Filed 1/7/20 P. v. Carson CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES ROBERT CARSON, Defendant and Appellant.	B289934 (Los Angeles County Super. Ct. No. MA070703)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed and remanded with directions.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and

Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant James Carson of the premeditated and deliberate murder of his girlfriend's ex-husband, Joey Jojola. Jojola bought appellant's girlfriend, her daughter Saundra, and Saundra's newborn a trailer to live in, but forbade appellant to live there. After Saundra invited appellant to the trailer to babysit, Jojola verbally confronted appellant about his presence there. The testimony of prosecution witnesses, including Saundra and another eyewitness, supported inferences that appellant engaged in an argument with Jojola for several minutes, during which appellant drew a folding knife, unlocked it, and opened it (requiring both hands), after which he drove the full length of its blade into Jojola's chest, fatally piercing his heart. Appellant also inflicted a second wound, to Jojola's back. The eyewitnesses did not observe Jojola threatening or advancing on appellant.

After the prosecution rested, appellant's counsel informed the court that he had newly decided to call Dr. Raven, a court-appointed pathologist whom he had previously indicated he would "definitely" not call, and requested a continuance to call her, which the court denied. Appellant, testifying on his own behalf, claimed that he drew his knife and made sweeping motions with it in self-defense, without intending to strike Jojola, but accidentally struck

Jojola when he slipped on the trailer steps at the same time Jojola advanced on him. In closing argument, the prosecutor urged the jury to reject appellant's account, but recognized that if believed, it would establish that the killing was accidental and therefore excused. Appellant's counsel characterized the killing as a combination of accident and self-defense, asserting "you can have both," to which the prosecutor responded, in rebuttal, "You can't have both."

The jury convicted appellant of first-degree murder. Appellant moved for a new trial on the basis of juror misconduct and petitioned for disclosure of juror identifying information, alleging that a juror had referred to specialized knowledge, derived from her background as an emergency room nurse, to support an opinion that Jojola's heart injury could not have been inflicted accidentally as appellant claimed. The court denied the motion and petition. Further denying appellant's "*Romero* motion" for dismissal of an allegation that appellant had previously been convicted of voluntary manslaughter, the court applied the three strikes law to appellant's sentence.[1] The court imposed a five-year

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[1] Appellant asked the court to dismiss the three strikes sentencing allegation under Penal Code section 1385, subdivision (a), which authorizes a court to dismiss an allegation of a prior conviction. (*People v. Hernandez* (2000) 22 Cal.4th 512, 523 (*Hernandez*), citing *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 (*Romero*).) Appellant's motion is more accurately understood as an informal request for the court to act sua sponte. (See *Hernandez*, *supra*, 22 Cal.4th at p. 522 ["a

(*Fn. is continued on the next page.*)

sentence enhancement for a prior serious felony conviction, and imposed fines and assessments without inquiring into appellant's ability to pay. After appellant appealed, Senate Bill No. 1393 (S.B 1393) went into effect, giving trial courts new discretion to strike sentence enhancements imposed for prior serious felony convictions. (See *People v. Johnson* (2019) 32 Cal.App.5th 26, 68 (*Johnson*).)

On appeal, appellant contends: (1) the evidence of malice aforethought was insufficient to sustain his first-degree murder conviction; (2) the evidence of premeditation and deliberation was likewise insufficient; (3) the trial court prejudicially erred by denying his request for a midtrial continuance to call Dr. Raven; (4) the prosecutor engaged in prejudicial misconduct by stating, in rebuttal, "You can't have both [accident and self-defense]"; (5) the court prejudicially erred by rejecting appellant's allegation of juror misconduct as a ground for a new trial or for disclosure of juror identifying information; (6) the court abused its discretion by denying appellant's *Romero* motion; (7) the court erred by imposing fines and assessments without a

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defendant does not have the statutory privilege of moving to dismiss an action, or part of an action, under Penal Code section 1385, subdivision (a)"]; *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 137 [notwithstanding absence of statutory authorization for defense motion, defense may informally request exercise of court's discretion].) The parties refer to the request as a "*Romero* motion" on appeal. For simplicity's sake, we do the same.

determination of appellant's ability to pay; and (8) appellant's case should be remanded to give the court an opportunity to exercise its new discretion to strike the five-year enhancement imposed for appellant's prior serious felony conviction.

We agree the trial court should have an opportunity to determine whether to strike the five-year enhancement, and remand to provide that opportunity. Finding no error, we otherwise affirm.

STATEMENT OF THE CASE

The state charged appellant with willful, deliberate, and premeditated murder, in violation of Penal Code section 187, subdivision (a). It alleged that in committing the murder, he used a knife as a deadly and dangerous weapon within the meaning of Penal Code section 12022, subdivision (b)(1). It further alleged that he had been convicted of voluntary manslaughter (Pen. Code, § 192, subd. (a)) in 1994, and that this prior conviction was a strike within the meaning of the three strikes law (*id.*, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a serious felony within the meaning of Penal Code section 667, subdivision (a).

The jury convicted appellant of first-degree murder, finding the murder was willful, premeditated, and deliberate. The jury found the deadly weapon allegation true. Appellant admitted that he had been convicted of voluntary manslaughter as alleged.

The court sentenced appellant to a term of 50 years to life (doubled, under the three strikes law, from a term of 25 years to life), followed by consecutive five-year and one-year terms under Penal Code sections 667 and 12022, respectively. The court imposed a $5,000 restitution fine, a $5,000 parole revocation fine, a $30 criminal conviction facility assessment, and a $40 court security fee.

Appellant timely appealed.

PROCEEDINGS BELOW

A. *Prosecution Case*

1. *Appellant's History with Jojola*

Joey Jojola was appellant's victim. Jojola and his ex-wife, Lynette, had a daughter, Saundra. When Saundra had a baby (about a year before Jojola died), Jojola bought a trailer for Saundra, her baby, and Lynette to live in. Jojola forbade appellant, who was dating Lynette at the time, to live in the trailer.

Saundra testified that Jojola told appellant he could live in the trailer only if he paid rent. Appellant did not pay rent and did not live in the trailer.

