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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEITH ERVIN BROWN, Defendant and Appellant.	B282341 (Los Angeles County Super. Ct. No. BA424829)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bernie C. LaForteza, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Stephanie A. Miyoshi, and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Keith Ervin Brown (appellant) was convicted of two counts of second degree robbery in violation of Penal Code section 211.[1] He admitted that he had prior convictions for three counts of robbery. He was sentenced to 60 years to life in state prison, calculated as follows: 25 years to life for each count, plus five years for each count pursuant to section 667, subdivision (a)(1).

On appeal, appellant argues: (1) the trial court should have granted a new trial based on juror misconduct and newly discovered evidence; and (2) the trial court should have granted appellant's motion to strike some or all of his prior strikes. We find no error and affirm.

FACTS

Prosecution Evidence

Robbery of Irma Sarti

Irma Sarti (Sarti) was walking her two small dogs and pushing her daughter in a stroller in the late morning of May 5, 2014. She approached a trash can near an alley to throw away a bag of dog waste and saw a tall, slender African-American male standing by a nearby wall. He was wearing a black shirt and plaid shorts. After she dropped the dog waste into the trash can, she felt the man standing behind her. He knocked her to the ground and took her purse, which contained $8. She was able to see his profile as he left the scene and got into a white car. The car had an "M" on it for Mustang.

Los Angeles Police Officer Ivan Lucero responded to the scene. Sarti said the robber was African-American, he had black hair, weighed 180 pounds and was approximately six-feet tall.

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

Officer Lucero saw a surveillance system on the corner of the nearby intersection.

Robbery of Randi Hague

On May 5, 2014, at about 10:00 in the evening, Randi Hague (Hague) parked on the street near the intersection of 8th Street and Burnside in Los Angeles. A white Mustang stopped beside her and then backed up so that it was next to the car behind her car.

Hague believed the driver of the Mustang wanted her parking space. She exited her car to let the driver know that she was not going to leave.

The driver got out of the Mustang. The driver was wearing a black T-shirt and multicolored plaid shorts, was 5 feet 10 inches tall and weighed about 180 pounds. The driver was not "overweight or anything" and did not have a large stomach. He asked Hague for directions to Rodeo Drive and Olympic Boulevard. She gave him the directions he requested.

As Hague turned to leave, the driver shoved her to the ground. He grabbed her purse, which contained her wallet and iPhone 5, and went to the Mustang. She followed him to the car and tried to retrieve her purse. The driver drove away. She ran to a Walgreens near her apartment and called the police.

Los Angeles Police Officer Anthony Messenger responded to the location and spoke with Hague, who described her assailant as an African-American who was 5 feet 10 inches tall and 180 pounds. She said he exited and entered a newer model white Ford Mustang.

Officer Messenger spoke to an eyewitness named George Jonson (Jonson). He described the assailant as an African-American who was 5 feet 10 inches tall, 200 pounds and

muscular. According to Jonson, the assailant was wearing a white T-shirt and white shorts. He also described the vehicle as being an older white Mustang.

The next day, Hague used a tracking application to track her phone to various locations. Detective Bernard Romero of the Los Angeles Police Department went to one of the locations, which was a "mom-and-pop store" that sold cell phones. It was located at 46th and Avalon. He asked the owners if anyone was in the store the previous day trying to sell a cell phone or have it unlocked. They answered in the negative.

When shown a photographic lineup, Hague immediately picked appellant's photograph. At trial, she was positive appellant was the robber and "remembered his face exactly."

Further Investigation; Arrest

The white Mustang was registered to appellant as of February 24, 2014. Using a license plate recognition system, the police located the white Mustang near the intersection of 46th and Central. There, Detective Chang Kim of the Los Angeles Police Department saw appellant exit a residence and enter a black Lexus. Shortly afterwards, a woman exited from the same residence and got into the white Mustang.

Appellant was stopped, and at some point during his arrest he was shot with a beanbag. He dropped a cell phone to the ground. Detective Kim recovered the phone and booked it into evidence.

Later, Detective Kim turned the phone on and took photographs of various screen shots. One screen shot involved a text message exchange with a person named Rudaff. In that exchange, the person using appellant's phone said that the user had an iPhone 5 that the user was trying to get rid of or sell.

