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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO MEJIA LEVERON, Defendant and Appellant.	B292165 (Los Angeles County Super. Ct. No. LA078100)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Jesic, Judge. Judgment of conviction affirmed; matter remanded with directions.

Michelle T. Livecchi-Raufi, 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, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Roberto Mejia Leveron of residential burglary. The jury found true the allegation that a person was present in the residence during the commission of the offense. Mejia Leveron appeals, contending (1) the evidence was insufficient to support the burglary offense; (2) the voluntary intoxication instruction erroneously precluded the jury from considering evidence of intoxication in deciding whether his flight supported a consciousness of guilt; (3) the denial of his request to dismiss his prior strike conviction was an abuse of discretion; and (4) remand is required to allow the trial court to exercise its discretion to strike the prior serious felony conviction enhancement, in light of Senate Bill No. 1393. We reject all but the last of his contentions. We order Mejia Leveron's sentence vacated and the matter remanded to allow the trial court to exercise its discretion pursuant to Senate Bill No. 1393. In all other respects, the judgment is affirmed.

FACTS AND PROCEDURE

1. *Facts*

a. Prosecution Evidence

Mejia Leveron dated Patricia Ortiz Lopez for about four years. They had a daughter together. From a prior relationship, Ortiz Lopez also had an adult son named Sergio Urbina. Ortiz Lopez, her daughter, and Urbina lived together in an apartment. Mejia Leveron had lived at Ortiz Lopez's apartment for a few months, but never had a key. He would never leave or enter the apartment without Ortiz Lopez or Urbina.

In 2014, Ortiz Lopez and Mejia Leveron ended their relationship. Ortiz Lopez began a new relationship with a man

named William DeLeon. At some point, Mejia Leveron asked Urbina for DeLeon's phone number. Urbina gave DeLeon's number to Mejia Leveron.

In March of 2014, Mejia Leveron called Ortiz Lopez, and cursed at her. Ortiz Lopez, DeLeon, and Urbina were all present for the call which was placed on speaker phone.

On March 28, 2014, Mejia Leveron called DeLeon, and complained about his relationship with Ortiz Lopez. Mejia Leveron also stated, "You're going to go to hell. And you know I know where your kids live." Out of fear for his children, DeLeon ended his relationship with Ortiz Lopez.

On April 13, 2014, around midnight, Mejia Leveron called Ortiz Lopez five or six times. He expressed anger that DeLeon was at her apartment. Ortiz Lopez informed him that she was alone and sleeping. Mejia Leveron told her that he was going to her home.

At about 4:00 a.m., a loud noise woke up Urbina while he was sleeping in the second-floor apartment he shared with Ortiz Lopez. He went to the living room. Through a sliding glass door, he saw Mejia Leveron on the balcony. The sliding glass door was partially opened. It was previously closed before Urbina went to sleep. Mejia Leveron began cussing, then asked, "Where is she? Where is he?" As Mejia Leveron was trying to open the sliding door, Urbina showed him his phone, and told him that he was going to call the police. Mejia Leveron dared him to call the police. He also stated, "I'm going to kill you, mother fucker."

Once Mejia Leveron opened the sliding glass door, he entered the living room and tried to reach Ortiz Lopez's bedroom. To prevent Mejia Leveron from reaching the bedroom, Urbina

grabbed him in a bear hug. Mejia Leveron continued to ask, "Where is she? Where is he?"

As Urbina maintained the bear hug, Mejia Leveron kicked the bedroom door two or three times until it broke open. Once the door opened, Mejia Leveron cussed at Ortiz Lopez who was alone inside the bedroom. Mejia Leveron asked, "Where is that man?" Ortiz Lopez told him that she was by herself. While holding a kitchen knife, Mejia Leveron told her that he was going to kill DeLeon.

Urbina was finally able to bring Mejia Leveron to the front door. Mejia Leveron tried to return to Ortiz Lopez's bedroom. When sirens could be heard, Mejia Leveron left the apartment. Neither Urbina, nor Ortiz Lopez, gave Mejia Leveron permission to enter their apartment on April 13, 2014.