Jojola rented a space for Saundra's trailer in a mobile home park located in Lancaster, California, and managed by David Walls. Walls testified that Jojola asked him to let Jojola know if he saw anybody other than Saundra and Lynette at the trailer. Several days before Jojola's death on March 3, 2017, Walls told Jojola that he had seen appellant at the trailer, and that Saundra had claimed appellant was

there to help with the baby. Jojola responded that the reason for appellant's presence did not matter.

2. *Eyewitnesses to the Fatal Stabbing*

Saundra testified that appellant stayed at the trailer, helping with her baby, the night before Jojola's death. Appellant was still there when Jojola arrived the next afternoon.[2] Jojola, visibly angry, entered the trailer and yelled at appellant to get out. She believed that Jojola meant both "'Get out of here and don't come back'" and "'Let's step outside and fight.'"

Jojola exited the trailer and appellant followed him. Saundra testified, "And as [appellant] was going out, I was going in to grab my daughter. By the time I turned back around to pick up my daughter, they were already face to face, and [appellant] had stabbed him." She further testified that she saw appellant stab Jojola five or six times in the chest. She never saw Jojola attack appellant in any way, or move toward appellant with his hands. She never heard Jojola hit or threaten appellant.

On cross-examination, Saundra testified that because appellant was positioned between her and Jojola when appellant struck, she did not see the blade make contact

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[2] Saundra testified that before Jojola's arrival on the day of his death, she told Walls appellant was at the trailer to help with the baby. Walls denied that he alerted Jojola to appellant's presence that day (or knew of it until after the stabbing).

with Jojola. She confirmed that when interviewed by police on the day of the killing, she did not claim to have seen appellant stabbing Jojola. It was not until a second police interview, about three weeks later, that she first claimed to have seen appellant stabbing Jojola five or six times.[3] During that second interview, she told police that appellant had been "'stabbing like [her] dad was going to hit him,'" by which she meant that she believed appellant thought Jojola was going to hit him. On redirect, she testified that she drew this inference about appellant's thinking solely from the fact that appellant held his head bowed as he struck.

A second eyewitness, Salvador Cerda, was doing work at his wife's trailer on the day of the killing. The sounds of a screaming argument between appellant and Jojola (both strangers to him) caught his attention. Because he continued to enter and exit his wife's trailer, he saw only portions of what transpired between the two men.[4] Appellant was trying to push Jojola, who was moving as if trying to distance himself from appellant. From what Cerda heard and observed, he believed Jojola was trying to prevent

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[3] One of the interviewing officers, called as a defense witness, confirmed that Saundra first claimed to have seen the stabbing in her second interview.

[4] Cerda estimated that he was standing about 42 feet away from appellant and Jojola. A defense investigator testified that he had measured the distance from Cerda's wife's trailer to Saundra's trailer as approximately 190 feet.

a confrontation. He never saw Jojola raise his hands or make any quick movement toward appellant. After two or three minutes of argument, appellant threw an uppercut punch that connected with Jojola's chest.[5] Cerda observed a nearby woman protesting, "'No, no.'" He then entered his wife's trailer, and when he emerged, he saw Jojola holding his chest and stumbling, almost falling. The woman, covered in blood and screaming, "'Don't kill him,'" stood between the two men and tried to separate them, as if trying to prevent appellant from hurting Jojola again. Cerda entered the trailer again, and when he emerged, he saw Jojola fall.

On cross-examination, Cerda testified that he did not see anything appellant and Jojola did before appellant threw his uppercut (although he heard the two men arguing). On redirect, he testified that he saw Jojola raise his shoulders and tilt his upper body backward when appellant raised his fist, as if Jojola was trying to avoid the blow.

3. *The Stabbing's Aftermath*

Saundra testified that after stabbing Jojola, appellant paced back and forth and said that he was going to go to jail, so he would call the cops himself. Cerda testified that appellant walked closer to him, holding a phone to his ear, before eventually returning toward Jojola. He never saw appellant try to help Jojola.

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[5] Cerda did not see a weapon.

Susana Martin happened to be visiting a resident of the mobile home park on the day of the killing. She testified that she drove by a wounded man and a bloody woman and called 911 at the woman's request. Appellant was present, but she did not see him help Jojola. During her 911 call, she reported that Jojola had been stabbed "on" or "by" the heart.[6]

Los Angeles County Sheriff's Department Deputy Benjamin Tanner testified that he reported to the crime scene and found appellant pacing back and forth, talking on the phone with a blank or neutral expression. Appellant, identified by a bystander as Jojola's assailant, was cooperative and did not attempt to flee. He searched appellant and found a folding knife with a three-inch blade. He testified that opening the knife required pushing a button and pulling the blade open with two hands.[7]

A Los Angeles County Sheriff's Department forensic identification specialist testified that she photographed appellant's body on the day of the killing and that he was uninjured.

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[6] A recording of Martin's 911 call was played for the jury. During deliberations, the jury requested and received a device to play the recording.

[7] Appellant, testifying on his own behalf, confirmed that he unlocked the knife by pushing a button, but testified that he opened it by flicking his wrist.

4. *The Medical Examiner*

Dr. Martina Kennedy, a deputy medical examiner for the County of Los Angeles, testified that she performed Jojola's autopsy. She opined that Jojola's death was a homicide caused by multiple sharp-force injuries. A three-inch-deep wound to Jojola's left chest had injured his heart. Jojola had also sustained a non-fatal knife wound to his back, which was half as deep. Each wound was longer than it was deep, and for that reason alone was classified as an "incised" wound, rather than a "stab" wound.

On cross-examination, appellant's counsel asked whether stab wounds were caused by thrusting motions whereas incised wounds (like Jojola's) were caused by slashing motions. Dr. Kennedy responded, "That's possible." Appellant's counsel posed a hypothetical in which one person, facing a second person as if fighting, made semicircular sweeping motions with a three-inch-long knife. He asked if it were possible that "the length of the blade could make contact with the chest; and then as the knife is coming through, go through the skin and soft tissue and reach the heart . . . ?" Dr. Kennedy responded, "Possible, but I've never seen that happen." When asked to clarify, she explained, "Where the heart is in the body, for the knife that is three inches [long] to make contact with the heart, which is an estimated three inches below the sternum, it would need a sharper angle than a swipe." But she confirmed that she could not rule out the possibility of reaching the heart with a sweeping motion.

