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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. LAMAR BECKETT, Defendant and Appellant.	B269829 (Los Angeles County Super. Ct. No. BA437867)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed in part, reversed in part, and remanded.

Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Lamar Beckett (defendant) was convicted at trial of second degree robbery (Pen. Code, § 211[1]) and sentenced to nine years' imprisonment.

On appeal, defendant contends that: (1) the prosecutor committed misconduct when cross-examining defendant about some of his prior convictions; and (2) the trial court improperly imposed a sentencing enhancement for a prior serious felony conviction pursuant to section 667, subdivision (a)(1). We reject these contentions, affirm the conviction, but remand the matter to the trial court for the limited purpose of deciding whether to impose or strike three sentencing enhancements for prior prison terms pursuant to section 667.5, subdivision (b).

BACKGROUND

I. Factual Background

A. Prosecution Evidence

Lauren Mobley testified that she was walking along Spring Street in downtown Los Angeles with a group of friends when she noticed defendant behind her, pushing a bicycle. Defendant came up to her from behind and pulled the strap of her purse forcefully, attempting to take the purse. Mobley screamed, instinctively held on to the purse strap, and fell as a result of defendant pulling on the purse strap. Defendant ran off with the purse.

Defendant ran about 21 feet before he encountered Don Garza, a bystander, who recovered the purse from defendant and

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[1] All statutory citations are to the Penal Code unless otherwise indicated.

returned it to Mobley. Garza provided a version of the events leading up to his intervening that was similar to Mobley's testimony. Eventually, defendant left the scene of the incident. The police arrived soon thereafter, spoke to Mobley, and ultimately apprehended defendant.

B. Defense Evidence

Defendant testified that he was walking with his bicycle north on Spring Street while carrying a backpack and his daughter's drawings. Garza jaywalked across the street and "cut in front" of him. Defendant felt fatigued and experienced chest pains, and reached for a nearby rail. He then saw Mobley fall down. Defendant's bike, which had a flat tire, fell into the dip of a tree planter. Defendant fell toward the tree. Defendant grabbed the tree and prevented his fall.

Defendant further testified that he believed there was a possibility he became "tangled up with" Mobley during his fall. Defendant stated he did not know what he grabbed to catch his balance, but he claimed that he never had Mobley's purse. Shortly after Mobley fell down, several individuals started striking defendant, including Garza who punched defendant in the face. People in the crowd told defendant to leave.

Defendant left the area to escape the crowd. About 25 minutes later, he was stopped by the police. The police asked if he took anything from "the lady," and defendant said, "No."

II. Procedural Background

Defendant was charged in a one-count information with second degree robbery in violation of section 211. The information also alleged three types of sentencing enhancements

relevant to this appeal. Pursuant to section 667, subdivisions (b) through (j), and section 1170.12, the information alleged that defendant sustained a prior strike conviction, namely, a 1993 robbery conviction. Pursuant to section 667, subdivision (a)(1), the information alleged that defendant sustained a prior conviction for a serious felony, namely, the same 1993 robbery conviction alleged as a prior strike. Pursuant to section 667.5, subdivision (b), the information alleged that defendant sustained three prior convictions resulting in prison terms.

Following trial, the jury found defendant guilty of second degree robbery. At a subsequent hearing, defendant admitted that he sustained the 1993 robbery conviction and the three prison priors alleged in the information.

The trial court ultimately sentenced defendant to state prison for a term of nine years, consisting of the low term of two years for the robbery, which was doubled due to defendant's prior strike conviction, plus five years for the prior serious felony conviction enhancement. The sentence did not include any enhancement for the alleged prison priors.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Prosecutorial Misconduct

Defendant claims the prosecutor committed misconduct when she cross-examined defendant by asking him about prior convictions purportedly "in defiance" of the trial court's order limiting impeachment to only certain convictions. We hold defendant forfeited his claim of prosecutorial misconduct by failing to object at trial.

A. Applicable Law

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

It may be misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a prior court order. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) However, limited questioning that elicits inadmissible evidence is not misconduct where it does not "constitute[] a pattern of conduct so egregious that it render[s] the trial fundamentally unfair." (*People v. Cox* (2003) 30 Cal.4th 916, 952, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 380, 421 fn. 22.)