Urbina smelled the odor of alcohol on Mejia Leveron. Ortiz Lopez was not close enough to smell any alcohol, but observed that Mejia Leveron was not acting like himself.

At some point, Mejia Leveron dropped the knife. The police later found a knife in the apartment.

b. Defense Evidence

The defense recalled DeLeon, who testified that he received the phone calls from Mejia Leveron between 1:00 a.m. and 3:00 a.m. Mejia Leveron did not appear to be intoxicated.

2. *Procedure*

A jury convicted Mejia Leveron of first degree residential burglary. It found true the allegation that a person was present in the residence during the commission of the offense. (Pen.

Code, §§ 459, 667.5, subd. (c)(21).)[1] The jury acquitted Mejia Leveron of criminal threats against DeLeon. (§ 422, subd. (a).)

Mejia Leveron waived his right to a jury trial for the prior conviction allegations, which the trial court bifurcated from the guilt phase on the charges. The trial court found that on August 18, 2006, Mejia Leveron suffered a prior conviction for assault with a firearm, in violation of section 245, subdivision (a)(2), and an enhancement for the personal use of a firearm, in violation of section 12022.5, subdivision (a). This prior conviction qualified as a prior felony conviction under the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12), a prior serious felony conviction under section 667, subdivision (a)(1), and a prior prison term under section 667.5, subdivision (b).

On the burglary charge in count 1, the trial court sentenced Mejia Leveron to the midterm of four years, doubled pursuant to the Three Strikes law. The trial court imposed an additional five years for the prior serious felony conviction enhancement under section 667, subdivision (a)(1). The court imposed and stayed one year for the prior prison term enhancement. The total aggregate term of imprisonment was 13 years in state prison.

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[1] All further undesignated statutory references are to the Penal Code.

DISCUSSION

1. Sufficiency of Evidence

A person is guilty of burglary when he or she enters a structure enumerated in section 459 with the intent to commit a larceny or any felony. (§ 459; *People v. Smith* (2006) 142 Cal.App.4th 923, 929.) Exceptions include when the person "has an unconditional possessory right to enter as the occupant of that structure," or "[has been] invited to enter by the occupant who … endorse[d] [his or her] felonious intent." (*People v. Salemme* (1992) 2 Cal.App.4th 775, 781; *People v. Davenport* (1990) 219 Cal.App.3d 885, 892; *Smith*, at p. 930.) Mejia Leveron argues that insufficient evidence supports the burglary conviction because he had a possessory right to enter Ortiz Lopez's apartment.[2] We disagree.

Our standard of review is well settled. When the sufficiency of the evidence is challenged, " ' " 'the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' " ' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054–1055; *People v. Zamudio* (2008) 43 Cal.4th 327, 357 ; *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) " '[I]t is the [trier of fact], not the appellate court which must be convinced of the defendant's guilt[.]' " (*Nguyen,* at pp. 1055–1056.) "A reversal for insufficient evidence 'is unwarranted

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[2] There was no evidence that Ortiz Lopez or Urbina invited Mejia Leveron to the apartment or endorsed his felonious intent. Mejia Leveron does not suggest otherwise.

unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' " the verdict. (*Zamudio,* at p. 357; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "[We] must presume in support of the judgment the existence of every fact [the trier of fact] could reasonably have deduced from the evidence. [Citation.]" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

The record provides substantial evidence that Mejia Leveron did not have an unconditional possessory interest in Ortiz Lopez's apartment. "The possessory right protected by section 459 is the 'right to exert control over property to the exclusion of others' or, stated differently, the 'right to enter as the occupant of that structure.' [Citation.]" (*People v. Clayton* (1998) 65 Cal.App.4th 418, 421, fn. 3; *People v. Smith*, *supra*, 142 Cal.App.4th at p. 932.)

Both Urbina and Ortiz Lopez testified that Mejia Leveron did not have permission to enter the apartment on the date of incident. Additional evidence supports this testimony. First, on the date of the incident, Mejia Leveron did not have a key to the apartment. Second, he entered by forcing open the second story balcony sliding glass door, rather using the front door. Third, Urbina's reaction to seeing Mejia Leveron was to call the police.