Appellant's Interview

On May 15, 2014, Detectives Sergio Martinez and Wong of the Los Angeles Police Department interviewed appellant. The interview was videotaped.

Early on, appellant told detectives, "I got some good shit for you all, man, and I'm not going to play no games with you all. If you all work with me, I'll work with you all."

The detectives asked if appellant drove a white Mustang. He stated that although the car was registered in his name, it did not belong to him. Detectives asked appellant about the robbery of Sarti. Appellant stated that he did not intend to hurt anybody and did not touch Sarti. Appellant said that he approached Sarti from behind and that her purse had a thin strap. Appellant said he got "[p]robably . . . like $8."

One of the detectives asked if appellant wanted to write anything to the victim. He replied, "Yeah, whatever you want."

The detectives said they were investigating a robbery on Burnside. Appellant said that he had nothing to do with that robbery. When the detectives explained that the victim had identified him and said he asked her questions, appellant said he tried to make sure "people" did not see his face. He stated, ". . . I know I didn't have no conversation with a person that they can turn around. And that's too long of a contact for me, me personally." He also said, "I don't operate like that."

Appellant said he had the white Mustang from about 3:00 p.m. to 9:30 p.m. He said he robbed Sarti about 6:30 p.m. Appellant returned the Mustang to the cousin of a person named "Dominique" at approximately 9:30 p.m. Dominique lived on Vernon between Broadway and Main. Appellant described himself as being 5 feet 11 inches tall and weighed 165 pounds.

At no point during the interview did appellant complain that he was in pain or ask for medical assistance. After the interview, he was taken to the dispensary. He was then taken to the hospital.

Defense Evidence

Jonson's Testimony

On May 5, 2014, Jonson resided on the second floor of a building on 8th and Burnside. At approximately 10:00 p.m., Jonson heard a conversation between a man and woman and looked down out his second-story window. Below him, and just past a garden, he saw two people talking on the sidewalk. The man had his cell phone out, and possibly some maps, and he was asking for directions from the woman. At the time, the lighting in the area was "average."

The woman turned her back. The man "slammed her violently, grabbed her purse," and ran to a white Mustang. The woman followed. She grabbed onto him or "something" and was almost dragged but kept her balance.

Jonson called 911, and the police eventually interviewed him. He described the suspect as an African-American man who was "heavyset" with a "belly." Jonson said the assailant's face "matched his tummy." He estimated the man's height to be about six feet and his weight was around 220 pounds. Jonson never described the man as having a muscular build. Jonson was surprised to see "a man of his size moving like that" because the person was "pretty overweight, out of shape looking." The assailant was wearing a white shirt and white shorts. As for the shorts, they had stripes or a "cross-pattern" that were blue and pink or blue and green. Jonson told the detective who

interviewed him that he saw three 1's on the Mustang's license plate.

Jonson was able to see the assailant's face, but could not tell the eye color, the shape of the nose, or "things like that." Appellant was not the robber. The man Jonson had seen was "lighter skinned" than appellant, but was not light-skinned. Jonson said that unless appellant had a "miracle weight loss pill," he could not be the person who robbed Sarti.

Appellant's Testimony

In 2005, appellant was convicted of grand theft auto and, separately, of unlawfully taking a vehicle. In 2007, he was convicted of grand theft person. In 2009, he was convicted of robbery.

On February 24, 2014, appellant was the registered owner of the Mustang. He sold the car to "Dominique." Because Dominique did not have "papers" to register the vehicle, he paid appellant to keep the car in his name so it could have up-to-date license plate tags. Appellant did not have physical possession of the car after he sold it, nor did he drive it. On May 4, 2014, he had a text message conversation with "Gloria" and said he was the "one in the white Mustang."

On May 15, 2014, he was driving a black Lexus, which belonged to his sister-in-law. He was arrested at approximately 8:45 a.m.

When appellant was pulled over, he shouted, "I didn't do shit." According to appellant, he complied with the orders of the police and got out of the car. They told him to get on his knees. He held up his hands. As he was going down to his knees, the police shot him in the stomach with a beanbag. Appellant was bleeding. He "kind of blacked out from the impact of the pain."

The next thing he remembered was waking up in the back of a police car. The officers told him, "'You're going down for robbery'" and told him about two different robberies.

