearing, never described what was said, and established no connection between the speakers and either defendant. The court acted within its discretion in admitting the evidence.

IV. Evidence Regarding the Mexican Mafia

During his testimony, Officer Espinoza was asked to interpret photographs depicting graffiti attributed to defendants'

street gang, the Street Villains. Interpreting a graffito depicting "STxV13," Espinoza testified the "STxV" represented the Street Villains, and the "13" represented the Mexican Mafia, because "M" is the 13th letter of the alphabet. Espinoza testified the Mexican Mafia is a prison gang that "controls all southern California Hispanic gang members from Bakersfield all the way down to even parts of Mexico, Tijuana," and "[a]ll Southern California gang members or surenos identify themselves with the letter 13 to show their affiliation to the Mexican Mafia." Espinoza testified that if a gang member gets an order from the Mexican Mafia, he must obey it.

Defendants contend their trial counsel rendered ineffective assistance by failing to object to Espinoza's testimony concerning the Mexican Mafia. We disagree.

"The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) A criminal defendant must show both deficient performance—"that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates," and prejudice—"that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 386; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.) In evaluating a defendant's showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms" (*Strickland*, *supra*, at p. 688), an appellate court accords "great deference to the tactical decisions of trial counsel in order to avoid 'second-guessing counsel's tactics and chilling vigorous advocacy by tempting counsel "to defend himself [or herself] against a claim of ineffective assistance after

trial rather than to defend his or her client against criminal charges at trial . . . .'"" (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070.) "'However, "deferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. '[D]eference is not abdication' [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions."'" (*Id*. at p. 1070.)

"'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] . . . . "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' [Citation.] If the record on appeal ""sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,'" and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.'" (*People v. Vines* (2011) 51 Cal.4th 830, 876.) Thus, in "the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel . . . unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

Here, the record sheds no light on why defendants' attorneys failed to object to Espinoza's testimony concerning the Mexican Mafia. Therefore, we must reject defendants ineffective assistance claim unless there could be no conceivable reason for trial counsels' decision. However, it is conceivable that the defense attorneys decided that objecting to Espinoza's references to the Mexican Mafia would have highlighted and reinforced them. The testimony itself was fleeting and tangential, and neither Espinoza nor the prosecution contended that the Mexican Mafia had anything to do with defendants or this case. It would therefore have been reasonable for defense counsel to let the references slide by, unremarked and unremembered. "Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1202.) Under the applicable deferential standard, we will not second guess a trial attorney's reasonable tactical decisions.

V. Prosecutorial Misconduct

During the prosecution's case-in-chief, Officer Tamayo testified he saw a black cloth glove on the floor of defendants' car when he arrested them. During closing argument, the prosecutor told the jury: "That glove which was actually really interesting. When I first pulled it out I didn't—there is one glove and it was inside out as it was found—I'm turning it around now. Found." The trial court overruled Villagran's counsel's objection that no evidence showed the glove was inside out when it was found.

Defendants argue the prosecutor committed misconduct by describing the glove as being inside out when Tamayo found it, which was outside the evidence. We disagree.

A prosecutor's misconduct violates due process if it infects a trial with unfairness. (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) Less egregious conduct may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*Ibid.*) If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument and determine whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*People v. Samayoa* (1997) 15 Cal.4th 795, 837.) But a prosecutor may not suggest the existence of facts outside of the record by arguing matters not in evidence (*People v. Benson* (1990) 52 Cal.3d 754, 794-795); mischaracterize the evidence (*People v. Hill* (1998) 17 Cal.4th 800, 823); or appeal to the jury's sympathy, passion, or prejudice (*People v. Fields* (1983) 35 Cal.3d 329, 362). Although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Here, the prosecutor told the jury the glove Tamayo saw on the floor of defendants' car was inside out when it was found, which was unsupported by any evidence. Defendants argue the prosecutor's representation was a "deceptive and reprehensible" misstatement of the evidence, but they fail to explain its import, and we discern none. Assuming the glove was inculpatory, the fact that it was inside out made it no more inculpatory. The prosecutor's error was therefore harmless under any standard.

Defendants argue the state of the glove "had great importance to the identity of the shooter," "implied if not stated that the glove was used in the assault," "implied haste," and "created a false consistency with the evidence in the record that the police came upon the [defendants] unexpectedly and hastily." We disagree. The state of the glove was no more probative of the identity of the shooter than the mere existence of the glove. And the defendants' haste was amply described elsewhere by Officer Lopez, who testified defendants ran back to their car after shooting Urbano and fled the scene "at a high rate of speed." Under these circumstances, no reasonable probability exists that defendants would have achieved a different result absent the prosecution's misstatement about the state of the glove.

VI. Eustaquio's Request for a Continuance

On October 14, 2014, more than seven months after the preliminary hearing and two days before trial, Eustaquio requested that Steven Flannagan be permitted to substitute in as his counsel. The court determined that all other attorneys in the case were ready for trial and informed Flannagan that it would not allow the substitution unless he too was ready to proceed to trial. Flannagan informed the court he was not ready, but asked for a continuance. The court denied the request and denied defendant's motion to substitute counsel.