With respect to impeaching a witness with his or her prior convictions, impeachment with a felony conviction is only proper if the underlying felony involves "moral turpitude," i.e., a "readiness to do evil." (*People v. Castro* (1985) 38 Cal.3d 301, 314, 317.) A witness may not be impeached with the mere fact of a misdemeanor conviction, but impeachment with the underlying conduct for the misdemeanor is permissible if it involves moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 297, 300, fns.

7 & 14, superseded on other grounds as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460-1462.)

B. Relevant Proceedings

In the People's trial brief, the prosecutor identified various prior convictions that might serve as impeachment should defendant testify: (1) a 1993 felony conviction for robbery (§ 211); (2) a 2003 misdemeanor conviction for domestic violence (§ 273.5, subd. (a)); (3) a 2005 felony conviction for domestic violence (§ 273.5, subd. (a)); and (4) three felony convictions in 2012, 2013, and 2014, for drug possession (Health & Saf. Code, § 11350, subd. (a)).

After the People's case-in-chief, the defense notified the trial court that defendant would testify, which led to a hearing outside the presence of the jury regarding what prior convictions the prosecution could use to impeach defendant's credibility. The prosecutor argued that the "strike conviction" (i.e., the 1993 felony robbery conviction) was a "crime of violence" and that both the misdemeanor and felony prior convictions for domestic violence were crimes of moral turpitude. Accordingly, the prosecutor contended that all three convictions could be used to impeach defendant. Defendant's counsel agreed that the 1993 robbery conviction and the 2005 felony conviction for domestic violence could be used to impeach defendant. Defendant's counsel, however, argued that "I don't think any of the other convictions are fair game for impeachment purposes." In response to the foregoing, the trial stated:

> "I'm not going to tell the people how to try their case, so I'm going to leave the 11350's alone for the moment.

"Will I permit [the prosecutor] to ask [defendant] whether or not he has been convicted of multiple felony charges? That is a completely permissible phraseology and question to pose.

"Dependent upon his testimony, the People may be able to explore the nature of the charges with respect to the Penal Code section 211 and the 273.5. But insofar as, I have indicated earlier, the relevance of felony convictions simply to call into question the v[e]racity of his testimony. What those convictions were at this point are not relevant.

"So I am directing [the prosecutor] to pose the question as I have articulated it. I will call counsel to sidebar if I believe any door is opened in the course of his testimony."

The trial court did not make any specific mention of whether defendant's 2003 misdemeanor domestic violence conviction or underlying conduct could be used to impeach defendant.

Defendant then testified, and the prosecutor proceeded to cross-examine him. During that cross-examination, the following exchange occurred concerning defendant's prior convictions:

"[Prosecutor:] In 1993, sir, did you suffer a felony conviction?

"[Defendant:] Yes.

"[Prosecutor:] In 2003 did you suffer a conviction for a crime of moral turpitude?

"[Defendant:] I don't know the meaning of that word.

"[Prosecutor]: I submit to the court—

"[Defendant's counsel]: May we approach, please?

"The Court: Not at this juncture. Please ask the question in a more generic sense at this time.

"[Defendant:] What did she say?

"The Court: Counsel?

"[Prosecutor]: A more generic term?

"The Court: Correct. There are limited people in this world who understand what a crime of moral turpitude is. This witness, perhaps, is one of them. Please ask the question in a different manner.

"[Prosecutor]: Were you convicted of violating Penal Code section 273.5 in 2003? And if you don't know what that section is, I will ask—

"[Defendant's counsel]: May we approach, please?

"The Court: You may."

At the sidebar conference, the following exchange occurred between the trial court and parties:

"The Court: . . . I was real clear on this. You can go through his felony convictions. I don't want you to cite the statutes.

" . . .

"The Court: 1993, convicted of a felony; 2005, convicted of a felony. Correct?

"[Defendant's counsel]: But she even mentioned the wrong date as well.

"The Court: Just tick them off.

"[Prosecutor]: Okay."

After the sidebar, the prosecutor continued her cross-examination of defendant as follows:

"[Prosecutor]: Sir, in 2005 were you convicted of a felony?

"[Defendant:] Yes.

"[Prosecutor]: In 2012 were you convicted of a felony?

"[Defendant:] Yes.

"[Prosecutor]: In 2013 were you convicted of a felony?

"[Defendant:] Yes.

"[Prosecutor]: And in 2014 were you convicted of a felony?

"[Defendant:] No. That was reduced. That was reduced.

"[Prosecutor]: May the court interject?

"[Defendant]: —to a misdemeanor.