Appellant was taken to Newton Station. He was crying and yelling out. He said he had been shot, and that he needed medical attention. Twenty minutes later, he was taken to Olympic Station. He was handcuffed. Detective Wong was sitting with him in the backseat, and he told appellant about a robbery that took place in an alley and another that took place at night. He told appellant he had been picked out of a lineup. Appellant said he was in pain and, due to asthma, could barely breath. He said he "needed to see medical." When he arrived at Olympic Station, he said he needed his asthma inhaler and water. He received neither. Also, he told Detective Wong that he needed to see a doctor, but they did not take him.

Detective Kim came to appellant's holding cell, showed him a picture, and said he had been identified. Detective Kim stated that appellant was "going down for robbery." After spending a half an hour in the holding cell, the police told appellant they wanted him to write an apology letter to the victim. According to the police, that was the only way appellant would get medical treatment. He refused to write an apology letter.

Appellant was taken to the interview room three times. The first time, appellant was told that there was a robbery in an alley with a lady, and they know he did it because they had his license plate on camera. Appellant said nothing. They took him back to the holding cell for approximately 45 minutes. Appellant was told that he would be taken to the hospital if he complied with what the police wanted. Officer Messenger took appellant to the interview room a second time, and he again refused to talk.

The police stated that he would not see a doctor unless he cooperated. They took him back to the holding cell for two hours. An officer told appellant that he needed to write an apology letter to the victim of the robbery in the alley. He gave appellant specific facts that he should write in the letter. Appellant was told that was his "last chance." At that point, he was taken back to the interview room a third time. That was when the police began videotaping. Appellant was in pain, and did not know what was wrong. Appellant wanted medical treatment and believed the only way to get it was to "follow instructions from the officers." He admitted to the robbery of Sarti even though he did not rob her, and he wrote an apology letter.

After the interview, the police made appellant take them to the address where Dominique lived. Afterwards, they took appellant to a hospital.

Appellant recalled a text message conversation with a person named Rudolph (also known as Rudaff) in which appellant said he had an iPhone 5 and wanted to know what he could get for it. Rudaff told appellant to go to "46th and Avalon," Green Shop Cellphone store. Appellant never went to that store.

Appellant denied robbing Sarti and Hague.

Rebuttal Evidence

During Jonson's 911 call, he told the operator that "a large Black male" in white shorts and a white T-shirt robbed a woman and drove off in a Mustang. The operator asked if he had gotten the license plate number, and he said, "I couldn't see it[.] I was looking." Jonson described the robber as being "dark skinned."

DISCUSSION

I. Motion for New Trial.

We review the denial of a new trial motion on an independent basis to determine whether any error was prejudicial. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160.)

If a verdict has been rendered or a finding made against a defendant, the trial court may grant a new trial, inter alia, when (1) the jury "has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented," or (2) new evidence is discovered "material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subds. (3) & (8).) Appellant argues that the trial court should have granted a new trial under these two subdivisions. For the reasons discussed below, appellant's arguments lack merit.

A. *Jury Misconduct.*

Appellant contends that a new trial was warranted because the jury committed misconduct by opening sealed verdict forms and failing to be impartial.

1. Background.

On Friday, December 11, 2015, the jury began deliberating at 11:30 a.m. Subsequently, at 3:24 p.m., the jury informed the trial court that it had reached a verdict. The minute order states: "At 3:30 p.m. the verdicts are ordered sealed. [¶] The jury is excused for the day and ordered to return on 12-14-15 at 9:00 a.m."

The following Monday, the jury assembled in the jury deliberation room at 9:20 a.m. Ten minutes later, it returned to

the courtroom with the defendant and the attorneys for both sides for the taking of the verdicts. After examining the verdict forms, the trial court indicated that one contained the following note: "'Void December 14th, 2015, error.'" The trial court asked the foreperson to explain "why it was written out [that] way[.]" The foreperson responded, "Because we were in a rush on Friday to get out of here, and so we were—we hastily signed the wrong form." In response, the trial court stated, "So you corrected that and dated another verdict form for today's date," and the foreperson said, "That is correct." The voided form was a verdict of not guilty on count 3 dated and signed by the foreperson on December 11, 2015. The replacement for it was a verdict of guilty on count 3, which was dated and signed by the foreperson on December 14, 2015.