Although at some point, Mejia Leveron did live at the apartment, it was only for a limited time. He was not residing at the apartment on the date of the incident. Even when he did live at the apartment, he could only enter with Urbina or Ortiz Lopez.

Mejia Leveron claims multiple facts support his possessory interest, including his freedom to enter and exit the apartment as he pleased, his receipt of a key to the apartment from his daughter, and his receiving mail at the apartment. First, none of

these facts are specifically supported by the record. Second, as the Attorney General correctly asserts, we are not to reweigh the evidence. " 'We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' " (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.) "If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639.) Even if these facts did exist in the record, the bulk of the record supports the judgment. Accordingly, we reject Mejia Leveron's insufficiency of evidence argument.

2. *The Voluntary Intoxication and Flight Instructions*

a. Forfeiture and the merits of Mejia Leveron's claim

The trial court instructed the jury with the voluntary intoxication instruction under CALCRIM No. 3426. The trial court inserted language to allow consideration of intoxication in deciding whether Mejia Leveron acted with the intent required for burglary. The trial court also instructed the jury with the flight instruction under CALCRIM No. 372. Mejia Leveron now argues that the trial court erred by not instructing the jury that it may consider voluntary intoxication in deciding whether his flight was evidence of his consciousness of guilt.

Mejia Leveron did not object to any instruction. He also did not request any clarifying or amplifying instructions. A defendant's failure to object to an instructional error forfeits the issue, unless the error affects his or her substantial rights. (§ 1259; *People v. Bedolla* (2018) 28 Cal.App.5th 535, 544; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978; *People v. Anderson*

(2007) 152 Cal.App.4th 919, 927; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) " 'Substantial rights' are equated with errors resulting in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465; *Arredondo*, at p. 978; *Anderson*, at p. 927; *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11; *Watson*, at p. 836.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim … ." (*Andersen*, at p. 1249; *Lawrence*, at p. 553, fn. 11.) Accordingly, we will analyze whether the instruction should have included consideration of intoxication for flight, and whether the error, if any, was prejudicial.

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citation] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration [citations]." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

We reject Mejia Leveron's argument that the trial court committed prejudicial error by precluding the jury from considering evidence of intoxication in deciding whether his flight supported a consciousness of guilt instruction under CALCRIM No. 3426. To agree with this contention, we would need to first apply the voluntary intoxication defense under section 29.4 to a mental state for an act showing consciousness of guilt. Second, we would need to determine that flight includes a mental state to which voluntary intoxication can apply. Even if we recognize that voluntary intoxication does apply outside of the context of section 29.4, we decline to apply it to the act of flight.

Mejia Leveron relies on *People v. Wiidanen* to support his contention with the voluntary intoxication instruction.[3] (*People v. Wiidanen* (2011) 201 Cal.App.4th 526, 533 (*Wiidanen*).) *Wiidanen* concluded that a jury should be permitted to consider whether a defendant's voluntary intoxication prevented him or her from knowing that his pretrial statements were false or misleading when those statements are used as evidence of consciousness of guilt, as instructed in CALCRIM No. 362. (*Ibid.*) In such a situation, *Wiidanen* directed trial courts to modify CALCRIM No. 3426 to allow jurors to consider evidence of voluntary intoxication in deciding whether the defendant had knowledge that his pretrial statement was false or he intended to mislead. (*Ibid.*) *Wiidanen* reasoned that the statement may not be probative of the defendant's veracity if the jurors believed he or she was too intoxicated to know his statement was false or misleading. (*Ibid.*) The court relied on the relevance of intoxication " ' "to the question of awareness, familiarity, understanding and the ability to recognize and comprehend." ' " (*Ibid.* [citing *People v. Reyes* (1997) 52 Cal.App.4th 975, 983].)

Wiidanen fails to address how the voluntary intoxication defense applies to making false or misleading statements, when the statute providing for the defense does not include such an application.[4] Section 29.4, subdivision (b), states, "Evidence of

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[3] Mejia Leveron also cites *People v. McGehee*, which expanded *Wiidanen* to allow for the consideration of mental illness or impairment in the same context of knowledge or intent under CALCRIM No. 362. (See *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1204–1205.)