Eustaquio contends the court abused its discretion in denying his request for a continuance. We disagree.

"Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend

without counsel. [Citation.] Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation.] There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; accord *People v. Howard* (1992) 1 Cal.4th 1132, 1171.) "An important factor for a trial court to consider is whether a continuance would be useful." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) "A defendant is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory." (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506.) The defendant bears the burden of demonstrating good cause for a continuance. (*Ibid.*)

Here, nothing in the record suggests Eustaquio made a good faith, diligent effort to obtain new counsel before the scheduled trial date. He waited more than seven months after the preliminary hearing, until two days before trial, to attempt to substitute counsel, and made no showing that the substitution could not have occurred earlier. "The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel." (*People v. Kaiser* (1980) 113 Cal.App.3d 754, 761.) The trial court therefore acted within its discretion in denying the continuance.

VII. Eustaquio's Third "Strike"—2010 Misdemeanor Vandalism

Eustaquio was charged with two prior "strike" convictions, one of which was for misdemeanor vandalism (graffiti) in 2010,

which although a misdemeanor, was sentenced as a felony because the offense was gang related. (§§ 186.22, 594.) The trial court here found both convictions were strikes within the meaning of the Three Strikes law, and therefore sentenced Eustaquio as a third strike offender. Eustaquio argues that although the misdemeanor vandalism conviction was treated as a felony for sentencing purposes, it is not a felony for purposes of the Three Strikes law. Therefore, he argues, his sentence was unauthorized. Respondent concedes the point, and we agree. A misdemeanor punished as a felony because it was gang related does not constitute a strike for purposes of the Three Strikes law. (*People v. Ulloa* (2009) 175 Cal.App.4th 405, 413.) The case must therefore be remanded for resentencing. (See *People v. Calderon* (1993) 20 Cal.App.4th 82, 88.)

VIII. Eustaquio's Second "Strike"—2003 Robbery

In 1999, the superior court sustained a petition alleging Eustaquio, then 14, threatened to kill his mother. In 2003, the superior court sustained a juvenile petition that alleged Eustaquio committed a robbery when he was 17. (§ 211.) The police report concerning that offense stated that on January 2, 2003, Eustaquio and an accomplice approached a 14-year-old boy, demanded that he give them everything he had, and took the victim's ring. In 2008, Eustaquio was convicted of possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) In 2013, Eustaquio pleaded no contest to a charge of possession of a weapon by a felon. When he moved to dismiss a strike allegation concerning the 2003 petition, the trial court granted the motion, citing "the age of the prior strike and age of the defendant at the time of the incident." Eustaquio was sentenced to three years in

prison, and was on parole when he committed the current offenses.

Before sentencing here, Eustaquio moved to dismiss the prior strike allegations—2003 robbery and 2010 vandalism—on the ground that the offenses fell outside the spirit of the Three Strikes law, as one was for a misdemeanor, *ante*, and the other occurred more than 10 years ago, when he was 17. The trial court denied the motion, finding that from the time he was 17 years old, Eustaquio had participated in "continuing gang activity and lifestyle," had "continuous contacts with law enforcement in some fashion," and is "continuing to participate in that lifestyle."

Eustaquio argues the trial court abused its discretion in denying his motion to dismiss the strike allegations. We agree.

In *People v. Romero*, our Supreme Court affirmed the authority of trial courts to strike prior felony conviction allegations under section 1385, in cases brought under the Three Strikes law. (*People v. Romero* (1996) 13 Cal.4th 497, 529-530.) In "ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his 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 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." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

On appeal, the burden is on the party attacking the sentence to "'clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]'" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) Thus, in reviewing sentencing matters appellate courts must apply an "extremely deferential and restrained standard." (*Id*. at p. 981.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Here, Eustaquio's one prior strike consisted of a 2003 robbery, where he stole a ring. His other prior offenses were threatening his mother when he was 14, possessing a controlled substance in 2008, misdemeanor vandalism in 2010, and illegally possessing a firearm in 2013. And in the instant case he committed assault with a semiautomatic weapon and possession of a gun by a felon. Nothing about this string of crimes suggests Eustaquio incorrigibly commits serious or violent crimes within

the meaning of the Three Strikes law, and the trial court made no such finding. Instead, the court denied his *Romero* motion because it found he continues to participate in "gang activity and lifestyle" and "continuous contacts with law enforcement in some fashion." But participating in gang activity and a gang lifestyle and having continuous contacts with law enforcement are not of themselves illegal. Although Eustaquio deserves a prison sentence of up to 33 years based on the current offenses and his first (and only) strike, he also deserves a lesser punishment, which defense counsel estimated could be as much as 24 years in prison. (See *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250 ["Every defendant who appears for sentencing with two strikes against him is deserving of a prison sentence of at least twenty-five years to life. But some of those defendants may also be deserving of a lesser punishment. This is precisely what section 1385 and *Romero* are all about"].) The court therefore abused its discretion in denying his *Romero* motion.

DISPOSITION

The judgment is affirmed as to Villagran.

Eustaquio's sentence is vacated, and the matter is remanded for resentencing in accordance with this opinion. In all other respects the judgment as to Eustaquio is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J. LUI, J.