The clerk read the verdict forms indicating the jury found appellant guilty of both counts. At appellant's request, the trial court polled the jury. In response to the question "[a]re these your verdicts," each juror said yes.

Pursuant to section 1181, appellant filed a motion for a new trial in which, inter alia, he asserted that he had a right to an impartial jury, alleged there was juror misconduct, and stated, "Had the jury informed the [trial court] it intended to be[gin] deliberations again on Monday morning, counsel would have had the ability to inquire regarding these issues." At the hearing, appellant's counsel assumed the jury "began its deliberations again" on Monday morning. He stated, "I would point out that when the jurors left the courtroom . . . several of them, including [a] juror that had to leave because of religious reasons, were very upset that they had to come back on Monday. [¶] I would have preferred to have discovered this before the jury was released, so

that we could inquire of the jury what had actually happened. I think that opening the sealed verdicts and starting deliberations again—if they wanted to do that, that's fine. I think they should have gotten the [trial court's] permission to do that first. [¶] So for those reasons, I think that there [was] an issue of jury misconduct."

Regarding what happened on Friday, appellant's counsel explained that "[a]round 3:30 in the afternoon, [the jurors] told us they had verdicts; and at the time, the [trial court] had to go to some appointment and the judge next door was going to baby-sit the jury. He was in trial and was going to come back after he finished that trial."

The trial court said, "Since I wasn't there on that Friday, December 11, [2015], . . . did Judge Wapner or anybody place on the record the taking of the actual verdicts and saying they were under seal?" Appellant's counsel answered, "No. The clerk took the verdicts and said she was going to seal them." He further indicated that the verdicts were sealed in an envelope.

After appellant's counsel indicated his belief that the jury began deliberating again on Monday morning, the trial court said, "So I understand, what [was] the prejudice? The [trial court] didn't take [the] verdicts. And you're saying that . . . it was improper for them to come back on Monday to discuss the case? [¶] Because the [trial court] did not take the verdicts under seal. . . . I was not here." Appellant's counsel said, "No, you weren't here. There was no [judge] here, and the judge from next door was in trial and the jury wanted to leave." The trial court indicated its understanding that one of the jurors was an Orthodox Jew who needed to be home before dark and had to leave the courthouse by 3:45 p.m. In appellant's counsel's view,

the jurors rushed out and were upset that they had to come back. He opined that if the jury had just wanted to be done with the case on Friday and therefore had reached a split decision to "make everyone happy," that was misconduct. Also, appellant's counsel stated, "It was misconduct to come back and open the sealed envelope."

The trial court asked how appellant's counsel knew the jury resumed deliberating Monday morning. He replied, "Well, because they changed their verdict from Friday to Monday. I mean, they had to talk about it. I would hope that they voted again." Appellant's counsel maintained that they could only resume deliberating with the trial court's permission. The trial court replied, "But they were never told . . . that they . . . had to stop deliberating."

When ruling, the trial court stated that it did "not find jury misconduct or any basis for any coercion in this case." The trial court read from the portion of the December 14, 2015, transcript in which the foreperson explained the void verdict form and the jurors were polled. On the heels of that, the trial court stated, "So I believe the [trial court] clarified any mistake with regard to the verdict forms, and . . . [appellant's counsel] has failed to persuade the [trial court] that there was any jury misconduct or coercion[.]"

2. Analysis

Appellant points out that a defendant has a constitutional right to a trial by unbiased, impartial jurors. (*People v. Weatherton* (2014) 59 Cal.4th 589, 598 (*Weatherton*).) Then he avers that, "the jury speeded up its deliberations due to the religious obligations of one juror. According to the verdict form that the foreperson signed on Friday, the jury reached a not

guilty decision. The jury briefly reconvened on Monday morning and once again in haste and without due consideration changed its original verdict to guilty. These circumstances do not reflect the verdict of an impartial and unbiased jury. A jury that is influenced to reach a decision quickly for reasons of personal convenience is not acting impartially."

In connection with a claim of jury misconduct, we accept the trial court's findings if they are supported by substantial evidence. In contrast, we engage in independent review of whether jury misconduct was prejudicial. (*Weatherton, supra,* 59 Cal.4th at p. 598.)