[4] *McGehee* similarly fails to address how mental illness or impairment applies to making false or misleading statements

voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b).) The plain language of section 29.4, subdivision (b), does not include application of voluntary intoxication to acts showing consciousness of guilt. Based on this omission, we can presume that section 29.4, subdivision (b), simply does not apply to such acts. (*People v. Soto* (2018) 4 Cal.5th 968, 975; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298.)

Even if we assume that section 29.4 can be expanded to allow for application of voluntary intoxication outside of the mental states for crimes and enhancements, we cannot conclude that voluntary intoxication can be applied to the act of flight after the commission of a crime. Flight does not require any mental state to which voluntary intoxication can apply.

Generally, when a crime's definition " 'consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence,' " the mental state is deemed general intent. (*People v. Atkins* (2001) 25 Cal.4th 76, 81–82 [citing *People v. Hood* (1969) 1 Cal.3d 444, 456–457].) Evidence of voluntary intoxication is inadmissible to negate general intent. (*Atkins*, at p. 81.) However, when the crime's definition refers to a defendant's intent to do some "further act or achieve some additional consequence," the mental state is deemed to be one of specific intent. (*Id.* at p. 82.) Voluntary

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when section 28, subdivision (a), does not include such an application. (§ 28, subd. (a).)

intoxication can negate specific intent. (*Id.* at p. 81–82; § 29.4, subd. (b).)

Wiidanen applies voluntary intoxication to the knowledge requirement in CALCRIM No. 362. Specifically, CALCRIM No. 362 requires that the defendant made a false or misleading statement relating to the charged crime with knowledge that the statement was false or with an intent to mislead. Arguably, knowledge is considered a specific intent to which voluntary intoxication can apply. (*People v. Reyes*, *supra*, 52 Cal.App.4th at p. 985.)

Unlike CALCRIM No. 362, CALCRIM No. 372 does not include knowledge or any other specific intent for the act of flight. CALCRIM No. 372 allows for the permissive inference of a consciousness of guilt based on a defendant's flight after a crime was committed. In this context, flight would require only general intent. The definition consists of only the description of the act without reference to an intent to complete a further act. Because voluntary intoxication can only be considered to negate specific intent or the other enumerated mental states in section 29.4, subdivision (b), it cannot negate the general intent for flight.

Mejia Leveron argues that flight implicitly contains a knowledge requirement. Specifically, he reasons that the defendant must knowingly flee from someone or something. We reject this argument. The instruction only requires proof of the act of flight and the timing of the flight after the commission of the crime.[5] These are the only facts from which the jury may

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[5] CALCRIM No. 372 states: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the

infer the defendant is aware of his or her guilt. The limitation to these facts allows for a permissive inference to be drawn. Once the jury finds that the evidence supports the defendant's act and the surrounding circumstances, it is to next weigh their significance. This leaves open the possibility for the jury to draw other inferences, even those suggesting innocence. Knowledge of flight from apprehension by the authorities or others would exclusively show that the defendant was leaving to avoid that apprehension. If we were to require such knowledge, no inference could be drawn other than the awareness of guilt. Such a result would contradict the cautionary nature of the flight instruction, which "benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; *People v. Streeter* (2012) 54 Cal.4th 205, 254.)

As raised in *Wiidanen*, Mejia Leveron also argues that the flight instruction created a constitutionally impermissible inference because it did not require that the jury first determine whether he knowingly fled from the scene. (*Wiidanen*, *supra*, 201 Cal.App.4th at pp. 533–534.) " 'A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]' " (*Id.* at p. 534, italics omitted; *People v. Mendoza* (2000) 24 Cal.4th 130, 180, superseded by statute on other grounds as stated in *People v. Brooks* (2017) 3 Cal.5th 1, 63, fn. 8.) A permissive inference does not relieve the prosecution of its burden " 'because it still requires the State to convince the jury that the suggested conclusion should be

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meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

inferred based on the predicate facts proved.' " (*Mendoza*, at p. 180.)