B. *Denial of Appellant's Request for a Midtrial Continuance*

Before trial, the court appointed pathologist Dr. Katherine Raven as a defense expert. At trial (but before the presentation of any evidence), the prosecutor asked the court to order disclosure of Dr. Raven's report so the prosecutor could prepare Dr. Kennedy (the medical examiner) for questioning about it. Appellant's counsel represented that he was uncertain whether he would call Dr. Raven. The court ordered appellant's counsel to turn over Dr. Raven's report by the following day unless he determined he was "definitely not going to call" her. Appellant's counsel decided not to call Dr. Raven, and did not turn over Dr. Raven's report.

The day after Dr. Kennedy testified and the prosecution rested, appellant's counsel informed the court that he had changed his mind about calling Dr. Raven. He represented that he and Dr. Raven, with whom he had spoken the night before, had been "surprised" and "mystified" by Dr. Kennedy's testimony, on cross-examination, that although it might be possible for a sweeping motion with a knife to penetrate a person's heart, she had never seen that happen. According to Dr. Raven, this scenario was "equally as plausible as any other." Dr. Raven, en route to another court for "some 402 motions," had told appellant's counsel she had a "very busy week" and would get back to him about scheduling.

The court asked whether Dr. Raven, despite being a paid expert appointed in the case, had been unaware that the case would be in trial that week. Appellant's counsel represented that she had been aware. The court responded that it would not delay trial for Dr. Raven, explaining, "The testimony from [Dr. Kennedy], I don't know why it would have been shocking. It just happens to be her experience that someone making lateral movements with a knife isn't going to penetrate 3 inches into the heart. [¶] You get from her it is possible. But I don't know if [Dr. Raven] was going to claim that it was just as likely that that could happen as it wouldn't, a 50/50 chance. We don't know because you didn't provide a report to the prosecution on the case. . . . [¶] So I'm not going to delay the trial for some unknown period of time because [Dr. Raven] may or may not be available on something that is as highly speculative as what was represented. I don't think it undermines your ability to defend the case."

The next morning, after giving the prosecutor a copy of Dr. Raven's report for the first time, appellant's counsel again addressed the court about Dr. Raven's "scheduling issues . . . ." The court adhered to its ruling denying a continuance.[8]

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[8] The prosecutor asked the court to lodge Dr. Raven's report as an exhibit to make a record of the asserted immateriality of Dr. Raven's proffered testimony. The court lodged the report as an exhibit to facilitate appellate review. In her report, Dr. Raven (*Fn. is continued on the next page.*)

C. *Defense Case*

Appellant testified on his own behalf.[9] He testified that he and Jojola had never had a problem with each other before the day of Jojola's death. On that day, however, Jojola angrily demanded to know why appellant was living at the trailer, ignoring appellant's explanation that he was merely visiting to babysit, and said, "'Well, let's step outside.'" Appellant thought Jojola looked like he wanted to fight.

Appellant was armed with a knife hooked on his belt. He drew the knife as he was following Jojola out of the trailer. His intent was to deter Jojola from fighting him. He slipped on the final step leading out of the trailer and stumbled forward, "with the knife in my hand out in front of me." At the same time, Jojola was coming toward appellant

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concurred with Dr. Kennedy that Jojola's cause of death was "sharp force injuries," finding that the fatal wound "incised the heart . . . ." In an undated addendum, Dr. Raven wrote, inter alia, "One cannot determine if the knife penetrated the . . . heart first and then incised the chest wall as it was coming out, or if the wound began as an incised wound and then penetrated the . . . heart as the last movement. Any suggestion that one could be more plausible than the other is mere speculation. All one can say is that the fatal wound was located to the anterior chest wall and at some point entered the chest cavity for approximately 3 inches and injured the heart."

[9] As noted, appellant also called a defense investigator and an officer who interviewed Saundra and See footnotes 3 and 4, *ante*.

with his arms raised in a "fighter stance," and appellant was "trying to kind of fend [Jojola] off, telling him to back up . . . . " On the stand, appellant demonstrated by holding his right arm at shoulder height and moving it side-to-side, parallel to the ground. Jojola nevertheless came toward him while he was making these "sweeping motions," and thus made contact with the knife. He did not know whether Jojola saw the knife. Nor did he know how many times the knife made contact with Jojola.

Jojola, in shock, told appellant, "'You stabbed me.'" Saundra came out of the trailer, too hysterical to call 911 as Jojola requested. Appellant himself called 911 and told the operator he had accidentally stabbed someone. After neighbors arrived and tried to help Jojola, appellant, at a neighbor's request, brought towels from the trailer to try to stop Jojola's bleeding. He stayed at the scene until police arrived, and cooperated with them.

On cross-examination, appellant admitted he was unsure how Jojola sustained the wound to his back, but thought it was when he came at appellant with his arms raised in a fighting stance. When asked whether Saundra had been wrong when she testified that Jojola never came at appellant with his arms raised, appellant responded that he did not know how to answer. He confirmed that he had falsely claimed, during a police interview, that Jojola hit him, and had falsely denied that he had swung the knife. He had told police that Jojola was tight with money and arrogant, and that he did not understand why Jojola would

require him to pay rent to live in the trailer when Lynette (his girlfriend and Jojola's ex-wife) was willing to pay it for him. He claimed, however, to have thought Jojola's rent requirement was fair, to have liked Jojola, and to have meant "arrogant" as a compliment.

D. *Jury Instructions*

Appellant's counsel requested that the court instruct the jury on involuntary manslaughter, arguing the jury could find "sort of a combination of self-defense, the act of simply putting the knife up or sweeping it back and forth in combination with the running onto the knife." The prosecutor argued the proposed instruction was unnecessary in light of the court's intent to deliver an instruction on accidental homicide, under which the jury would be instructed to acquit appellant if it believed appellant's account of the killing. The court agreed with the prosecutor and declined to instruct on involuntary manslaughter, explaining, in part, "If [appellant's] testimony is to be believed, it was an accident. It would be a complete acquittal on the case."