"The Court: We are not asking whether they were reduced at some point. At the time of conviction—

"[Defendant]: At the time of conviction, yes.

"The Court: Thank you.

"[Prosecutor]: And that was less than a year before July 3 of this year, is that correct? When you were convicted of that last felony?

"[Defendant:] It was a year. Exactly a year."

"[Prosecutor]: I have no further questions, your Honor."

The defense made no contemporaneous or subsequent objection to the prosecutor's questions, and the prosecutor made no further inquiry regarding defendant's criminal history.

C. Forfeiture

To preserve a claim of prosecutorial misconduct, the defendant must object at the time the claimed misconduct occurs and request a curative admonition to the jury or instruction. (*People v. Tully* (2012) 54 Cal.4th 952, 1010; *People v. Thomas* (2012) 54 Cal.4th 908, 938-939.) An objection on a different ground may not be sufficient to preserve a claim of misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 766.) "'The primary purpose of the requirement that a defendant object at trial to . . . prosecutorial misconduct is to give the trial court an opportunity,

through admonition of the jury, to correct any error and mitigate any prejudice.' [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

Defendant has forfeited his claim of prosecutorial misconduct on appeal because he never objected to the prosecutor's questions about defendant's prior convictions on any ground, let alone prosecutorial misconduct. When the prosecutor asked defendant whether he suffered a felony conviction in 1993, defendant did not object and answered affirmatively.[2]

When the prosecutor twice asked defendant about his 2003 conviction, there was also no objection by the defense. After the first question, defense counsel requested a sidebar, but the trial court instead instructed the prosecutor to rephrase the question. After the prosecutor posed the rephrased question, the trial court then granted defense counsel's request to approach. Once at sidebar, however, the defense still did not articulate any objection to the prosecutor's questions, let alone argue the prosecutor engaged in misconduct. Rather, without any objection by the defense, the trial court told the prosecutor that "[y]ou can go through his felony convictions" and then demonstrated how the court expected the prosecutor to "[j]ust tick them off," stating "1993, convicted of a felony; 2005, convicted of a felony. Correct?"

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[2] As noted above, defense counsel had earlier conceded the 1993 robbery conviction could be used to impeach, and defendant does not contest otherwise on appeal.

After that, defense counsel merely commented that the prosecutor "even mentioned the wrong date as well."[3]

After the sidebar conference, the prosecutor posed no further questions relating to defendant's 2003 misdemeanor domestic violence conviction. Instead, the prosecutor asked four questions in succession whether defendant had been convicted of a felony in 2005, 2012, 2013, and 2014, respectively. Defendant did not object to any of those questions on any ground and answered yes to each.[4]

Because defendant never objected to any of the prosecutor's questions regarding his prior convictions, he failed to alert the trial court to purported misconduct and deprived the trial court of any opportunity to fashion an appropriate remedy as needed. Indeed, if defendant had objected and convinced the trial court it was misconduct to ask if defendant was convicted in 2003 of a crime of moral turpitude or a violation of section 273.5 (neither of which defendant answered), the trial court could have cured the error by instructing the jury that questions of counsel are not evidence. (See *People v. Edwards* (2013) 57 Cal.4th 658, 764 [presuming jury will follow instruction that statements of

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[3] The meaning of that statement is far from clear, but it would seem defense counsel acknowledged the 2005 domestic violence conviction could be used to impeach but meant to criticize the prosecutor for confusing it with the 2003 conviction. Regardless, this passing comment about the incorrect date cannot logically be construed as raising a prosecutorial misconduct objection.

[4] As noted above, defendant had earlier conceded the 2005 domestic violence felony conviction was permissible for impeachment and does not contest otherwise now.

attorneys are not evidence].)[5] Likewise, if defendant had objected and convinced the trial court that it was misconduct to impeach defendant with his 2012, 2013, and 2014 felony drug possession convictions, the trial court could have cured the error by striking such testimony and instructing the jury to disregard it.[6] (See *People v. Pearson* (2013) 56 Cal.4th 393, 434-435 ["The court admonished the jury to disregard any mention of the arrest, and we presume it followed the court's instruction"].) But defendant afforded the trial court no such opportunities to address the claims of misconduct he now asserts for the first time on appeal. He has therefore forfeited them. (*People v. Seumanu, supra,* 61 Cal.4th at p. 1328; *People v. Tully, supra,* 54 Cal.4th at p. 1010; *People v. Thomas, supra,* 54 Cal.4th at pp. 938-939.)