The flight instruction here did not violate due process by reducing the prosecution's burden of proof. As we discussed, any proof of knowledge is not required in the flight instruction. Moreover, the jury could reasonably infer, based on the evidence, that Mejia Leveron was aware of his guilt when he fled. He illegally and forcefully entered the apartment, armed with a knife, looking for DeLeon. Urbina warned Mejia Leveron that he would call the police. Ortiz Lopez did call the police because of Mejia Leveron's threatening behavior. Once Mejia Leveron heard the sirens approaching, he left the apartment. Under these circumstances, the permissive inference of his awareness of guilt was reasonable.

b. Assumed error would be harmless

Even if the trial court did err by not allowing for consideration of voluntary intoxication to flight, any error would be harmless. Mejia Leveron contends that the federal harmless error standard applies because the error violated his rights under the Sixth Amendment Compulsory Process Clause and Fourteenth Amendment Due Process Clause by denying him a meaningful opportunity to present a complete defense.

However, the California Supreme Court has held that instructional error restricting a jury's consideration of voluntary intoxication amounts to state law error. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134–1135.) If erroneous, the voluntary intoxication instruction here may have adversely affected the defense, but it did not deprive Mejia Leveron of the right to present a defense. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.) The instruction merely precluded consideration of

evidence for the flight instruction, and not for the substantive offense of burglary. Such an error is subject to the standard for state law error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836). The court must reverse "only if it also finds a reasonable probability the error affected the verdict adversely to defendant." (*Ibid.*; *Humphrey*, at p. 1089; *Mendoza*, at pp. 1134–1135.)

We are not convinced that Mejia Leveron has suffered prejudice under any standard. First, the jury was free to consider intoxication as a defense to the burglary charge, and rejected it. The trial court did properly instruct on the consideration of intoxication to negate the requisite intent for the burglary charge. Overwhelming evidence contradicted Mejia Leveron's claim that his intoxication negated the intent to assault DeLeon. The evidence supported Mejia Leveron's conscious and deliberate effort to seek out and attack DeLeon. He armed himself with a knife. He entered the apartment by forcing open the second story balcony sliding door. He continuously demanded to know if DeLeon was present in the apartment. Finally, he broke down an inner bedroom door, and threatened to kill DeLeon.

In contrast to the overwhelming evidence of the intent to assault, the evidence of intoxication was minimal. It was limited to the odor of alcohol on Mejia Leveron, and behavior characterized as not normal. There was no evidence as to the quantity of alcohol that Mejia Leveron consumed or its debilitating effects. The jury rejected any effect that intoxication would have had on Mejia Leveron's intent to assault. It would have similarly rejected any impact the evidence of intoxication would have had on his flight from the apartment.

Second, no other explanation reasonably suggests why Mejia Leveron would leave the apartment other than to avoid

apprehension by the police. In the moments before the sirens were audible, after Mejia Leveron displayed his threatening behavior, Urbina had warned him that he would call the police. Ortiz Lopez did call the police. Why else would Mejia Leveron leave when the police approached? It was not reasonably probable that the jury would have concluded that intoxication caused him to leave when the police arrived.

Third, the prosecutor minimally relied on the evidence of flight to support Mejia Leveron's consciousness of guilt. Instead, the prosecutor argued that the evidence of flight contradicted any effect the intoxication might have on Mejia Leveron's intent to assault. He made a series of arguments to show that Mejia Leveron's actions and words, prior to arriving at the apartment, during his time there, and when he departed, supported his ability to form the requisite intent. Only in one final comment did the prosecutor mention that the jury could consider flight as evidence of consciousness of guilt.

Even if the instruction included the application of intoxication to flight, it is not reasonably probable that Mejia Leveron would have obtained a more favorable result. Accordingly, we conclude that the instruction did not result in a miscarriage of justice to Mejia Leveron and his substantial rights were not affected.

3. *Denial of Request to Dismiss Prior Strike Conviction*

On the conviction for burglary, the trial court sentenced Mejia Leveron to the midterm of four years, doubled due to the prior strike conviction under the Three Strikes law.[6] Mejia

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[6] Sections 667, subdivisions (b)–(j), 1170.12.