The trial court found no jury misconduct. Appellant never argues this finding was unsupported by substantial evidence. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1364, 1370 [a trial court's factual findings are reviewed under the substantial evidence test].) As a result, appellant fails to meet his appellate burden of establishing trial court error. (*People v. Foss* (2007) 155 Cal.App.4th 113, 126 ["When an appellant fails to apply the appropriate standard of review, the argument lacks legal force"].) As to the merits, we perceive no defect in the finding. The foreperson indicated that the jury was in a rush to sign the verdict forms, and that its rush resulted in an error. On its face, this did not equate to the jury being in a rush to reach the verdicts themselves. The suggestion by appellant that the jury sped up its deliberations to accommodate the religious obligations of one juror and therefore failed to fully deliberate is based solely on the speculation of appellant's counsel. Consequently, there is no basis to conclude the trial court was required to find that the jury had lost its impartiality.

On a different matter, appellant states in his opening brief "the fact that the verdict was not accepted forthwith as [required by the Penal Code] is an indication that no judicial officer was present" on Friday, December 11, 2015. But then he states, "It should not be presumed that the [trial court] violated the law." In the next paragraph, he argues that "on the assumption that a judicial officer was present on December 11[, 2015] to order the sealing of the verdicts, the jury violated the order on Monday morning . . . by unsealing the verdicts without obtaining the [trial court's] permission." He cites California Rules of Court, rule 2.551(h)(1) for the proposition that a sealed record cannot be unsealed absent a court order. Based on this, appellant argues that the jury was guilty of misconduct when it removed the verdict forms from the sealed envelope.

There are two problems with this argument.

First, even though the minute order stated that the verdict was sealed, the trial court implicitly found otherwise. This was supported by substantial evidence. Appellant's counsel was asked if a judge took the verdict forms and said they were under seal. The response was no, that the clerk simply sealed them in an envelope. The act of a clerk physically sealing verdict forms in an envelope does not equate to the verdict forms being legally sealed pursuant to a court order.

Second, even if the jury opened legally sealed documents without permission of the trial court, appellant cannot establish prejudice. The evidence is that the foreperson signed the wrong verdict form. To correct this mistake, the foreperson voided it and signed another verdict form. The jury was polled and confirmed their vote for guilty on count 3. Thus, if the jury had not removed the verdict forms from the envelope, they would

have been read to the jury. Upon being polled regarding the verdict form on count 3, the jury would have identified the mistake, and the mistake would have been corrected at that point. Consequently, the jurors' removal of the verdict forms from the envelope did not change the end result, which was appellant's conviction on count 3.

B. *Separation*.

Section 1121 provides that "[t]he jurors sworn to try an action may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them. Where the jurors are kept in charge of a proper officer, the officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof." When there is separation of jurors in a criminal case without permission of the trial court, there is a presumption of prejudice to the defendant. The burden is on the prosecution to rebut that presumption. (*People v. Rushton* (1952) 111 Cal.App.2d 811, 815.)

Based on these rules, appellant contends that a new trial was mandated because the jury left the courtroom on Friday without the trial court's permission.

What happened on the afternoon of Friday, December 11, 2015, is not clear from the record. Notably, the minute order from December 11, 2015, indicates that the jury was excused and ordered back.

Even if there was separation without permission from a judicial officer, appellant did not raise this argument below.

Points not raised in the trial court will not be considered on appeal. (*Hepner v. Franchise Tax Bd*. (1997) 52 Cal.App.4th 1475, 1486, citing *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422.) To permit a party to raise a new issue that was not raised in the trial court would not only be unfair to the trial court, but manifestly unjust to the opposing party. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.) Here, because appellant did not raise this issue below, the prosecutor did not have an opportunity to rebut the presumption of prejudice, and the trial court did not have an opportunity to decide the issue.

C. *Newly Discovered Evidence*.

1. Background.

In support of the motion for new trial, the defense called three witnesses and submitted exhibits.