To avoid forfeiture, defendant argues his failure to object at trial should be excused because any objection would have been

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[5] The trial court did instruct the jury prior to deliberations that the attorneys' statements and questions are not evidence. Thus, assuming *arguendo* that posing two unanswered questions concerning defendant's 2003 conviction was misconduct, it was harmless. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564 ["Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice"].)

[6] We recognize the trial court might have determined such convictions were not proper impeachment (see *People v. Castro, supra,* 38 Cal.3d at p. 317 ["[S]imple possession of heroin does not necessarily involve moral turpitude"]), but it was incumbent upon defendant to object when the prosecutor began questioning defendant about them, particularly because the trial court had indicated at the initial hearing to discuss impeachment that it was "going to leave [the drug possession convictions] alone for the moment."

futile. Specifically, defendant contends that he made two attempts to lodge objections during the prosecutor's questioning, but those attempts "fell on deaf ears." First, defendant claims the trial court "summarily denied" defense counsel's request for a sidebar when the prosecutor initially asked about defendant's 2003 conviction. Second, defendant claims the trial court "did nothing" once at sidebar to address the prosecutor's reference to defendant's 2003 misdemeanor conviction.

The record does not support defendant's claim that an objection would have been futile; indeed, it shows the opposite. To begin with, defendant's request for a sidebar was simply that—a request to address the judge outside the presence of the jury. It is not reasonable to presume the trial court could have divined from such request that the defense believed the prosecutor had engaged in misconduct. Further, as noted above, the trial court denied the initial request for a sidebar in favor of instructing the prosecutor to rephrase her initial question regarding defendant's 2003 conviction. But when the prosecutor could not do so satisfactorily, the trial court immediately granted defendant's request to approach. Once at sidebar, far from doing "nothing," the trial court told the prosecutor that she could only "go through [defendant's] felony convictions." The defense had ample opportunity at sidebar to raise the contention that the prosecutor had engaged in misconduct, but defense counsel only stated offhandedly at the end of the sidebar conference that the prosecutor had "the wrong date as well," signaling to any reasonable observer that the trial court had sufficiently addressed whatever concerns had led to the defendant's request for the sidebar. Indeed, after the sidebar, the prosecutor adhered to the trial court's directive and posed no further questions about

defendant's 2003 conviction. Contrary to defendant's contentions, this entire exchange demonstrates the trial court was responsive to defendant's concerns. The record provides no support for defendant's claim that an objection would have been futile.

Accordingly, we hold that defendant forfeited his claim that the prosecutor engaged in misconduct.

II. Section 667, Subdivision (a)(1) Enhancement

Defendant contends that the trial court improperly imposed a prior serious felony enhancement pursuant to section 667, subdivision (a)(1), claiming that, although he admitted he sustained the 1993 robbery conviction alleged in the information as the basis for both the serious felony (§ 667, subd. (a)(1)) and prior strike (§ 667, subd. (b)-(i)) sentencing enhancements, his admission could only be used to support the prior strike enhancement. We disagree.

A. Relevant Proceedings

The information alleged pursuant to section 667, subdivision (a)(1) that in 1993 defendant suffered a conviction for a serious felony (i.e., robbery) in case number BA078137. If true, the prior serious felony enhancement would subject defendant to an additional five-year consecutive term of imprisonment. The information also alleged that the same 1993 robbery conviction (case number BA078137) constituted a prior strike conviction pursuant to section 667, subdivision (b)-(j) and section 1170.12. If true, the prior strike enhancement would double the selected base term of imprisonment for defendant's robbery conviction.

At the hearing to address the allegations of the prior convictions, the following exchange occurred:

"The Court: This matter is here for . . . proof of the alleged priors.
". . .
"[Defendant's counsel]: . . . It's my understanding that [defendant] is going to admit the prior convictions, . . .
". . .
Again, he would like to admit those prior convictions, and we can go through that process for purposes of waiving that right to an actual trial . . . .
"The Court: Okay.
". . .
"[Prosecutor], it would seem appropriate to the court, based on representations by [defendant's counsel], that I take an admission with respect to the 667.5(b) priors alleged and the strike prior.
"[Prosecutor]: I agree.
"The Court: Okay. [Defendant], back when we were involved in your jury trial, you waived your right to have the jurors make the determination if you suffered the prior convictions that are contained in the information.
"Your attorney has just told me that you are going to now waive a trial before myself and admit that you have been convicted of those offenses. Do you understand?
"The Defendant: Yes."