Leveron argues that the trial court abused its discretion by refusing to dismiss the strike prior conviction. We disagree.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529–530 (*Romero*).) To strike or dismiss a prior conviction allegation under the Three Strikes law, the court must consider whether the defendant may be deemed outside the scheme's spirit, in whole or in part "in light of the nature and circumstances of his [or her] present felonies and prior serious and/or violent felony convictions, and the particulars of his [or her] background, character, and prospects … ." (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Garcia* (1999) 20 Cal.4th 490, 498–499; *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

The Three Strikes law is intended to restrict discretion in sentencing repeat offenders. (*Romero*, *supra*, 13 Cal.4th at p. 528.) It establishes a sentencing scheme to be applied in every case where the defendant has a qualifying prior conviction. (*People v. Strong* (2001) 87 Cal.App.4th 328, 337–338; *Carmony*, *supra*, 33 Cal.4th at p. 377.) "In deciding to strike a prior, a sentencing court is concluding that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he [or she] actually fell outside the Three Strikes scheme." (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474; *Strong*, at pp. 337–338; *Carmony*, at p. 377.)

Accordingly, we review for abuse of discretion a trial court's failure to dismiss a prior "strike" conviction in the interests of justice. (*Carmony*, *supra*, 33 Cal.4th at p. 376; *Romero*, *supra*, 13 Cal.4th at p. 530.) We must not substitute our judgment for the

judgment of the trial court. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.)

The trial court stated that the sentence was based on its consideration of Mejia Leveron's criminal record. The prior strike conviction itself was for assault with a firearm with a personal use of a firearm enhancement. Mejia Leveron received an eight year state prison sentence in 2006. The prior conviction was not remote in time, given the length of the sentence and the current offense date of 2014. There is no mitigation surrounding the prior conviction.

Additional factors raised by the prosecutor for the trial court to consider included the threat of great bodily injury and use of a weapon in the commission of the current offense, as well as the vulnerability of the victim, Ortiz Lopez. Burglary, when committed in the presence of an occupant, is a violent felony. (§ 667.5, subd. (c)(21).) It carries a high risk of danger, as it did in this case, where the intruder confronts the occupants.

Mejia Leveron claims that the trial court did not consider the mitigating factors raised at sentencing, including his struggle with alcoholism, productivity in his job prior to the current incarceration, and efforts at improvement while in custody. Mejia Leveron also contends that by raising his pending federal criminal case involving the MS 13 gang, the trial court relied on an impermissible factor in declining to dismiss the strike prior conviction. (See *Carmony*, *supra*, 33 Cal.4th at p. 378.)

However, we presume the trial court considered all the relevant factors in the absence of an affirmative record to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Although the trial court expressly referred only to Mejia Leveron's criminal history and the pending federal case, we

presume it did consider, and based its decision on, all the relevant factors set forth in *Romero* and *Williams*. (*Id.*; *Romero*, *supra*, 13 Cal.4th at p. 530; *People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

Based on the nature of the current offense and the prior offense, the denial of Mejia Leveron's request to dismiss the prior strike conviction was not so "irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at p. 377.) " 'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' " (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at pp. 977–978; *Carmony*, at p. 377.)

4. *Knowing and Intelligent Waiver of Right to Jury Trial for Prior Convictions*

Mejia Leveron claims that his waiver of the right to a jury trial for the prior conviction allegations was not knowing and intelligent because the trial court inadequately advised him of his right to a jury trial. We reject his claim.

Generally, the right, if any, to a jury trial for prior conviction allegations derives from sections 1025, subd. (b), and 1158, not from the state or federal constitutions.[7] (§§ 1025, subd. (b), 1158; *People v. Epps* (2001) 25 Cal.4th 19, 22; *People v. Mosby* (2004) 33 Cal.4th 353, 360; *Apprendi v. New Jersey* (2000) 530

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[7] When proof of the prior conviction requires resolution of a factual dispute in the defendant's conduct in the prior offense, he or she is entitled to a jury trial as a matter of state and federal law. (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1207–1208; *People v. Wilson* (2013) 219 Cal.App.4th 500, 515.)