The court instructed the jury on homicide excused as accidental (CALCRIM No. 510), explaining, in part, "The People have the burden of proving beyond a reasonable doubt that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of murder or voluntary manslaughter." The court also instructed the jury on "complete" self-defense (CALCRIM

No. 505) and on both the "heat of passion" and "imperfect self-defense" theories of voluntary manslaughter (CALCRIM Nos. 570 and 571).

E. *Closing Arguments*

In the initial closing argument, the prosecutor identified the elements set forth in the accident instruction and argued, "[T]o buy into any of that, you have to believe his story. His story is basically that. His story is, 'Well, I'm lawfully defending myself by waving a knife around. I didn't mean to do anything. I sort of tripped, and he came to me and ran onto my knife. So it was an accident.'" The prosecutor argued that the killing was neither accidental nor committed in self-defense, but was instead premeditated and deliberate murder. He argued appellant's inaction after inflicting the fatal wound suggested the killing was premeditated. He further argued that appellant deliberated about killing Jojola in the process of drawing, opening, and using the knife. He argued that appellant's plan to kill, rather than merely injure, was evidenced by the fact that he inflicted two stab wounds, including one to the heart, and by Saundra's testimony suggesting that appellant attempted to stab Jojola additional times. Finally, he argued that appellant was motivated by anger at Jojola for embarrassing and emasculating him, including by forbidding him to live in Saundra's trailer.

Appellant's counsel argued that the prosecution had failed to disprove that appellant inflicted the fatal wound

accidentally or in self-defense. He argued, "[J]ust because [appellant] put that knife up and swung it side to side, it doesn't mean that he intended for the knife to go into Mr. Jojola. And you can have both things going on at once. You can have self-defense. He's swinging the knife back and forth, trying to keep Mr. Jojola away, trying to fend him off. And on top of that, you have an accident; that Mr. Jojola is rushing in at him." He further argued that the prosecution had failed to prove premeditation and deliberation because appellant did not arrive at the trailer with a plan to kill Jojola; the manner in which appellant inflicted the fatal wound did not reflect a tenacious execution of such a plan; and appellant's comments to police were insufficient to establish that he held a grudge against Jojola, in the absence of testimony from any witness suggesting that he did.

A second prosecutor delivered the rebuttal. She asserted, "[Appellant's counsel is] insisting that this is self-defense, and it's an accident. You can't have both." Appellant's counsel objected on the ground that the prosecutor had misstated the law, but the court overruled the objection. The prosecutor again argued that the killing was neither accidental nor committed in self-defense, but was instead premeditated and deliberate murder.

F. *Appellant's Allegation of Juror Misconduct*

The jury convicted appellant of first-degree murder and found the deadly weapon allegation true. Appellant filed a motion for a new trial, arguing, inter alia, that Juror No. 3, a

registered nurse, had committed prejudicial misconduct during deliberations. Appellant's memorandum, unaccompanied by any declaration or other evidence, asserted, "In speaking with some of the jurors after the verdict, defense counsel was informed that Juror Number Three, who is a Registered Nurse, told the other jurors during deliberations that she sees surgeons make incisions in multiple layers, and that it would therefore be very difficult for the knife to penetrate through soft tissue and reach the heart without [appellant] having intended it, as had been argued by the defense." The prosecution opposed the motion, arguing, inter alia, that appellant had produced no evidence of juror misconduct.

The next day, appellant filed a petition for disclosure of the jurors' names, addresses, and telephone numbers, arguing there was good cause for disclosure because it would enable appellant to investigate Juror No. 3's alleged misconduct. In a declaration, appellant's counsel asserted that he had been informed, during a discussion with jurors, that Juror No. 3 "told the other jurors based on her training and experience as a nurse she knows that doctors cut the chest tissue in multiple layers when performing surgery, and that it would therefore have been difficult or impossible for [appellant] to have inflicted the fatal wound in a single rapid slashing motion as posited by the defense." The prosecution opposed the petition, arguing, inter alia, that Juror No. 3's alleged statements did not constitute misconduct even if she made them.

The court held a hearing on the petition and motion and denied both. It found that appellant had failed to establish good cause for the disclosure of juror identifying information, reasoning, "I do agree with [*People v. Steele* (2002) 27 Cal.4th 1230 (*Steele*) and *People v. San Nicolas* (2004) 34 Cal.4th 614 (*San Nicolas*)] that jurors are able to rely on their life experience during deliberations in evaluating and interpreting the evidence. [¶] There is not any evidence to show . . . that the juror in this particular case consulted outside sources, for example. [¶] And I don't believe the defense has shown a basis to go on a fishing expedition as to whether or not the juror did consult outside sources. There is no evidence to show that she did." Further, in denying appellant's new trial motion, the court explained, "I believe that any conduct of the particular juror in this case . . . does not rise to a level of juror misconduct to justify a new trial."

G. *Sentencing*

Appellant admitted his 1994 conviction for voluntary manslaughter, which the prosecution alleged was a strike within the meaning of the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a serious felony within the meaning of Penal Code section 667, subdivision (a). However, appellant filed a *Romero* motion for dismissal of the three strikes sentencing allegation. According to appellant's description of the voluntary manslaughter, it was a drive-by shooting in which appellant,

standing in the bed of a pickup truck, fired at a group of men -- whom he or one of his companions had previously threatened -- but struck and killed a different man nearby. Appellant conceded that after this 1994 conviction, he sustained a 1996 conviction for possessing a firearm while a felon, a 2004 conviction for receiving stolen property, and a 2009 conviction for carrying a concealed dirk or dagger. Appellant nevertheless argued he fell outside the spirit of the three strikes law, relying on asserted differences between the voluntary manslaughter and the instant murder; the amount of time that had passed between those offenses; the nonviolent nature of his intervening offenses; his relationships with Lynette, Saundra, and others; his employment (which he acknowledged was seasonal or otherwise intermittent); and his cooperation with law enforcement.

