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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL MORRIS, Defendant and Appellant.	B246086 (Los Angeles County Super. Ct. No. NA089804)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Reversed in part, affirmed in part and remanded with directions.

Heather J. Manolakas, 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, Shawn McGahey Webb and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Morris (appellant) appeals the judgment following a jury trial in which he was convicted of assault with a deadly weapon, a wooden stick (Pen. Code, § 245, subd. (a)(1)),[1] with a true finding he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court found appellant had nine prior serious felony convictions which also qualified as strikes within the meaning of the Three Strikes law. (§§ 667, 1170.12.) It found appellant had two prior serious felonies within the meaning of section 667, subdivision (a)(1), and that he had served two prior separate prison terms for a felony (§ 667.5, subd. (b)).

After denying a motion to sentence appellant as if he had only one prior strike conviction (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*)), the trial court sentenced appellant to a total term of 35 years in state prison, consisting of a base term of 25 years to life pursuant to the Three Strikes law, enhanced by a consecutive term of 10 years for the two prior serious felony convictions (§ 667, subd. (a)(1)). The trial court imposed and stayed the two 1-year terms imposed for the service of a separate prison term for a felony.

BACKGROUND

1. *The prosecution's case-in-chief.*

At about 9:30 p.m. on Saturday, August 6, 2011, Robert Hall's (Hall) former fiancé and eight-year-former-live-in girlfriend, Brenda Browning (Browning), arrived at Hall's 204th Street, Torrance, apartment. Browning was acting erratically, and Hall concluded she was drunk. She demanded money. Hall refused as he was aware just three days earlier she had received a social security disability check. Browning left. At about 10:30 p.m., Browning returned with appellant, Browning's new boyfriend. Hall was legally blind as he had glaucoma. However, he could see appellant's shiny head and recognized appellant's voice. Appellant had lived for a year to late July 2011 across the street from Hall's apartment in a halfway house for parolees.

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

Appellant and Browning came to the door of Hall's apartment. Browning went inside and took a number of items belonging to Hall from the apartment. In the meantime, appellant attacked Hall with a six-to-eight-inch knife he held in one hand. In his other hand, appellant wielded a "stick," which Hall described alternately as a 2 x 4 or a 3½- to 4-foot wooden axe handle, or the wooden handle for some other tool.

Appellant attempted to hit Hall over the head. However, Hall managed to protect his head from the axe handle with one arm. Appellant nevertheless landed at least three to four blows on Hall's back and neck before Hall lost consciousness. When Hall awoke, appellant was dragging Hall into Hall's apartment in a headlock. Keeping Hall in the headlock, appellant pressed the knife along his neck, threatening to kill Hall. There was blood all over, and Hall discovered later he had a number of nonfatal wounds all over his body, possibly inflicted by the knife.

Browning told appellant, "Let's get out of here." Appellant asked Hall for "the phone." Hall hesitated, confused as he thought appellant was referring to his telephone. Appellant pressed the knife to Hall's neck and repeated his demand. Hall then gave appellant the cellular phone Hall had in his shirt pocket. Browning and appellant drove off in the same vehicle in which they had arrived.

Any number of neighbors witnessed Browning's and appellant's arrivals and departures from the apartment and heard the assault, which largely took place out of sight inside Hall's apartment. Two eyewitnesses and neighbors, G.C. and A.N., testified during the prosecution's case-in-chief, identifying appellant as the assailant. They testified appellant either had the large knife and/or something like a stick in hand when he had arrived. A.N. said she observed Browning arrive with a bat. G.C. observed appellant leaving with a stick-like item in his hand. G.C. was impeached with prior felony convictions.

Two recorded 9-1-1 calls from G.C. corroborated the testimony in the prosecution's case-in-chief.

Appellant's parole officer testified appellant was wearing an ankle bracelet with a Global Positioning System sensor (G.P.S.). It disclosed appellant was at or near the scene of the assault at the critical time.

Hall was taken to the hospital by ambulance. He returned home about 24 hours later, on Sunday night. Shortly after returning home, he discovered appellant had left the assault weapon, which at trial Hall called an "axe handle," inside Hall's apartment. On September 6, 2012, in the midst of Hall's trial testimony, an officer retrieved the axe handle from Hall.

