Filed 9/6/12 P. v. Young CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN CEPHAS YOUNG, Defendant and Appellant.	B230106 (Los Angeles County Super. Ct. No. PA065631)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant John Cephas Young guilty of one count of burglary. On appeal, he contends that the judgment must be reversed due to instructional error, namely, the trial court failed to instruct on the defense of consent and should not have instructed on aiding and abetting and on insurance fraud. He also contends that the trial court abused its discretion by denying his *Pitchess*[1] motion and that there are errors in his sentence. We reject all contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case.*

In September 2009, Miguel Raphael attended Columbia College, a film school. He and Tyler Shields shared an off-campus dormitory room. Sometime in 2008 or early 2009, Raphael met defendant, who said he worked for a moving company. The two men started hanging out almost every day, recording music in the "A.D.R." room at Columbia. A Russian man occasionally joined them.

In September 2009, defendant asked Raphael if he could get a school camera for a friend. On September 5, Raphael texted to defendant a picture of a video camera belonging to the school. Raphael checked out the camera from school.

On September 8, 2009, Raphael left his dorm around 7:30 a.m. and returned around 1:00 a.m. on September 9. During the time he was out of his room, he saw defendant, who was with the Russian guy, around 4:00 p.m. Raphael and defendant also spoke over the phone during the day. Shields left the room around 12:30 in the afternoon and returned around 4:00 p.m. to pick up his laptop, but he left again and did not return until about 1:30 a.m. When Raphael returned to the room around 1:00 a.m., the bottom lock was locked, but he could not tell if the top was locked. There were no signs of forced entry, but the room was in disarray, with clothes and books strewn on the floor and the refrigerator and drawers open. Missing were Raphael's two suitcases and camera and

---

[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

lighting equipment that Shields had checked out from Columbia. Also missing were Shields's computer desktop and laptop, movies, and books.

The police showed Raphael surveillance video of the building where Raphael and Shields lived. Raphael identified defendant, who had items from Raphael's and Shields's room.[2] Shields denied knowing defendant.

As part of his investigation into the burglary, Detective John Goslin with the Los Angeles Police Department interviewed defendant, who said Raphael paid him $30 to take his things so that Raphael could file an insurance claim. Raphael denied paying defendant to move his things. He never filed an insurance claim for the stolen items, because he didn't have insurance.

B. *Defense case.*

Defendant testified. In addition to owning a moving company, defendant was a musician and artist, and he and Raphael recorded songs together. Raphael was "almost like a little brother" to defendant. They had a falling out, however, over a money transaction: defendant's friend, Baldwin, wire transferred money into Raphael's bank account and paid him $200, which somehow caused the account to become overdrawn. Defendant told Raphael that the problem was between Raphael and Baldwin.

On September 5, 2009, Raphael texted a picture of a camera to defendant and said he knew somebody who wanted to buy cameras, but he needed defendant to drive him.

On September 8, 2009, Raphael called defendant multiple times, asking him to move cases from his room, because Raphael was going to Florida. Defendant and Raphael met sometime between 5:00 p.m. and 7:30 p.m., and Raphael gave his key to defendant. Raphael told defendant to move the items separated and stacked in cases, including what looked like camera cases, although defendant did not know what was in the cases. Defendant and "the Russian guy" moved the items and took them to defendant's house. When they left Raphael's dorm room, it was not ransacked. Raphael and defendant met again around 12:45 a.m. so that defendant could return the room key

[2] Defendant was with another man, the Russian, identified as Ruslan Magomedgadzhiev, who pleaded the Fifth Amendment at trial.

to Raphael.[3] That morning, defendant met a guy at a gas station and gave the items to him.

When asked about his statement that Raphael paid him $30 to move his stuff as part of an insurance scam, defendant said "[t]hat was a mischaracterization of how the dialogue went."

Defendant had two felony convictions, one on October 23, 2008 for terrorist threats and a second on November 10, 2004 for receiving stolen property.

II. Procedural background.

On August 13, 2010, a jury found defendant guilty of residential burglary (Pen. Code, § 459).[4]

On January 5, 2011, the trial court sentenced defendant to six years, doubled based on a prior conviction found true by the jury, to 12 years in prison.