The trial court then advised defendant of his rights. Defendant waived those rights and admitted he sustained the three prison priors alleged in the information pursuant to section 667.5, subdivision (b). Defendant also admitted he sustained the 1993 robbery conviction alleged in the information as follows:

"The Court: And with respect to the allegation in case[] No. BA 078137 that you were convicted of a serious or violent felony, in laymen's terms, a prior strike conviction in September of 1993, do you admit that prior conviction? The Defendant: Yes."

At sentencing the trial court denied defendant's motion to strike the "strike" conviction and used that "strike" allegation to double the base term pursuant to section 667, subdivisions (b) through (j). The trial court imposed an additional five years' imprisonment for the prior serious felony conviction enhancement pursuant to section 667, subdivision (a)(1).

B. Analysis

We reject defendant's claim that the trial court erred by imposing the section 667, subdivision (a)(1) prior serious felony conviction enhancement. That provision provides that any person convicted of a serious felony who has previously been convicted of a serious felony shall receive a consecutive, five-year sentence for each prior conviction. (§ 667, subd. (a)(1).) A "serious felony" as used in section 667, subdivision (a) means any serious felony listed in subdivision (c) of section 1192.7 (§ 667, subd. (a)(4).) Robbery is listed as a serious felony under section 1192.7, subdivision (c)(19). Section 1025, subdivision (a) provides that a defendant's admission of a prior conviction alleged in the accusatory pleading shall "be conclusive of the fact of his or her having suffered the prior conviction in all subsequent proceedings." Once a defendant has admitted he sustained the prior conviction alleged as the basis for the enhancement, the trial court then determines whether the conviction qualifies as a

conviction that triggers application of the enhancement. (See *People v. McGee* (2006) 38 Cal.4th 682, 695; *People v. Kelli* (1999) 21 Cal.4th 452, 454; *People v. Woodell* (1998) 17 Cal.4th 448, 453.)

Here, defendant admitted that he sustained the 1993 robbery conviction in case number BA078137. The trial court explicitly found that his admission was made with a "knowing, intelligent, voluntary, and express" waiver of his rights. On the basis of defendant's admission, the trial court found that "th[e] allegations have been proven." Defendant's 1993 robbery conviction undisputedly qualifies as a "serious felony" under section 667, subdivision (a)(1), and the trial court correctly so concluded. We therefore find no error in the trial court's imposition of the prior serious felony enhancement based on defendant's admission that he sustained the 1993 robbery conviction.

Defendant, nonetheless, contends that his admission of the 1993 robbery conviction cannot be used as the basis for the serious felony enhancement because defendant only admitted he sustained that conviction for use as a prior strike conviction. More specifically, defendant argues that he did not knowingly and voluntarily admit the 1993 robbery conviction for use as a serious felony enhancement because the trial court did not explicitly mention that enhancement or its accompanying five-year term of imprisonment when taking defendant's admission to the prior. This claim elevates form over substance and must be rejected.

In deciding whether a defendant has knowingly and voluntarily admitted the truth of a sentencing allegation, the trial court must determine that the defendant was fully advised

of the constitutional rights waived by so doing, as well as the full penal effect of a finding of the truth of the allegation. (*In re Yurko* (1974) 10 Cal.3d 857, 865.) Our Supreme Court has made clear that the "pertinent inquiry" is whether "'the record affirmatively shows that [the admission] is voluntary and intelligent under the *totality of the circumstances*.' [citations.] . . . ." (*People v. Mosby* (2004) 33 Cal.4th 353, 360 [emphasis in original] (*Mosby*).) In adopting the totality of the circumstances test, the court in *Mosby* "rejected the rule that the absence of express admonitions and waivers requires reversal." (*Id.* at 361.)

Here, while the trial court did not expressly mention section 667, subdivision (a)(1) or its five-year consecutive term of imprisonment when taking defendant's admission of the 1993 robbery conviction, we are satisfied that the record as a whole demonstrates defendant knowingly and voluntarily admitted the conviction for purposes of that enhancement.