Christopher Nicely (Nicely), a private investigator, testified that he interviewed Gerald Pickett (Pickett). Pickett was in custody at the North County Correctional Facility and the interview was conducted pursuant to court order. Pickett stated that he knew appellant. Nicely showed Pickett a photo of the white Mustang, and asked if he had purchased it from appellant. He said yes, and that the purchase occurred around May 5, 2014. Per Nicely, Pickett said that he used the name Dominic.[2] At the time of the interview, Pickett said he was six feet tall, and that he weighed between 150 and 160 pounds.

Pickett was also called as a witness. When he took the stand, he contradicted Nicely's testimony. According to Pickett, he was in custody for vandalism and driving a vehicle without the

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[2] Appellant testified that he sold his car to Dominique, not Dominic.

owner's consent. He did not know appellant and had never used the name Dominic. He denied owning or driving a 2001 white Mustang, or buying one from appellant. Pickett maintained that he did not recognize Nicely, and stated that he did not recall speaking to Nicely. Pickett was asked whether he was involved in snatching someone's purse on May 5, 2014. He testified that he was in jail on that date.[3]

Jonson, a professional barber, was called to the witness stand. He testified that during trial, he "saw an individual they brought out and stood by the door." He said, "[t]here were cues on his head and his hair that . . . matched what I saw." That person's hairline, hair pattern, head shape, and facial hair all matched the robber. Jonson was shown a booking photo of Pickett and testified that he looked similar to the person who committed the robbery, and noted, "There are cues." When Jonson was shown another booking photo of Pickett, he said it was the same person who committed the robbery. A trial, Jonson said that the assailant was not as dark skinned as appellant. He confirmed that testimony. There was no question in Jonson's mind that appellant was not the person who committed the robbery of Hague.

Among other exhibits, the trial court admitted a photo of Pickett, the court order allowing an investigator to interview Pickett in jail, a photo of the Mustang, and Nicely's report of his interview with Pickett.

At the hearing, the trial court stated, "Based on the hearing of the evidence in this trial, the written motion by the defense, and the arguments of counsel, I am not persuaded by the defense that a new trial should be granted. . . . The [trial court] is not

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[3] It appears that either Nicely or Pickett was lying.

convinced that the evidence presented here would render a different result at a retrial."

The trial court trial noted that based on a booking photo and information for Pickett from May 9, 2014, he was 160 pounds and did not match Jonson's trial testimony that the assailant was overly heavy and had a large stomach. In the trial court's view, the jury did not believe Jonson. The trial court observed that Jonson "seemed to be wanting not to identify [appellant], wanted to identify somebody else, making it seem that it certainly wasn't [appellant]. Maybe that's true. [¶] . . . I watched the way [Jonson] testified, his demeanor and his credibility, and then the contradictions that I hear today and how he described the [assailant] [in] his original testimony, lead me to believe that I just don't find Mr. Jonson to be credible to the extent that I would believe him at this time. [¶] . . . I don't believe his testimony would render a different result if there was a retrial."

The trial court denied the motion.

2. Analysis.

A trial court may grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. (8).)

A defendant must show (1) that the evidence, and not merely its materiality, is newly discovered; (2) that the evidence is not merely cumulative; (3) the evidence must makes a different result probable on retrial; (4) that the defendant could not with reasonable diligence have discovered and produced the evidence at trial; and (5) that the facts are shown by the best evidence of which the case admits. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1016.) A trial court's ruling on a motion for new trial based on

newly discovered evidence will not be disturbed except for a clear abuse of discretion. A reviewing court must accept a trial court's credibility determinations and findings of fact if they are supported by substantial evidence. (*Ibid*.)

Appellant argues that the new testimony from Jonson and Nicely would make a different result probable on retrial. This argument is unavailing.

The new evidence is tangentially related to the robbery of Sarti because it gives rise to a weak inference that Pickett had the white Mustang on May 5, 2014. But appellant admitted that he robbed Sarti, and the verdict establishes that the jury rejected appellant's contention that any of his admissions during his interview were coerced. Also, during his interview, appellant admitted that he had possession of the white Mustang when Sarti was robbed. Thus, the new evidence would not have effected a different outcome, i.e., appellant would still have been convicted of robbing Sarti.

We now turn to the Hague robbery and the suggestion by Jonson that Pickett was the robber.