Hall was impeached with various inconsistent statements, his prior felony convictions, with a recent conviction of a theft-related felony, and with his use of numerous aliases during what he admitted was a lifetime criminal career. Hall was also impeached with a letter he sent telling the prosecutor that Hall did not want Browning prosecuted. In the letter, Hall said he would even resort to lying to prevent Browning's prosecution. Hall denied Browning had stabbed him or ever had a knife.

2. *The defense.*

Appellant did not testify on his own behalf. After appellant was arrested, he waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), and spoke to a police officer. Appellant denied he was present at Hall's apartment at the time of the beating. He claimed he had been visiting someone else who lived nearby. Appellant explained Hall's complaint, like others Hall had made about appellant, were untrue. He blurted out to the officer that the complaint arose from jealousy because appellant was "with [Browning] now," i.e., appellant was now Browning's boyfriend.

The defense also called A.N. as a defense witness. In defense, A.N. recanted her earlier post-assault and trial identification claims appellant was the assailant. She said she actually saw a younger man at Hall's apartment that night. She described a 20-year-old man she frequently had seen with Browning. She believed the man was Browning's son or nephew. She acknowledged she was afraid of the parolees who resided at

appellant's former residence. But she explained she had recently moved, and thus her fear of the parolees who lived across the street was not what caused her to recant.

3. *Rebuttal.*

A police officer testified that immediately after the assault, A.N. did not name appellant as Hall's assailant. However, A.N. had told the officer Hall's assailant was about 40 years of age.

Hall testified that A.N. might be referring to a youth named "Cowboy." Hall explained Cowboy was a 22- to 23-year-old youth who was a close friend of Browning's daughter and had been at his apartment frequently when Browning lived there. Hall said he and Cowboy were friendly. Previously, Cowboy had also lived across the street in the halfway house. However, Cowboy had since moved, and Cowboy was not at the apartment at the time of the assault.

CONTENTIONS

Appellant makes the following contentions.

1. The trial court improperly failed to hold *Marsden* hearings after appellant personally wrote the trial court two letters. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).);

2. The prosecutor committed a discovery violation by failing to keep the defense appraised of G.C.'s address, and the trial court erroneously failed to assess an appropriate sanction for the discovery violation;

3. The trial court committed reversible error by admitting into the evidence at trial exhibit 7, the axe handle recovered from Hall during the trial.

4. There is insufficient evidence to support the jury finding of the personal infliction of great body injury;

5. Trial counsel was constitutionally ineffective as he (a) failed to impeach Hall with the inconsistent statements Hall made at Browning's preliminary hearing and (b) trial counsel's cross-examination provided the evidence that supported the jury finding of the personal infliction of great bodily injury;

6. The trial court abused its discretion when it denied appellant's *Romero* motion to strike pursuant to *Romero*, *supra*, 13 Cal.4th 497; and

7. The cumulative effect of multiple legal errors resulted in a miscarriage of justice.

Appellant's contentions lack merit.

On appeal, respondent raises an issue of an illegal sentence. Respondent asserts the trial court failed to impose or strike the infliction of great bodily injury enhancement, as is required at sentencing.

We will modify the judgment to strike the finding of the personal infliction of great bodily injury and affirm the judgment.

DISCUSSION

1. *The need for* Marsden *hearings*.

In substance, appellant contends the trial failed to hold *Marsden* hearings after appellant personally wrote the trial court two letters, one complaining about trial counsel, and the other notifying the trial court appellant had filed a complaint of a conflict of interest against his trial counsel.

We hold the trial court had no duty to hold *Marsden* hearings.

a. *Background*

(1) The April 17, 2012, *Marsden* hearing.

Prior to the preliminary hearing, trial counsel Jonathan E. Roberts (Mr. Roberts) was appointed to represent appellant.

On April 17, 2012, during pretrial proceedings, after the trial court had denied a section 995 motion, Mr. Roberts told the trial court appellant wanted to speak to the trial court. Mr. Roberts asked appellant, "Do you want to talk about me?" Appellant replied, "I want to talk about – I want to talk to the judge." Mr. Roberts suggested appellant might be making a *Marsden* motion and asked that they proceed in that fashion. The trial court inquired whether appellant had a complaint about Mr. Roberts. Appellant said he had a complaint about the "whole scenario, about everything."

The trial court had the prosecutor step out of the courtroom.