U.S. 466, 490.) A defendant may waive his or her right to a jury trial for prior conviction allegations. (§§ 1025, subd. (b), 1158.) A court may not accept a defendant's waiver of the right to a jury trial, unless it is "knowing and intelligent," that is made with "full awareness" of both the nature of the right being waived and the consequences of the waiver. (*People v. Cunningham* (2015) 61 Cal.4th 609, 636–637; *People v. Collins* (2001) 26 Cal.4th 297, 304–305.) The waiver must also be voluntary. It must be the " ' " 'product of a free and deliberate choice rather than intimidation, coercion, or deception. [Citations.]' " ' " (*Collins*, at p. 305.)

The Supreme Court has "not mandated any specific method for determining whether a defendant has made a knowing and intelligent waiver of a jury trial in favor of a bench trial."[8] (*People v. Sivongxxay*, *supra*, 3 Cal.5th at p. 167.) "Reviewing courts must continue to consider all relevant circumstances in determining whether a jury trial waiver was knowing, intelligent, and voluntary." (*Id.* at p. 170.)

The key circumstance in Mejia Leveron's case is that the trial court took his waiver near the conclusion of the guilt phase of his own jury trial. This circumstance distinguishes Mejia Leveron's waiver from those taken in the cases he cites. (See, e.g., *People v. Jones* (2018) 26 Cal.App.5th 420, 436 [no showing that defendant understood the nature of the right to a jury trial for the guilt phase of the substantive offense].) Mejia Leveron watched the selection of the jurors. He, along with those jurors,

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[8] The Supreme Court recommended that trial courts advise defendants of the basic mechanics of a jury trial, and ensure that defendants comprehend what the jury trial entails. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 167–168.)

saw the evidence presented and witnesses examined. Through his own experience, he observed the mechanics of a jury trial. This experience supplemented any possible deficiency in the trial court's advisement. We conclude the record does support a knowing and intelligent waiver by Mejia Leveron, under the totality of the circumstances.

5. *Senate Bill No. 1393 and the Prior Serious Felony Conviction Enhancement*

The trial court imposed an additional five years to Mejia Leveron's sentence based on the status enhancement that he suffered a prior serious felony conviction, pursuant to section 667, subdivision (a)(1). Mejia Leveron contends his sentence must be vacated and remanded to allow the trial court to exercise its discretion to strike the enhancement in light of Senate Bill No. 1393. The Attorney General concedes, and we agree.

When Mejia Leveron was sentenced on July 16, 2018, section 667, subdivision (a)(1), required the imposition of an additional and consecutive five years to the sentence. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Effective January 1, 2019, Senate Bill No. 1393 amended sections 667, subdivision (a), and 1385, to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2; *Garcia*, at p. 971.)

Senate Bill No. 1393 applies retroactively to all cases that were not final when it took effect, such as Mejia Leveron's case. (*People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973.) Under *In re Estrada*, absent contrary evidence, we presume that an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Brown* (2012) 54 Cal.4th 314, 323.)

The *Estrada* rule applies to penalty enhancements, as well as to amendments giving the trial court discretion to impose a lesser penalty. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Francis* (1969) 71 Cal.2d 66, 75–76.)

Remand is appropriate. The trial court's comments do not clearly indicate whether it would, or would not, have imposed the enhancement had it possessed the discretion to strike it. "Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Accordingly, we vacate Mejia Leveron's sentence and remand for resentencing to allow the trial court to exercise its discretion, and determine whether to strike the serious felony enhancement under section 667, subdivision (a)(1). We offer no opinion on how the trial court should exercise its discretion. Such discretion is for the trial court to exercise in the first instance.

DISPOSITION

Mejia Leveron's sentence is vacated. The matter is remanded to allow the trial court to exercise its discretion and determine whether to strike the prior serious felony conviction status enhancement under section 667, subdivision (a)(1). If the trial court does not strike the enhancement, then it shall be reinstated as originally imposed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HANASONO, J.*

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.

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