The court denied the *Romero* motion at appellant's sentencing hearing, commenting, "I don't believe [appellant] falls outside the scope of the three strikes law in this case . . . ."[10] The court told appellant, "[A]t the end of the day, you have stolen from people in this court who loved this man; who was not a man that was a draw on society, but a contributor to society and made this world a better place." Appellant apologized to Jojola's loved ones. The court thanked appellant on behalf of Jojola's family, predicting

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[10] The court noted that it had not reviewed the prosecution's untimely opposition to the *Romero* motion.

that appellant's words might eventually help the family move on from self-destructive hatred. The court concluded, "At the end of the day, it doesn't change the horrible act you committed. I have no doubt, as you sit here, you regret it. But as one of [the people who delivered victim impact statements] brought up, we all make decisions in our life. And this is the one made on that day, and that is the end result of that -- pain to some, Mr. Jojola's family; pain to people who love you; and, arguably, spending the rest of your life in prison."

The court sentenced appellant to a term of 50 years to life (doubled, under the three strikes law, from a term of 25 years to life), followed by consecutive five-year and one-year terms under Penal Code sections 667 and 12022, respectively. It also imposed a $5,000 restitution fine, a $5,000 parole revocation fine, a $30 criminal conviction facility assessment, and a $40 court security fee.

DISCUSSION

Appellant contends: (1) the evidence of malice aforethought was insufficient to sustain his first-degree murder conviction; (2) the evidence of premeditation and deliberation was likewise insufficient; (3) the trial court prejudicially erred by denying his request for a midtrial continuance to call Dr. Raven; (4) the prosecutor engaged in prejudicial misconduct by stating, in rebuttal, "You can't have both [accident and self-defense]"; (5) the court prejudicially erred by rejecting appellant's allegation of juror

misconduct as a ground for a new trial or for disclosure of juror identifying information; (6) the court abused its discretion by denying appellant's *Romero* motion; (7) the court erred by imposing fines and assessments without a determination of appellant's ability to pay; and (8) appellant's case should be remanded to give the court an opportunity to exercise its new discretion to strike the five-year enhancement imposed for appellant's prior serious felony conviction.

A. *Sufficiency of the Evidence*

Appellant contends there was insufficient evidence of malice, premeditation, and deliberation to sustain his first-degree murder conviction. We review the sufficiency of the evidence supporting a conviction for substantial evidence, meaning evidence from which a reasonable factfinder could find the defendant guilty beyond a reasonable doubt. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890 (*Covarrubias*).) We neither reweigh evidence nor reevaluate witness credibility. (*Ibid.*)

1. *Malice*

There was sufficient evidence of malice to support appellant's first-degree murder conviction. "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (Pen. Code, § 187, subd. (a).) Intent to kill (unlawfully) is one form of malice. (*Covarrubias*, *supra*, 1 Cal.5th at p. 890.) "'[P]lunging a lethal weapon into the

chest evidences a deliberate intention to kill.'" (*People v. Potts* (2019) 6 Cal.5th 1012, 1028 (*Potts*), quoting *People v. Anderson* (1968) 70 Cal.2d 15, 27 (*Anderson*).)

Here, the jury reasonably could have found that appellant intended to kill Jojola. It reasonably could have inferred that appellant intentionally targeted Jojola's heart, relying on: (1) the chest wound's location, which led Martin to report to the 911 operator that Jojola had been stabbed on or by the heart; and (2) the wound's depth, which equaled the full length of appellant's three-inch-long knife blade. Intent to strike the heart supports an inference of intent to kill. (See *Potts*, *supra*, 6 Cal.5th at p. 1028 [sufficient evidence supported first-degree murder conviction, where knife attacks to chest suggested deliberate intent to kill]; cf. *People v. Mendoza* (2011) 52 Cal.4th 1056, 1071 [same, where single shot to head supported inference of deliberate intent to kill]; *People v. Bolden* (2002) 29 Cal.4th 515, 561 [trial court's failure to instruct jury that intent to kill was element of robbery-murder special circumstance was harmless beyond a reasonable doubt because "defendant could have had no other intent than to kill," where defendant inflicted five-to-six-inch-deep wound to victim's back without signs of struggle or quarrel].)

Contrary to appellant's contention, the evidence did not compel the jury to find the prosecution failed to disprove appellant's self-defense theory. Cerda testified that Jojola seemed to be trying to distance himself from appellant before appellant struck. Saundra testified that she never saw

Jojola attack or advance on appellant and never heard him hit or threaten appellant. Appellant challenges these eyewitnesses' credibility, emphasizing the distance from which Cerda observed the incident and asserting that Saundra told police that "it looked as if Jojola was going to hit [appellant] . . . ." However, we do not reevaluate a witness's credibility.[11] (*Covarrubias*, *supra*, 1 Cal.5th at p. 890.) The jury reasonably could have inferred from Saundra's and Cerda's testimony about Jojola's behavior that appellant did not act on a perceived need to defend himself from Jojola, but instead acted with malice.

2. *Premeditation and Deliberation*

There was sufficient evidence of premeditation and deliberation to support appellant's first-degree murder conviction. Murder that is willful, premeditated, and deliberate is first degree murder. (Pen. Code, § 189.) A murder is "premeditated" if considered beforehand and "deliberate" if the decision to kill results from careful thought and weighing of competing considerations. (*People*

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[11] Moreover, appellant's challenge to Saundra's credibility misrepresents the record, as Saundra did not tell police she believed Jojola was going to hit appellant. Instead, Saundra told police that appellant had been stabbing "like" Jojola was going to hit him, and testified that she meant only that appellant seemed to think Jojola was going to hit him, based solely on the fact that he bowed his head as he struck. The jury was entitled to reject Saundra's inference about appellant's thinking.

v. Lee (2011) 51 Cal.4th 620, 636.) The required extent of reflection may occur quickly. (*Ibid.*) In assessing the sufficiency of evidence of premeditation and deliberation, courts often consider three factors: planning, motive, and manner of killing. (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 10 (*Shamblin*), citing *Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) These "*Anderson* factors" are merely a guide; no specific factor or combination of factors is required. (*Shamblin*, *supra*, at p. 10 & fn. 16.)