DISCUSSION

III. *Pitchess*

Defendant contends that the trial court abused its discretion by denying his *Pitchess* motion, which asked for the records of Detective Goslin. We disagree that the court abused its discretion.

A. *Additional facts.*

Defendant's *Pitchess* motion sought any and all complaints pertaining to "acts of bias, racial misconduct, dishonesty, cover-up, acts constituting a violation of statutory or constitutional rights of others, acts of excessive force if it center[s] around[] racial issues, falsifying evidence, such material shall include, but are not limited to material generated during investigation conducted by these officers . . . ." In support of his motion, defendant submitted his declaration stating that "the named officer [admitted] that he illegally enter[ed] the defendant['s] backyard, detained the defendant, 'lied' to the

---

[3] Defendant asked Detective Goslin to get video footage from the school to show that defendant met with Raphael that night.

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

defendant, . . . obtained information, that he omitted significant parts of his police report to change the overall tone and outcome of the actual happenings versus his colorful account of events, . . .” Defendant also stated that Detective Goslin showed a videotape to a witness, had discussions with the witness and aided the witness in identifying him.

Attached to his motion was Detective Goslin’s report stating that after receiving information defendant burglarized Raphael’s dorm room, Goslin went to defendant’s home. When there was no answer at the door, the detective walked towards the garage after being told someone lived there. Defendant came out of the house and identified himself. To get defendant’s date of birth, the detective told defendant he was investigating a fight at CSUN. Later, the detective showed Raphael a photographic six-pack with defendant in position 3. He asked Raphael if he could pick defendant from the lineup, and Raphael did. Raphael also identified defendant from the video surveillance.

At the hearing on the motion, the trial court found that the detective did not illegally enter defendant’s residence and that the detective’s use of a ruse to get defendant’s date of birth did not constitute an illegal detention.

B. *The trial court did not abuse its discretion by denying the Pitchess motion.*

On a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer who is accused of misconduct against the defendant. (*People v. Gaines* (2009) 46 Cal.4th 172, 179; Evid. Code, § 1043 et seq.) “To initiate discovery, the defendant must file a motion supported by affidavits showing ‘good cause for the discovery,’ first by demonstrating the materiality of the information to the pending litigation, and second by ‘stating upon reasonable belief’ that the police agency has the records or information at issue. [Citation.]” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) If a defendant shows good cause, the trial court examines the material sought in camera to determine whether disclosure should be made and discloses “only that information falling within the statutorily defined standards of relevance.” (*Ibid*.)

"There is a 'relatively low threshold' for establishing the good cause necessary to compel in camera review by the court. [Citations.]" (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316.) To establish good cause, "defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges" and articulate how the discovery sought might lead to relevant evidence. (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1024.) The defense must present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025.) "[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id.* at p. 1026.) "Depending on the circumstances of the case, the denial of facts described in the police report may establish a plausible factual foundation." (*Thompson,* at p. 1316.) Trial courts are vested with broad discretion when ruling on *Pitchess* motions (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review a trial court's ruling for abuse of discretion (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228).

Defendant here did not establish good cause for an in camera review of Detective Goslin's records, because defendant's declaration did not articulate how the discovery sought might lead to relevant evidence or otherwise present a specific factual scenario of officer misconduct that might support a defense to the charges. (*Warrick v. Superior Court, supra*, 35 Cal.4th at pp. 1024-1026.) Defendant's first reason for wanting the detective's records—the detective used a ruse to gain illegal entrance to defendant's property—was unrelated to any defense. It is unclear how the manner in which the detective obtained defendant's date of birth or this brief encounter between the detective and defendant related to any defense to burglary. In any event, the trial court found that Detective Goslin did not illegally enter defendant's property. According to Detective Goslin's report, he knocked on the front door. There was no answer. A person told him that someone lived in the detached garage. As the detective walked towards the garage, a man stepped from the home. The detective asked for his name, and the man identified

himself as John Young. The detective said he was investigating a fight at CSUN and needed defendant's date of birth, which defendant gave. The detective did not enter defendant's home or otherwise detain him. (See generally, *Florida v. Bostick* (1991) 501 U.S. 429, 434 [a seizure does not occur simply because a police officer approaches a person and asks a few questions].)