Out of the presence of the prosecutor, appellant made no request for new counsel. Appellant's remarks during the hearing were primarily addressed to the issue of why the trial court had failed to dismiss appellant's case during the section 995 motion. Appellant personally complained he was entitled to a dismissal of his case as it was apparent Hall was an "admitted perjurer," Hall had numerous aliases, Hall did not use his true name and Hall had made any number of inconsistent statements concerning how he was injured.

In the midst of these complaints, appellant turned to Mr. Roberts and said, "And as to you, Mr. Roberts, how do I know you have my best interest at hand? How do I know this?" Mr. Roberts replied, "All I can say is I will do my best." Appellant conceded he understood Mr. Roberts "might be a good lawyer." Mr. Roberts gave appellant assurances he intended to do a good job and that the trial judge could vouch for Mr. Roberts's competence. Mr. Roberts told appellant he was as good as any other attorney who might be appointed to try the case.

Appellant said that he understood Mr. Roberts had called him quick-tempered, dangerous and violent. Mr. Roberts said he did not recall saying such things. Mr. Roberts told appellant he did recall appellant saying that appellant "perhaps [was] going to do something in the courtroom this morning."

Appellant replied he was doing it right now. Mr. Roberts said, "That's all I know." Appellant said, "I'm doing it right now. I'm talking right now. Because if I'm going to trial and my life is on the line behind some man sitting up there lying, I need to know who I have in my corner and who I don't."

The trial court interrupted and told appellant he had a strong defense in the case. It suggested appellant let Mr. Roberts put on this strong case at trial and that he should not get angry about it. The trial court advised appellant it was impressed with how vigorously Mr. Roberts had argued the section 995 motion on grounds Hall was a liar. Appellant should let his trial counsel tear Hall apart at the trial. "So we'll give him that chance to do that . . . . You can't do any better."

After further discussions concerning the reasons the trial court had denied the section 995 motion, the trial court ruled, "The *Marsden* matter is resolved."

(2) *The July 2012 letter*.

Later during pretrial proceedings, as trial neared, appellant personally wrote the following letter to the trial court. The letter was handwritten and dated July 9, 2012. An apparent date of receipt of July 31, 2012, appears in a hand other than appellant's at the top of the letter.

"Dear Judge Richard Romero [¶] Judge Romero, the last time I was in your court room was June 18, 2012. I spoke with you to let you know that I have been hav[ing] trouble with my attorney come to see me at twin towers county jail and I also have trouble reaching him by phone the lawyer who fillen [*sic*] in for him on June 18, 2012 you informed him to let my lawyer Jonathan E. Roberts know to come see me, since then I have not seen him or spoke with him concerning [*sic*] my case. And the reason I'm writing you this letter is because they say I am facing life and if that ture [*sic*] I really need you to get my lawyer to do his job. And come see me because I feel I have done everything I could do, I have wrote the bar association of California and their [*sic*] sending me a log no. 12-12847 and nothing has happened [sic], so now I turn to you and ask you could please get in contact with my lawyer and make him do his job and come see me. [¶] Thank you [¶] Michael Morris 2845494"[2]

On July 24 and 31, 2012, Mr. Roberts appeared personally in court with appellant. Appellant did not mention again Mr. Roberts was not in communication with him or had failed to visit him at the county jail.

On August 30, 2012, as the parties awaited the arrival in the courtroom of the prospective jurors, Mr. Roberts documented for the record his efforts to obtain a settlement for appellant. Appellant personally spoke to the trial court "for the record."

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[2] During later court proceedings, the trial court mentioned that it generally passed on to trial counsel any letters of complaint from defendants. The record has not been augmented with the proceedings of June 18, 2012. The minute order of June 18, 2012, fails to reflect any complaint by appellant concerning Mr. Roberts.

Appellant complained only that the trial court had not responded to his prior personal complaint that appellant wanted subpoenaed for trial Hall's social security records, as well as the records of a person named "Kevin Johnson." Apparently, appellant believed that Hall had filed for social security benefits under several different names, and appellant wanted to use these records to support his claim that Hall was a liar. Appellant indicated he had made several requests to the trial court to subpoena the records, and the trial court had informed him it did not have the power to do so.

The trial court listened to appellant's complaint and, without a response, moved on to other court business.

On August 31, 2012, the jury was sworn.

(3) *The October 2012 letter*.

On September 12, 2012, the jury returned its guilty verdict.