Here, the jury reasonably could have found that appellant engaged in an argument with Jojola for several minutes (as Cerda testified), during which appellant (as he himself testified) drew his knife from his belt, unlocked it, and opened it (requiring both hands, as Deputy Tanner testified), after which he drove the full length of its blade into the area of Jojola's heart. These conclusions, in turn, supported findings of premeditation and deliberation. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 577 [sufficient evidence supported findings of premeditation and deliberation, where, several minutes after defendant and victim engaged in verbal altercation, defendant "approached the victim, pulled a firearm from his waistband, cocked the weapon, and fired several shots to the victim's head, neck, and chest areas"].)

The *Anderson* factors support this conclusion. In *Anderson* itself, our Supreme Court recognized that "plunging a lethal weapon into the chest" is a manner of killing that "evidences a deliberate intention to kill . . . ."

(*Anderson*, *supra*, 70 Cal.2d at p. 27; accord, *Potts*, *supra*, 6 Cal.5th at p. 1028; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 ["[a] factor indicating a killing is premeditated and deliberate is the existence of 'wounds [which] were not wild and unaimed but were in the area of the chest and heart'"].) Additionally, the jury reasonably could have found that appellant was motivated by rage against Jojola -- whom he described as arrogant and tight with money -- for prohibiting him from living in Saundra's trailer and for ordering him out of it in front of her. (See *People v. Williams* (2018) 23 Cal.App.5th 396, 410 [evidence of appellant's rage at collapse of his marriage evidenced motive for killing his wife].) Finally, appellant's drawing, unlocking, and opening his knife was evidence of planning. (See *People v. Hashaway* (1945) 67 Cal.App.2d 554, 573 [sufficient evidence supported findings of premeditation and deliberation, in part because defendant took pocket knife out of her pocket and "tried to or did open the pocket knife"], disapproved on another ground by *People v. Sanchez* (1947) 30 Cal.2d 560, 572; *People v. Elmore* (1914) 167 Cal. 205, 210 [jury finding that murder was not premeditated or deliberate "necessarily implie[d] that the jury believed that when [the defendant], prior to the attack, took out his knife, opened it, and kept it opened in his hand, he did so without any design to kill"]; cf. *San Nicolas*, *supra*, 34 Cal.4th at p. 658 [defendant's testimony that he saw victim's reflection in mirror before turning around and stabbing her was evidence of planning].)

B. *Asserted Errors at Trial*

Appellant contends his trial was infected with prejudicial errors, viz., (1) the trial court's denial of his request for a midtrial continuance to call Dr. Raven; (2) the prosecutor's statement, in rebuttal, "You can't have both [accident and self-defense]"; and (3) Juror No. 3's alleged misconduct (along with the court's associated refusal to order a new trial or disclosure of juror identifying information). We address each asserted error in turn.

1. *Denial of Midtrial Continuance*

The trial court acted within its discretion in denying appellant's request for a midtrial continuance to call Dr. Raven. A defendant must show that he has exercised due diligence in securing a witness's attendance to establish good cause for a continuance to call that witness. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037; see also *People v. Wilson* (2005) 36 Cal.4th 309, 351-352 (*Wilson*) [trial court acted within its discretion by denying defense request for continuance to subpoena rebuttal witnesses, despite defense counsel's objection that he was surprised by prosecution witnesses' proffered testimony, where defense counsel had been aware of prosecution's intent to call those witnesses as early as jury selection and nevertheless failed to prepare to have rebuttal witnesses available].) Here, as appellant concedes, Dr. Raven was unavailable because his counsel had decided not to call her. Indeed, appellant's counsel had

withheld Dr. Raven's report from the prosecution when ordered to turn it over unless he determined he was "definitely" not going to call her.

No unforeseeable circumstance required the trial court to excuse this lack of diligence in securing Dr. Raven's attendance. Appellant's counsel reportedly changed his mind about calling Dr. Raven after being "surprised" by Dr. Kennedy's testimony, on cross-examination, that she had never seen a sweeping motion with a knife penetrate a person's heart. But appellant's counsel had long been aware of the prosecution's intent to call Dr. Kennedy, and he himself elicited her testimony about sweeping motions, a topic which the prosecution did not address when questioning her. Due diligence required appellant's counsel, planning to question Dr. Kennedy on this topic, to prepare to have Dr. Raven available for rebuttal on the topic. He did not prepare, instead contacting Dr. Raven only after the prosecution rested and discovering that her "very busy week" prevented her from immediately confirming her availability. The trial court acted within its discretion in declining to excuse this lack of diligence. (See *Wilson*, *supra*, 36 Cal.4th at pp. 351-352.)[12]

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[12] Appellant does not contend his counsel's lack of diligence amounted to constitutionally ineffective assistance. Had he raised such a contention, we would reject it. As the trial court correctly observed, the exclusion of Dr. Raven's proffered testimony as a result of appellant's counsel's failure to secure her attendance did not prejudice appellant's defense. (See *People v.*
(*Fn. is continued on the next page.*)

2. *Prosecutorial Misconduct*

The prosecutor did not commit misconduct by remarking, in rebuttal to appellant's counsel's argument that "you can have both" accident and self-defense in a single killing, "You can't have both." To establish that a prosecutor committed misconduct by making remarks in closing argument, a defendant must show a reasonable likelihood that the jury construed the remarks in an objectionable fashion. (*Potts*, *supra*, 6 Cal.5th at p. 1036.)

Here, contrary to appellant's contention, there is no reasonable likelihood the jury construed the prosecutor's remark as a representation that appellant's account of the killing, if believed, would not establish a legally viable defense. Appellant's account was that he drew and swung his knife only as a warning, without intending to strike Jojola, but accidentally struck him when appellant slipped

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Centeno (2014) 60 Cal.4th 659, 674-676 (*Centeno*) [ineffective assistance claim requires showing of prejudice].) In her report, Dr. Raven agreed with Dr. Kennedy that Jojola died because his heart was pierced by a knife that penetrated three inches deep into his chest (the full length of appellant's knife blade). The key issue at trial was appellant's state of mind when he inflicted this fatal wound; the possibility that he inflicted it by a sweeping motion was tangential at best. Moreover, Dr. Kennedy expressly did not rule out that possibility. There is no reasonable probability that appellant would have obtained a better result had Dr. Raven testified that the autopsy findings were equally consistent with a sweeping motion as with another type of motion.