The second reason defendant gave to support his *Pitchess* motion was the detective "aided" Raphael in identifying him. It is again unclear how this related to any defense to burglary, as there was no claim he was misidentified. Defendant did not deny he was friends with Raphael or that he removed items from Raphael's room, as depicted in the video surveillance. Rather, he said he took the items with Raphael's permission. Moreover, the trial court found that Raphael had previously identified defendant as the man in the video when he viewed the video with a school administrator. Defendant therefore did not establish that the identification made with Detective Goslin was related to his defense.

Finally, to the extent that defendant generally argued he was entitled to Detective Goslin's records because the detective "omitted significant parts of his police report to change the overall tone and outcome of the actual happenings versus his colorful account of events" this charge lacked the specificity required of a *Pitchess* motion. (See generally, *Warrick v. Superior Court, supra,* 35 Cal.4th 1011.)

IV. Instructional error on the defense of consent.

Defendant requested a consent instruction under *People v. Thomas* (1977) 74 Cal.App.3d 320. The court found that the instructions already covered the consent issue. No error occurred.

Burglary is committed when a person enters a building with the intent to commit a felony. (§ 459.) A defense of consent to burglary is available "when the owner *actively* invites the accused to enter, *knowing* the illegal, felonious intention in the mind of the invitee." (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397-1398; see also *People v. Thomas, supra,* 74 Cal.App.3d 320.) There must be evidence of informed consent to enter coupled with the visitor's knowledge the occupant is aware of the felonious purpose

and does not challenge it. (*Felix*, at pp. 1397-1398.) Consent to burglary is an affirmative defense. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1304; *Thomas*, at p. 322.)

In a criminal case the trial court must instruct on the general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case, including affirmative defenses for which the record contains substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Salas* (2006) 37 Cal.4th 967, 982.) But if the affirmative defense is inconsistent with the defendant's theory of the case, then the trial court need not instruct on it. (*Salas*, at p. 982; *People v. Michaels* (2002) 28 Cal.4th 486, 529.)

Here, the jury was instructed with CALCRIM No. 1700, namely, to establish defendant committed a burglary, the People had to prove he entered a room within a building and when he entered the room he intended "to commit theft or other felony." The jury was further instructed that to be guilty of theft, the People had to prove: "1. The defendant took possession of the property owned by someone else; [¶] 2. *The defendant took the property without the owner['s] or owner's agent's consent*; [¶] 3. When the defendant took the property, he intended to deprive the owner of it permanently; and, [¶] 4. The defendant moved the property, even a small distance, and kept it for any period of time[,] however[,] brief." (CALCRIM No. 1800, italics added.) The "other felony" that the jury was instructed on was insurance fraud (with aiding and abetting instructions).

Thus, the two theories of burglary were defendant entered Raphael's and Shields's room with the felonious intent to commit either (1) a theft or (2) to aid and abet an insurance fraud. As to the theft theory of burglary, the jury was instructed that the People had to prove the lack of owner's consent. Therefore, additional instruction on the consent issue was unnecessary.

As to the insurance fraud theory of burglary, the trial court properly refused to instruct the jury generally that consent was a defense to burglary under that theory. First, to instruct the jury on consent in connection with the insurance fraud would have been inconsistent with the defendant's theory of the case. In the prosecutor's case-in-chief,

Detective Goslin testified that defendant said Raphael paid him $30 to take his stuff so he could make an insurance claim. When defendant was asked about this statement, he said the "dialogue" between him and Detective Goslin was "mischaracteriz[ed]." Defense counsel then tried to cast further doubt on the accuracy of Detective Goslin's testimony about the alleged insurance scam by stating in closing argument that defendant's alleged report was "undocumented" and "not recorded," and there was no evidence either Raphael or Shields had insurance. The defense was therefore based on consent to the theft and not on consent to the insurance fraud.

It would have been error for the trial court to instruct the jury generally on consent for an additional reason: there was no evidence that Shields, Raphael's roommate, either consented to the entry or knew of defendant's felonious intent.[5] (See *People v. Clayton* (1998) 65 Cal.App.4th 418.)

We therefore conclude that the trial court properly refused to instruct the jury generally on consent.

V. Instructional error on aiding and abetting and insurance fraud.

Defendant also contends that the trial court erred by instructing the jury on aiding and abetting and insurance fraud. We disagree.