The information outlined all the charges and enhancements filed against defendant, including the section 667, subdivision (a)(1) five-year enhancement based on his 1993 robbery conviction. At the outset of the hearing on defendant's priors, the trial court made clear that "th[e] matter is here for . . . proof of alleged priors," and counsel for defendant indicated "that [defendant] is going to admit the prior convictions." Before the trial court began its colloquy with defendant, defense counsel again confirmed—without limitation—that "[defendant] would like to admit those prior convictions."

The trial court then addressed defendant directly, confirming whether defendant understood that "you waived your right to have the jurors make the determination if you suffered

the prior convictions that are contained in the information" and that "you are going to now waive a trial before myself and admit that you have been convicted of those offenses." Defendant responded "Yes," without indicating that he had not intended to waive jury or did not intend to admit the 1993 robbery conviction for use as a prior serious felony under section 667, subdivision (a)(1).[7] Moreover, when asking defendant whether he had sustained the 1993 robbery conviction in case number BA078137, the trial court referred to it as both "a serious or violent felony" and "a prior strike conviction." Without asserting any sort of limitation or caveat, defendant admitted he sustained that conviction.

Further, "[a] review of the entire record also sheds light on defendant's understanding." (*Mosby, supra*, 33 Cal.4th at p. 365.) In defendant's sentencing memorandum, his counsel argued for leniency (including a request that the trial court dismiss the strike enhancement), but all of the various potential sentences discussed by defense counsel included the five-year enhancement under section 667, subdivision (a)(1). Likewise, at the sentencing hearing, defendant never contended that the section 667, subdivision (a)(1) had yet to be proven, even after the trial court

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[7] Prior to trial, defendant agreed to bifurcation of the prior conviction allegations and waived his right to a jury trial on those allegations. When taking defendant's waiver of jury on the allegations, the trial court initially referred only to the "allegation that [defendant] has suffered a prior strike prior and prison priors." But the trial court ultimately asked defendant: "[A]re you willing to give up your right to a jury trial . . . to prove that you have suffered prior convictions *as alleged in the information*?" [Italics added.] Without qualification, defendant responded, "Yes."

indicated that it had no discretion to decline to apply that enhancement.[8] Indeed, defendant concedes in his opening brief on appeal that "at sentencing, all parties proceeded as though [defendant] had admitted both a strike prior and a section 667(a) prior." The logical import of defendant proceeding at sentencing as if the five-year enhancement applied is that defendant fully understood he had admitted the conviction that triggered its application and knew its penal consequence.[9]

We recognize the defendant's understanding and intent would be even more clear if the trial court had engaged in the better practice of stating explicitly the sentencing enhancement and accompanying punishment accompanying defendant's admission of the prior conviction, but the record as a whole nonetheless demonstrates that defendant knowingly and voluntarily admitted the 1993 robbery conviction for purposes of the section 667, subdivision (a)(1) prior serious felony sentencing enhancement.

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[8] The five-year section 667, subdivision (a) enhancement may not be stricken by the trial court pursuant to section 1385, subdivision (a) or any other provision of law. (*People v. Garcia,* (2008) 167 Cal.App.4th 1550, 1560-1561 (*Garcia).*)

[9] By contrast, it is not logical to conclude defendant chose to admit the robbery conviction as a strike prior (thereby potentially doubling the 2, 3 or 5 year base term for his robbery conviction), but admitted the conviction as a serious felony conviction without knowing it would subject him to a five-year term of imprisonment.

III. Three Prior Prison Term Enhancements

The Attorney General contends that the trial court erred by failing to either impose or strike the three prior prison term enhancements. We agree.

Defendant admitted the three prior prison convictions pursuant to section 667.5, subdivision (b), and the trial court found those allegations to have been proven. Once such an enhancement is found true, it must be imposed or stricken. (*Garcia, supra,* 167 Cal.App.4th at p. 1561; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) The trial court did neither, which was error. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390 ["To neither strike nor impose a prior prison term enhancement is a legally unauthorized sentence"].) We therefore remand for the limited purpose of the trial court determining whether to impose one or more of the prior prison term enhancement or strike one or more of them pursuant to section 1385, subdivision (a). (*Id.* at p. 400; *Garcia, supra,* 167 Cal.App.4th at p. 1561 ["[U]pon remittitur issuance, the trial court must exercise its discretion and either impose or strike the section 667.5, subdivision (b) prior prison term enhancements pursuant to section 1385, subdivision (a)"].)

DISPOSITION

The matter is remanded to the trial court to impose or strike the three prior prison term enhancements alleged in the information. We otherwise affirm the judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIN, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.