As for Jonson, the trial court concluded that he lacked credibility. We must defer to that conclusion because it is supported by substantial evidence. During trial, Jonson said the assailant was overly heavy and about 220 pounds, but at the hearing he said Pickett—who was between 150 and 160 pounds–looked like the assailant. Moreover, Jonson testified that he saw three numbers on the license plate of the Mustang. That was contradicted by the transcript of his 911 call in which he stated that he could not see the license plate on the vehicle. These contradictions are substantial evidence undermining Jonson's credibility and supporting the trial court's conclusion.

Turning to Nicely, his testimony at most suggested that appellant sold the white Mustang to Pickett. It did not, however, negate the evidence that the white Mustang was registered to appellant. Nor did it negate appellant's admission during his interview that he had the white Mustang on May 5, 2014. Also, the evidence showed that a woman that exited the same residence as appellant on May 12, 2014, got into the white Mustang. In other words, the evidence showed appellant had use of and access to the white Mustang on the day of the robbery of Hague.

Aside from these details, Hague positively identified appellant as the man who robbed her. This evidence was corroborated by evidence that the robber took Hague's purse containing her iPhone 5, and appellant texted Rudaff to say he had an iPhone he wanted to sell. Also, Hague was able to track her iPhone 5 to the same store at 46th and Avalon where Rudaff told appellant he could sell an iPhone.

Based on the preceding, we conclude that the trial court did not abuse its discretion.

II. Motion to Strike One or Both Strikes.

Appellant contends that the trial court's refusal to strike his prior convictions was an abuse of discretion, and that his sentence constituted cruel and unusual punishment. In reviewing a trial court's denial of a motion to strike a prior pursuant to section 1385,[4] an appellate court applies an abuse of

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[4] Section 1385, subdivision (a) provides that a judge may order an action to be dismissed in furtherance of justice. In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529–531 (*Romero*), the court held that section 1385, subdivision (a) gives a trial court discretion to strike or vacate an allegation or finding

discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).) Whether a punishment is cruel or unusual is a question of law subject to de novo review. (*People v. Em* (2009) 171 Cal.App.4th 964, 971.)

A. *Background*.

Appellant admitted that he had three prior robbery convictions, and that they qualified as strikes for purposes of, inter alia, section 667, subdivision (a)(1). He then filed a motion requesting that the trial court strike one or all of his prior strike convictions and sentence him as either a first or second strike offender. His motion was based on section 1385, subdivision (a) as well as the prohibition against cruel or unusual punishment in both the Eighth Amendment of the federal Constitution and article 1, section 17 of the California Constitution.

The prosecutor provided the trial court with a "mitigation package," which was sealed by the trial court. Based on that mitigation package, the prosecutor had decided not to strike any strikes.

The probation report indicated that appellant had a juvenile court case for vandalism (§ 594, subd. (a)) in 2001. He was convicted of possessing burglary tools (§ 466), a misdemeanor, in 2004. In 2005, he was convicted of grand theft (§ 487, subd. (d)), and was twice convicted of taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). In 2007, he was convicted of grand theft from person (§ 487, subd. (c)). Finally, in 2009, he was convicted on multiple robbery counts (§ 211).

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under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony.

In the evaluation section, the probation report stated that appellant "has an extensive prior criminal record that consists of numerous convictions for similar crimes of 211 Penal Code. [Appellant's] prior record is an indication [appellant] is an extremely violent man who ruthlessly and viciously attacks innocent and unsuspecting victims in the community and aggressively takes what does not belong to him. . . . [¶] It is obvious [appellant] is a career criminal who repeatedly commits similar crimes of robbery. If allowed to remain free, [appellant's] illegal and violent actions will most definitely continue. [He] is no longer amenable to probation as he has failed to abide by the [trial court's] orders and conditions of probation a multitude of times. In addition, [appellant] is currently on parole. [Appellant's] parole status has failed to deter [his] life of crime." It was noted that "[a]s charged, [appellant] is not eligible for probation."

The People's sentencing memorandum stated, inter alia, that appellant was previously convicted on three counts of robbery (§ 211).