As we have said, the jury was instructed that defendant could be found guilty of burglary if he entered the dorm room with the intent either to commit a theft by larceny or to commit insurance fraud. The court also instructed the jury on aiding and abetting. (CALCRIM Nos. 400 & 401.) The prosecutor argued that defendant was guilty of burglary if he entered the room with the intent to aid and abet an insurance fraud scheme.

Defendant argues that the aiding and abetting and insurance fraud instructions were given in error, because there was no evidence Raphael completed the crime of insurance fraud, hence, it was a legal impossibility for defendant to aid and abet an insurance fraud. Instead, Raphael testified he had no insurance and did not file a claim for any lost or stolen items. The People, however, did not have to establish that the crime

---

[5] We discuss this point in greater depth in Section V.

of insurance fraud was ultimately committed to find defendant guilty of burglary on an aiding and abetting insurance fraud theory. "One may [be] liable for burglary upon entry with the requisite intent to commit a felony or a theft (whether felony or misdemeanor), regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042; see also *People v. Walters* (1967) 249 Cal.App.2d 547, 550 [the crime of burglary is completed when entry with the essential intent is made, "regardless whether the felony planned is committed or not"].)

If "the necessary intent exists at the time of entry, the crime of burglary is committed. It is immaterial whether the intended theft or other object . . . is accomplished; i.e., neither impossibility of achievement of the intended purpose, nor abandonment of that purpose, is a defense." (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crime Against Property, § 148, p. 195; see also *People v. Shaber* (1867) 32 Cal. 36, 38 ["a conviction would be due even though it should appear that there were no goods in the building at the time the entry was made. The forcible entry and the intent being found or given, the crime would be complete even though it should turn out that, contrary to the calculations of the burglar, the building was empty"].) "The sting of the crime is, in short, the guilty purpose, without reference to the possibility of accomplishing it, in any given instance." (*Shaber*, at p. 38, cited with approval in *People v. Montoya*, *supra*, 7 Cal.4th at p. 1042.)

Defendant does not address *Montoya* and instead relies on *People v. Perez* (2005) 35 Cal.4th 1219. *Perez* found that for a defendant to be guilty of a crime under an aiding and abetting theory there must be proof the direct perpetrator committed or attempted to commit a crime, "i.e., absent proof of a predicate offense, conviction on an aiding and abetting theory cannot be sustained." (*Perez*, at p. 1225.) *Perez* is not on point because it was an aiding and abetting case, not a burglary one. If defendant here had been charged with aiding and abetting insurance fraud, then *Perez* would be relevant because there was no evidence that Raphael or anyone else actually tried to submit a fraudulent insurance

claim. But the prosecutor's theory was defendant committed burglary because, when he entered the dorm room, he had the felonious intent to aid and abet an insurance fraud.

Defendant also argues that the aiding and abetting instruction was improper because defendant could not aid and abet Raphael to burglarize his own home. (See generally, *People v. Gauze* (1975) 15 Cal.3d 709, 714 [defendant who entered own home with the intent to assault his roommate could not be guilty of burglary].) This is the crux of defendant's argument: if the burglary was predicated on a felonious intent to aid and abet Raphael in an insurance scam, defendant could not be guilty of burglary because he had Raphael's consent to be in the room and to take his things. Hence, a burglary based on this theory was a legal impossibility.

Even if defendant had Raphael's consent to be in the room and to take his things, there was no evidence that defendant had *Shields's* consent to be in the room or to take *his* things. In *People v. Clayton, supra,* 65 Cal.App.4th 418, Richard hired Clayton to kill Richard's wife, Kathleen. Richard gave the key to the house to Clayton, who used it to enter the home. Clayton attacked Kathleen. He was thereafter charged with, among other things, burglary. *Clayton* acknowledged the general rule that one cannot burglarize his or her own home (*People v. Gauze, supra,* 15 Cal.3d 709). But the defendant in *Clayton* did not burglarize his own home. Rather, Richard shared possession of the house with Kathleen, who did not give Clayton consent to the entry. (*Clayton*, at p. 420.) "[I]ndependent of the consequences of the intended felony, there is a danger of violence when one person in possession of the premises consents to a third person's entry for the purpose of injuring a person with joint possession of the premises." (*Id.* at p. 421.) Thus, where one of two persons with a joint right of possession of the same premises gives permission to a third person to enter the premises to commit a felony on the other person with the joint right to possession, the third person may be guilty of burglary. (See *id.* at p. 422.)