on the trailer steps at the same time Jojola advanced on him. Although appellant characterizes this account as a "self-defense and accident combination," the trial court correctly recognized that appellant's account corresponded to the legal theory of accident, not self-defense.[13] (See *People v. Villanueva* (2008) 169 Cal.App.4th 41, 53 ["[W]hen a defendant draws a weapon in self-defense, but fires accidentally, the shooting itself is not considered self-defense. Instead, it is an accident"].) The prosecution acknowledged the legal viability of appellant's accident theory (while challenging its evidentiary support). Specifically, after identifying the elements set forth in the instruction on accidental homicide, the prosecutor argued, "[T]o buy into any of that, you have to believe [appellant's] story. His story is basically that. His story is, 'Well, I'm lawfully defending myself by waving a knife around. I didn't mean to do anything. I sort of tripped, and he came to me and ran onto my knife. So it was an accident.'" The jury was not reasonably likely to have construed the prosecutor's challenged remark as withdrawing this recognition that appellant's account, if believed, excused the killing.

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[13] The trial court nevertheless instructed the jury on "complete" and "imperfect" self-defense, in addition to the excuse of accident and the heat of passion theory of voluntary manslaughter. Appellant does not contend the court's instructions on any of these four defense theories were erroneous or confusing.

3. *Juror Misconduct*

The trial court acted within its discretion in finding that the statements attributed to Juror No. 3 did not amount to misconduct.[14] "'A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, . . . [w]e cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations.'" (*People v. Loker* (2008) 44 Cal.4th 691, 753 (*Loker*), quoting *Steele*, *supra*, 27 Cal.4th at p. 1266.)

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[14] Appellant's counsel alleged, in his memorandum in support of appellant's motion for a new trial, that Juror No. 3 told the other jurors "that she sees surgeons make incisions in multiple layers, and that it would therefore be very difficult for the knife to penetrate through soft tissue and reach the heart without [appellant] having intended it, as had been argued by the defense." Later, in his declaration submitted in support of appellant's petition for disclosure of juror identifying information, he similarly alleged that Juror No. 3 told the other jurors "based on her training and experience as a nurse she knows that doctors cut the chest tissue in multiple layers when performing surgery, and that it would therefore have been difficult or impossible for [appellant] to have inflicted the fatal wound in a single rapid slashing motion as posited by the defense."

Here, Juror No. 3's alleged reference to her experience was permissible. Juror No. 3 allegedly referred to her background as an emergency room nurse -- specifically, to her experience observing doctors performing chest surgery -- to support an inference that she used, together with the undisputed evidence that Jojola's chest wound reached his heart, to evaluate the credibility of appellant's testimony that he inflicted the wound accidentally. Assuming arguendo that Juror No. 3 made this reference, it was not misconduct. (See *San Nicolas*, *supra*, 34 Cal.4th at pp. 648-650 [trial court acted within its discretion in finding no juror misconduct, where juror -- "an emergency room nurse familiar with stab wounds" -- allegedly explained medical issues addressed by prosecution expert and relevant to whether victim died from stab wounds before rape]; *Steele*, *supra*, 27 Cal.4th at pp. 1259-1260, 1265-1267 [same, where two jurors with experience in medical field allegedly opined that defense experts had used inadequate criteria to establish validity of brain electrical activity mapping test].)

The primary authority on which appellant relies, *In re Malone* (1996) 12 Cal.4th 935, is distinguishable. There, a psychologist serving as a juror expressed beliefs on the accuracy of polygraph evidence. (*Id.* at p. 948.) She told the other jurors her beliefs were "based on her readings" of professional articles, rather than her own experimental research, and informed the jurors of specific accuracy rates found in those articles. (*Ibid.*) By asserting that the information she conveyed was drawn from her "professional

knowledge," the juror violated the prohibition against expressing opinions "explicitly based on specialized information obtained from outside sources." (*Id.* at p. 963 & fn. 16.) Juror No. 3 was not accused of conveying specialized information from outside sources of professional knowledge, such as professional articles on nursing or surgery. Instead, Juror No. 3 allegedly based her opinion on an inference drawn from what she had personally seen doctors do when performing surgery. Although this observation occurred in the course of her occupational experience, even professionals are allowed to draw on and refer to occupational experience to interpret and evaluate evidence. (See *Loker*, *supra*, 44 Cal.4th at pp. 751-753 [juror with experience as special education teacher committed no misconduct even if he explained to other jurors his or her "'professional opinion'" that defendant had no serious learning disability and gave other jurors "'examples from [his or her] professional background'"]; *San Nicolas*, *supra*, 34 Cal.4th at pp. 648-650; *Steele*, *supra*, 27 Cal.4th at pp. 1259-1260, 1265-1267.)

Because the trial court acted within its discretion in ruling that the statements attributed to Juror No. 3 did not amount to juror misconduct, it likewise acted within its discretion in denying appellant's petition for disclosure of juror identifying information. (See *People v. McNally* (2015) 236 Cal.App.4th 1419, 1429-1431 [trial court acted within its discretion in denying petition for release of juror identifying information, where defendant failed to make prima facie showing of misconduct].) For the same reason, the trial

court acted within its discretion in denying appellant's motion for a new trial without holding an evidentiary hearing on the asserted misconduct. (See *People v. Avila* (2006) 38 Cal.4th 491, 604 [evidentiary hearing should be held only where defense evidence shows strong possibility of prejudicial misconduct].)

Appellant contends he was prejudiced by the cumulative effect of the asserted juror misconduct, asserted prosecutorial misconduct, and asserted error in the denial of his request for a midtrial continuance. Having rejected each individual contention of error, we find no cumulative prejudice.

C. *Asserted Errors at Sentencing*

Appellant contends the trial court erred at sentencing by denying his *Romero* motion and by imposing fines and assessments without a determination of his ability to pay. We address each contention in turn.