After trial, appellant personally sent the trial court a three page, hand-printed letter dated October 15, 2012. Therein, appellant informed the trial court of the following. " . . . There appears to exist a conflict of interest due to a complaint filed on the appointed counsel in this case." Appellant then said he "advised" the trial court "about proceeding in sentencing . . . with said counsel for" appellant.

The letter also asked for a "change of venue," by which appellant meant he wanted a new judicial officer to preside over the remainder of the proceedings.

In the same letter, appellant informed the trial court he had filed a complaint against the trial court with the Commission for Judicial Performance. In the last two pages of the letter, appellant detailed his claims of violations of constitutional rights as the trial court had permitted exhibit 7, the "stick" Hall claimed was used during the assault, to be introduced at trial as evidence. Appellant's complaint revolved around the axe handle's belated recovery by the authorities and the defense's inability before trial to administer forensic tests to the axe handle that might tend to exonerate appellant.

Immediately after the trial court's receipt of the October 19, 2012 letter, Mr. Roberts declared a conflict of interest. The trial court observed that Mr. Roberts had offered ex parte to explain the reason for the conflict. However, the trial court observed

that in the past, the trial court had been provided with authority that a trial court may not inquire into the reasons for the declaration of a conflict of interest. It therefore would not inquire of Mr. Roberts as to the reasons for the declaration of a conflict of interest.

When Mr. Roberts declared the conflict of interest, the trial court immediately discharged Mr. Roberts as counsel of record. It appointed new trial counsel, Mr. Theodore Batsakis (Mr. Batsakis), who represented appellant throughout the remainder of the proceedings.

In the motion for new trial, no complaint was made concerning the adequacy of Mr. Roberts's representation. On appeal, appellant raises two issues of ineffective trial counsel, *infra*, which this court concludes lack merit.

b. *The relevant legal authorities.*

In *Marsden*, the California Supreme Court held a criminal defendant has a right to substitute counsel on a proper showing that his constitutional right to counsel would otherwise be substantially impaired. (*People v. Marsden, supra*, 2 Cal.3d at p. 123; see also *People v. Crandell* (1988) 46 Cal.3d 833, 854.) It also held that the defendant is entitled to present evidence or argument on the matter of substitute counsel, assuming he has clearly indicated that he wants a substitute. (*Marsden, supra*, at pp. 123-124; see *People v. Mendoza* (2000) 24 Cal.4th 130, 157; *People v. Lucky* (1988) 45 Cal.3d 259, 281& fn. 8 (*Lucky*).)

However, the trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney only arises when a defendant in some manner moves to discharge counsel. (*Lucky, supra*, 45 Cal.3d at p. 281.) This does not necessarily require a proper and formal legal motion, but "at least some clear indication by defendant that he wants substitute" counsel. (*Id*. at p. 281, fn. 8.)

"Under the federal Constitution, prejudice is presumed when counsel suffers from an actual conflict of interest. (*Cuyler v. Sullivan* (1980) 446 U.S. 335.) This presumption arises, however, 'only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." ' (*Strickland v. Washington* (1984) 466 U.S. 668, 692, quoting

Cuyler, at p. 348.) An actual conflict of interest means 'a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties.' (*Mickens v. Taylor* (2002) 535 U.S. 162, 171, italics omitted.) Under the federal precedents, which we have also applied to claims of conflict of interest under the California Constitution, a defendant is required to show that counsel performed deficiently and a reasonable probability exists that, but for counsel's deficiencies, the result of the proceeding would have been different. (*People v. Doolin* (2009) 45 Cal.4th at p. 421 & fn. 22 [disapproving the former state law 'informed speculation' standard of prejudice].)" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 309.)

"When a trial court knows or should know that defense counsel has a possible conflict of interest with his client, it must inquire into the matter (*People v. Bonin* [(1989)] 47 Cal.3d [808,] 836; *Wood v. Georgia* [(1981)] 450 U.S. [261,] 272 [67 L.Ed.2d at pp. 230-231]; see *Holloway v. Arkansas* (1978) 435 U.S. 475, 484) and act in response to what its inquiry discovers (*People v. Bonin*, *supra*, 47 Cal.3d at p. 836)." (*People v. Jones* (1991) 53 Cal.3d 1115, 1136.) "When in violation of its duty the trial court fails to inquire into the possibility of a conflict of interest or fails to adequately act in response to what its inquiry discovers, it commits error under *Wood v. Georgia*, *supra*, 450 U.S. 261. [Citation.]" (*People v. Bonin*, *supra*, at p. 837.)

c. *The analysis.*

Appellant's July 2012 letter quite plainly did not ask for Mr. Roberts's discharge and the appointment of new counsel. It merely requested the trial court's assistance in obtaining a jail interview with Mr. Roberts and perhaps the preparation of the case in line with appellant's own personal view as to the adequate preparation for trial. All that is suggested by appellant's letter is that he had sought the state bar's assistance in obtaining Mr. Robert's attendance at a jail interview. When he was unable by that means to secure the desired interview, he next sought the trial court's assistance in obtaining the interview.