At the hearing, defense counsel noted certain facts and argued for leniency. Next, defense counsel argued that the failure to strike any of appellant's prior convictions would result in cruel and unusual punishment because the "district attorney has provided other worse individuals with much better outcomes." The trial court heard from appellant. He stated, inter alia, that he had not committed the Hague robbery, and that he had cooperated with the detectives in the case. He

pointed out that he took a detective to Pickett's house during the investigation.[5]

The trial court denied the motion and stated, "I have considered the nature and circumstances of [appellant's] present felonies and his prior convictions. [¶] I would note that in the prior conviction of 2009, robberies, . . . I've read the preliminary hearing transcripts and the nature of the seven counts of robberies, robbery in concert, similar to this case, where the victims were very vulnerable. There was purse snatching from the victims. [Appellant] worked with two other defendants, though, in those other cases and committed similar robberies as to the cases here. [¶] The prior convictions have persuaded me that the particulars of his background, the character, and prospects of [appellant] . . . [do] not persuade me [to] grant[] the motion. The [trial court] does not find [appellant] is deemed outside the spirit of the three strikes law in whole or in part. He is a criminal and the facts and circumstances of his current case and his priors go to the heart of the three strikes purposes and spirit."

B. *No Romero Error.*

In exercising its discretion under *Romero*, a trial court "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 [a defendant's] 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

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[5] We have reviewed appellant's statements. Due to their sensitive nature, portions of his statements have been omitted from this opinion.

more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Appellant argues that the trial court abused its discretion because its decision to deny his *Romero* motion was based on factual errors regarding his priors. (*People v. Surplice* (1962) 203 Cal.App.2d 784, 791 ["[t]o exercise the power of judicial discretion all the material facts in evidence must be both known and considered"].) He claims that the trial court mistakenly determined he was previously convicted on seven counts of robbery. Assuming for the sake of argument the trial court made a mistake regarding the number of robberies, it is not reasonably probable a mistake free hearing would have led to a different result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant had an extensive criminal history that included a variety of crimes, and that history established appellant as a hardened recidivist. Thus, there was ample support for the trial court's denial of appellant's motion.

Next, appellant argues, "It does not appear . . . that the [trial court] gave any consideration to the reforming possibilities of imprisonment. The [trial court] also did not give any weight to [appellant's work with law enforcement helping it to solve cases]. [His] activity [helping law enforcement] showed that [appellant] was not an incorrigible criminal, but someone with potential to become a good citizen in the community. Oblivious to all positive and hopeful factors, the [trial court] was by its sentence metaphorically washing its hands" of appellant. Based on these statements, he posits that the trial court's denial of the *Romero* motion was "fraught with inaccuracies about [appellant's] . . . real character and his potential for reform while in prison."

The record established that appellant had made a career out of robbery and taking property that did not belong to him. As noted by the probation report, he failed to comply with the terms of probation in the past, and he committed the current offenses while on parole. He has spent most of his adult life either incarcerated or on probation or parole. The trial court determine that appellant's criminal record established that he had no viable prospects. Consequently, the trial court ruled well within the bounds of its discretion when it determined that appellant does not fall outside the spirit of the Three Strikes law. "Indeed, [appellant] appears to be 'an exemplar of the "revolving door" career criminal to whom the Three Strikes [l]aw is addressed.'" (*Carmony, supra*, 33 Cal.4th at p. 379.)

Although appellant maintains that the trial court did not consider his prospects for reform and rehabilitation, he did not present any evidence of his prospects. "It is one thing to say that the court must consider evidence offered by the defendant in support of his [*Romero*] motion, but quite another to say that the court must gather and consider evidence that was not presented." (*People v. Lee* (2008) 161 Cal.App.4th 124, 129.) A criminal defendant "may not now complain that the trial court abused its discretion because it did not consider evidence that was never presented." (*Id.* at p. 130.)

C. *No Constitutional Error*.

The United States Supreme Court has upheld sentences under the Three Strikes law. (*Ewing v. California* (2003) 538 U.S. 11, 29–30 (*Ewing*); *Lockyer v. Andrade* (2003) 538 U.S. 63, 77.) *In re Coley* (2012) 55 Cal.4th 524 noted that *Ewing* upheld a three strikes sentence when the third-strike was a comparatively minor, nonviolent offense. Here, appellant's current offenses

were violent. We easily conclude his sentence does not transgress either Eighth Amendment principles or the California Constitution.[6]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

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[6] Appellant does not offer a separate analysis of article 1, section 17 of the California Constitution.