Here, there was no evidence Shields gave defendant permission to enter the premises. There was no evidence Shields knew that defendant intended to take his things, namely, his computer, books and music. Shields instead testified he had never

seen defendant, testimony from which Shields's lack of consent can reasonably be inferred.

We therefore conclude that the jury was properly instructed on aiding and abetting and insurance fraud.

VI. The strike sentence.

After a jury trial on defendant's prior convictions, the jury found that defendant suffered a prior conviction of section 422, criminal threats, on October 23, 2008.[6] The trial court then denied defendant's *Romero* motion to strike the conviction and doubled defendant's six-year high term sentence to 12 years, based on that conviction. Defendant now contends that the "strike sentence" was illegal because his prior conviction of criminal threats was a misdemeanor, not a prior serious felony within the meaning of the Three Strikes law. We disagree.

A wobbler is " 'an offense which may be charged and punished as either a felony or a misdemeanor.' [Citations.]" (*People v. Statum* (2002) 28 Cal.4th 682, 699, italics omitted.) "The determination of whether a prior conviction is a prior felony conviction for purposes of [the Three Strikes law] shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1); see also *People v. Glee* (2000) 82 Cal.App.4th 99 (*Glee*).) A felony is converted to a misdemeanor after a judgment imposing punishment other than imprisonment in the state prison. (*Glee*, at p. 102; former § 17, subd. (b)(1).)[7]

---

[6] The jury also found that defendant had suffered, on November 10, 2004, a prior conviction of receiving stolen property (§ 496).

[7] A felony also becomes a misdemeanor for all purposes "(2) [w]hen the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor[;] [¶] (3) [w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor[;] [¶] (4) [w]hen the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor,

Defendant relies on *Glee* to support his argument that his criminal threats conviction was a misdemeanor and not a felony. In *Glee*, the jury found that the defendant had previously been convicted of assault with a deadly weapon, a wobbler offense. (*Glee, supra,* 82 Cal.App.4th 99.) On appeal, he argued there was insufficient evidence to support sentencing him under the Three Strikes law, because the assault conviction was not a strike. (*Id.* at p. 101.) The defendant had been sentenced on the assault with a firearm to probation and one year in the county jail, with probation to terminate at the end of that year. (*Ibid*.) *Glee* found that the assault did not qualify as a strike because the sentence imposed "automatically rendered the crime a misdemeanor" under section 17, subdivision (b)(1). (*Glee*, at pp. 105-106.) In reaching this conclusion, *Glee* relied on several key facts. First, the sentencing court did not indicate it intended to impose a felony sentence. Second, the sentencing court granted "summary probation," which is only authorized in misdemeanor cases. Third, the sentencing court terminated probation upon completion of the jail time, and did not retain jurisdiction over the case to impose a felony sentence if the defendant violated any probation conditions. (*Id.* at pp. 104-106.) *Glee* distinguished cases where the court suspended proceedings on a wobbler and granted probation with county jail as a probation condition and time remained on probation after the defendant's release from jail. In such cases, the court retained jurisdiction over the defendant to impose a state prison sentence for a probation violation committed after the defendant's release from jail. (*Id.* at p. 105.)

Here, defendant pleaded no contest, in 2008, to one count of criminal threats. Criminal threats is a wobbler offense, punishable by imprisonment in county jail for a period not to exceed one year or by imprisonment in the state prison. (§ 422, subd. (a).)

---

unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint[;] [¶] (5) [w]hen, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint." (Former § 17, subd. (b).)

Imposition of defendant's sentence was suspended, and he was placed on three years' "formal probation" on various conditions, including that he serve 416 days in jail. The minute order from the date of defendant's plea states: "The defendant is rearraigned and pleads no contest to count 3, a violation of Penal Code section 422, a felony." Thus, unlike the *Glee* defendant, defendant here was placed on formal probation, not summary probation. Unlike the sentencing court in *Glee*, the sentencing court here did not terminate probation upon completion of jail time, and instead retained jurisdiction over the case to impose a felony sentence if defendant violated any probation conditions.