1. *Denial of* Romero *Motion*

The trial court acted within its discretion in declining to dismiss the allegation that appellant had a prior strike conviction, viz., a 1994 voluntary manslaughter conviction arising from a drive-by shooting. A trial court abuses its discretion by declining to dismiss a prior strike allegation only if the defendant so clearly falls outside the spirit of the three strikes scheme that no reasonable person could disagree. (See *People v. Carmony* (2004) 33 Cal.4th 367, 376

(*Carmony*).) Only extraordinary circumstances warrant a finding that a defendant falls outside the spirit of the three strikes scheme. (*Ibid.*) Accordingly, "the circumstances where no reasonable people could disagree that the [defendant] falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Id.* at p. 378.)

The circumstances here are not so extraordinary. In committing the current offense and his prior strike offense, appellant used weapons to kill two people. (See Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2019) ¶ 20:55 ["An important factor to consider is whether the current or past offenses involved violence or the use of a weapon"], citing *People v. Myers* (1999) 69 Cal.App.4th 305, 308-310.) In the intervening years, appellant was convicted twice of unlawful possession of weapons and once of receiving stolen property. A reasonable person could believe appellant fell within the spirit of the three strikes scheme. (See *People v. Cole* (2007) 152 Cal.App.4th 230, 233-237 & fn. 6 [trial court acted within its discretion in applying three strikes law to defendant convicted in 2006 for possession of cocaine for sale "given his history of continuing criminal conduct," where defendant had previously been convicted in 2004 for taking contraband into California Youth Authority and in 1997 -- when he was only 16 years old -- for lewd and lascivious act upon 13-year-old].)

2. *Omission of Inquiry into Appellant's Ability to Pay*

Appellant forfeited his challenge, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), to the trial court's imposition of fines and assessments without a determination of his ability to pay. As appellant acknowledges, he did not object on this ground in the trial court. We agree with our colleagues in Division Eight of this Appellate District that a failure to object in the trial court forfeits this issue on appeal. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 (*Frandsen*).) For the reasons set forth in *Frandsen*, we reject appellant's contentions that the issue was preserved because it is a pure question of law or because any objection before the purportedly unforeseeable ruling in *Dueñas* would have been futile. (See *Frandsen*, *supra*, 33 at pp. 1153-1155.)

We also reject appellant's contention, raised in the alternative, that his counsel's failure to object constituted ineffective assistance of counsel. To establish ineffective assistance of counsel, an appellant bears the burden of showing prejudice, meaning a reasonable probability that but for the challenged act or omission of counsel, the appellant would have obtained a more favorable result. (*Centeno*, *supra*, 60 Cal.4th at pp. 674-676; see also *In re Crew* (2011) 52 Cal.4th 126, 150 ["If a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel's performance was deficient"].) Although appellant asserts

that the trial court likely would have found he lacked the ability to pay the fines and assessments, he identifies no support for this assertion other than his use of appointed counsel, which has limited probative value. (Cf. *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1075-1076 [inability to pay costs of appointed counsel does not establish inability to pay restitution fine or other court-imposed fees].) Further, appellant fails to address whether the court might have found him able to pay the fines and assessments from prison wages. (See *id.* at pp. 1075-1077 [any *Dueñas* error was harmless due to defendant's ability to earn prison wages equaling amount of fine and assessments]; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 [same]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140 [same].) He therefore fails to satisfy his burden to show prejudice.

D. *Remand for Exercise of New Discretion to Strike Enhancement*

We grant appellant's request for remand to the trial court for an opportunity to exercise the court's new discretion, under S.B. 1393, to strike the five-year sentence enhancement imposed for appellant's prior serious felony conviction.[15] Remand is required unless the court "'clearly indicated'" that it would not have stricken the enhancement had it had discretion to do so. (*People v. Franks* (2019)

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[15] Respondent concedes that S.B. 1393's expansion of the trial court's discretion operates retroactively.

35 Cal.App.5th 883, 892; but see *Johnson*, *supra*, 32 Cal.App.5th at p. 69 [remanding for exercise of discretion under S.B. 1393 "out of an abundance of caution," even though trial court stated it would not have stricken enhancement had it had discretion to do so].) Respondent opposes remand, arguing the court clearly indicated it would not have stricken the enhancement by: (1) denying appellant's *Romero* motion; (2) commenting that appellant had stolen Jojola from his loved ones (emphasizing this loss with a positive description of Jojola's role in his family and in society); and (3) observing that appellant's "horrible act" would "arguably" result in appellant's lifelong imprisonment.

We conclude remand is appropriate. The court's denial of appellant's *Romero* motion indicates only a finding that no extraordinary circumstances warranted departure from the three strikes law. (See *Carmony*, *supra*, 33 Cal.4th at p. 376; *Johnson*, *supra*, 32 Cal.App.5th at p. 69 [rejecting argument that trial court's refusal to dismiss prior strike showed it would not have stricken enhancement under S.B. 1393].) The comments on which respondent relies were unexceptional descriptions of the gravity of appellant's crime and its consequences. Moreover, respondent exaggerates the import of those comments by taking them out of context. Although the court unsurprisingly deemed the murder a "horrible act," the court also noted that it believed appellant regretted the act, and credited appellant with apologizing to Jojola's family. It also commented on its own severely limited discretion. On this record, we find no clear

indication the court would have imposed an identical sentence had its discretion then been as broad as it is now.

People v. Jones (2019) 32 Cal.App.5th 267, on which respondent relies, is distinguishable. There, the trial court had discretion to exercise leniency on one count but nevertheless imposed the upper term, stating that "'no shortage'" of aggravating factors supported it. (*Id.* at p. 274.) The court further stated, "'This gives me obviously, as you know, great satisfaction in imposing the very lengthy sentence here today.'" (*Ibid.*) The trial court's comments here are not comparable.

DISPOSITION

Appellant's conviction is affirmed. The matter is remanded with directions to the trial court to decide, at a hearing at which appellant has the right to be present with counsel, whether it will exercise its discretion to strike the prior conviction enhancement imposed under Penal Code section 667, subdivision (a). (See *People v. Rocha* (2019) 32 Cal.App.5th 352, 359-360.) If the court elects to strike the enhancement, it shall resentence appellant, issue a new abstract of judgment, and forward the new abstract of judgment to the California Department of Corrections and Rehabilitation. If the court elects not to strike the enhancement, appellant's original sentence shall remain in effect. (See *id.* at p. 361; *People v. Buckhalter* (2001) 26 Cal.4th 20, 35.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.