Thus, this case is more like *People v. Barkley* (2008) 166 Cal.App.4th 1590. The defendant in *Barkley* contended that his prior assault conviction was a misdemeanor and not a felony for the purposes of the Three Strikes law. On the assault case, he had been " 'granted probation generally' " and ordered to serve 12 months in jail as a condition of probation. (*Id.* at p. 1594.) The court also said it planned to terminate probation on completion of the jail sentence, and the clerk's minutes indicated that the defendant was placed on "formal probation." (*Ibid.*)[8] *Barkley* said, a "jail term that is imposed as a condition of probation is not a misdemeanor 'sentence.' " (*Id.* at p. 1596.) As in *Barkley*, defendant's jail term was imposed as a condition of probation, and therefore it was not a misdemeanor sentence.

We therefore conclude that the record supports the trial court's decision to treat defendant's prior conviction as a strike for the purposes of the Three Strikes law, and we reject defendant's contention that his strike sentence was unlawful.

---

[8] The sentencing judge testified that when he " 'granted probation generally' " he intended to maintain the matter as a felony. Although that testimony supported the majority's decision, the majority did not place much weight on the sentencing judge's intent, of which there is no direct evidence in this case.

VII. The upper term sentence.

Defendant next contends that his upper term sentence of six years was an abuse of the trial court's discretion. We disagree.

Whether to impose the upper term is a decision resting in the trial court's sound discretion. (§ 1170, subd. (b).) In determining the appropriate term, the court may consider the record in the case, the probation report, evidence introduced at the sentencing hearing, and "any other factor reasonably related to the sentencing decision" (Cal. Rules of Court, rule 4.420(b)) and "shall select the term which, in the court's discretion, best serves the interests of justice" (§ 1170, subd. (b)). A trial court may base an upper term sentence upon any aggravating circumstance the court deems significant, subject to specific prohibitions. Its discretion to identify aggravating circumstances is limited only by the requirement they be reasonably related to the decision being made. (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.) The trial court "shall state the reasons for its sentence choice on the record at the time of sentencing." (§ 1170, subd. (c); see also *Sandoval,* at pp. 846-847; Cal. Rules of Court, rule 4.420(e).) But the court is not required "to cite 'facts' that support its decision or to weigh aggravating and mitigating circumstances," nor must it provide a " 'concise statement of the ultimate facts that the court deemed to constitute circumstances in aggravation or mitigation.' [Citations.]" (*Sandoval*, at p. 847.)

A trial court's sentencing decision will not be disturbed on appeal unless it is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Jones* (2009) 178 Cal.App.4th 853, 860; *People v. Carmony* (2004) 33 Cal.4th 367, 377.) The court's "discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.) A court abuses its discretion if it fails to exercise its discretion in sentencing, relies upon irrelevant circumstances, or relies upon circumstances that constitute an improper basis for the decision. (*Id.* at pp. 847-848.) The burden is on the party attacking the sentence to clearly show the sentencing decision

was irrational or arbitrary, and an appellate court will not substitute its judgment for that of the trial court. (*Jones*, at p. 861.) "Even if a trial court has stated both proper and improper reasons for a sentence choice, 'a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]' " (*Ibid*.)

The trial court here based its selection of the upper term on the numerous and increasing nature of defendant's prior convictions; he acted in concert with another person; he was on probation when he committed the current crime; defendant showed no remorse; and he lied under oath. These factors supported the upper term, namely, defendant had prior juvenile and adult convictions (e.g., forgery, a misdemeanor driving on a suspended license, and misdemeanor possession of burglary tools) that were numerous or of increasing seriousness (Cal. Rules of Court, rule 4.421(b)(2)); he committed the burglary with another person, the Russian, and there was evidence defendant was in a position of leadership (Cal. Rules of Court, rule 4.421(a)(4)); and defendant was on probation when he committed the current crime (Cal. Rules of Court, rule 4.421(b)(4)). Given that the court properly relied on these factors, we need not further address defendant's argument that the trial court relied on improper or irrelevant factors and relied too heavily on his recidivism—matters which, even if true, would not compel us to conclude the court abused its considerable discretion in imposing the upper term.

Defendant also contends that there was an improper dual use of facts to enhance the sentence and to impose the aggravated term, namely, the court used his prior conviction to impose the strike sentence and to impose the upper term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c) & (d).) The Three Strikes law, however, is not an enhancement, as meant in section 1170, subdivision (b). It is a separate sentencing scheme that applies automatically where a defendant has at least one prior serious felony conviction and the trial court does not strike it. (*People v. Garcia* (2001) 25 Cal.4th 744, 757.) The Three Strikes law required the court to double the term for defendant's present conviction. Consequently, when the court imposed the upper term on the robbery

conviction and doubled that term under the Three Strikes law, the court did not engage in an improper dual use of facts in sentencing.

Finally, defendant also contends that his trial counsel provided ineffective assistance for failing to object to "dual and improper use of aggravating sentencing factors" and to state reasons why defendant fell outside the Three Strikes sentencing scheme. "In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694.) If the defendant makes an insufficient showing with regard to either component, the claim must fail. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) Defendant's counsel was not ineffective for failing to object or to offer additional arguments in favor of a lighter sentence. He filed a *Romero* motion in which he argued that the prior conviction should be stricken, but the court denied it. The trial court also stated the reasons for its sentencing decisions at length, and any further argument or objection by counsel would not have changed those decisions.

VIII. Section 667, subdivision (a), enhancement.

The People ask that we correct an alleged error in defendant's sentence, namely, that we impose an additional five-year term under section 667, subdivision (a)(1), which would bring defendant's total sentence to 17 years.

Section 667, subdivision (a)(1), provides, "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." The jury here found that defendant committed a residential burglary, which is a serious felony (§ 1192.7, subd. (c)(18)) and that he had a prior

conviction of criminal threats, which was also a serious felony. It would therefore appear that the five-year enhancement applied to him.

Due process, however, requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial. (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438; see *People v. Tardy* (2003) 112 Cal.App.4th 783, 786.) Here neither the original information nor the amended information alleged the section 667, subdivision (a)(1), enhancement. The original information did not allege that defendant suffered a prior serious felony of criminal threats. The amended information alleged the criminal threats prior conviction only as a strike (§§ 667, subds. (b)-(i), 1170, subds. (a)-(d)).

The People cite *People v. Purata* (1996) 42 Cal.App.4th 489, 498, for the proposition the enhancement nevertheless must be imposed. In *Purata*, the trial court declined to impose a five-year enhancement under section 667, subdivision (a)(1), on a prior serious felony conviction, because the court used the same conviction to qualify as a strike. (*Purata*, at p. 492.) The appellate court found that imposing the enhancement on the prior and using the same prior to qualify Purata for a Three Strikes sentence was not a "dual use" of the prior. (*Id.* at p. 498.) The court therefore said: "Where a person has been convicted of a serious felony in the current case, and it has been alleged and proved the person suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), the trial court must impose a consecutive five-year term for each such prior conviction. The trial court has no discretion and the sentence is mandatory." (*Ibid.*)

In *Purata*, the enhancement was alleged. The trial court simply refused to impose it based on a mistaken belief to do so would constitute an improper dual use of facts. *Purata* therefore did not concern imposing an enhancement that was not alleged in the pleading document or proven. In contrast, no serious felony enhancement allegation was pleaded or proved here. The only allegations pleaded were clearly identified as strike allegations. There was no allegation in the information giving defendant notice that he could be found subject to a five-year enhancement for a prior serious felony conviction.

The People, however, also argue that due process can be satisfied if the accusatory pleading apprises the defendant of the potential for the enhanced penalty and alleges every fact and circumstance necessary to establish its applicability. (*People v. Thomas* (1987) 43 Cal.3d 818, 826; *People v. Tardy*, *supra*, 112 Cal.App.4th at p. 787.) Where, for example, the information references the incorrect penal statute but notifies the defendant of the facts of the allegation, adequate notice of the enhancement may be found. (See, e.g., *People v. Neal* (1984) 159 Cal.App.3d 69.)

These general principles are inapplicable here, because the information did not inform defendant, by alleging any facts, that the five-year enhancement would be sought. (See *People v. Mancebo* (2002) 27 Cal.4th 735.) There was not a citation to the wrong Penal Code section by mistake. The enhancement was also not pleaded by facts without reference to a specific statutory provision. We therefore find that the five-year enhancement under section 667, subdivision (a)(1), may not be imposed.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.