The number of times the defendant sees his attorney, and where and when the interviews occur do not suggest incompetence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1192.) Nor does a threat appellant may file a complaint with the state bar. The record supports the conclusion Mr. Roberts did complete an interview with appellant prior to July 24, 2012. Appellant raised no complaint before proceeding to trial that he had not been interviewed at length by Mr. Roberts, that Mr. Roberts was unprepared for trial, or that he was not in contact with his counsel.

On this record, the trial court did not err by failing to hold a *Marsden* hearing after receiving the July 2012 letter. It was sufficient that the trial court made efforts to notify Mr. Roberts that appellant wanted to speak with Mr. Roberts at length about the case.

Again, in October 2012, the trial court did not err by failing to hold a *Marsden* hearing subsequent to its receipt of the October letter. Almost immediately after the trial court received the October 2012 letter, Mr. Roberts declared the conflict of interest, and the trial court discharged him. Once the trial court substituted out Mr. Roberts, it had no reason to inquire into the nature of the conflict of interest. If appellant had any legitimate complaints about Mr. Roberts's performance during the trial or the existence of an actual conflict of interest, he had an opportunity to raise them during his motion for a new trial.

The court in *People v. Horton* (1995) 11 Cal.4th 1068, at page 1106, said the following: "Under the state and federal Constitutions, a criminal defendant has the right to the *effective* assistance of counsel, which includes the right to representation that is free from conflicts of interest. (*People v. Jones* (1991) 53 Cal.3d 1115, 1134.) Conflicts of interest arise in ' "all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." ' (*Ibid*., quoting *People v. Bonin*[, *supra*,] 47 Cal.3d [at p.] 835.)"

The decision in *People v. Horton, supra*, 11 Cal.4th at page 1106, does not stand for the proposition that a trial court must conduct a *Marsden* inquiry before acceding to a defendant's request and granting him what he was asking for – the appointment of new trial counsel. On appeal in *Horton*, the defendant claimed the trial court erred when it refused to permit appointed counsel to withdraw as counsel after the defendant filed a

malpractice action against his trial counsel, then withdrew it. (*Id*. at pp. 1104-1106.) *Horton* does not assist us here as the trial court in *Horton* made the *Marsden* inquiry upon discovering the defendant had filed a malpractice action against his counsel, which the defendant eventually withdrew. And, the *Horton* counsel's request to withdraw was properly refused as the trial court was able to determine there was no actual conflict of interest. (*Id*. at pp. 1104-1107.)

Here, any error is at best harmless beyond a reasonable doubt. (*People v. Taylor* (2010) 48 Cal.4th 574, 601 [where the trial court failed to hold *Marsden* hearings during section 1368 proceedings, but eventually discharged appellant's counsel and appointed new counsel for him, the error was harmless beyond a reasonable doubt].) Regardless of whether the trial court properly should have conducted a *Marsden* inquiry into an actual conflict of interest after reading the October 2012 letter, appellant obtained the objective of his letter – obtaining new counsel. If appellant had a valid complaint about Mr. Roberts's performance during the trial, Mr. Batsakis had the opportunity to raise a complaint of ineffective trial counsel at any time after Mr. Batsakis's appointment, and certainly, during the motion for new trial. Or appellant could have raised the issue on appeal. As the trial was already over before the receipt of the October 2012 letter, any delay by the trial court in discovering an actual conflict of interest or impaired representation was nonprejudicial.[3]

2. *Discovery sanctions.*

Appellant contends the prosecution failed to comply with the reciprocal discovery rules by failing to comply with sections 1054.1, subdivision (a), and 1054.7 by disclosing a material witness's address to the defense 30 days prior to trial, or as soon thereafter as it was known. He complains the trial court abused its discretion by failing to enforce the statutory discovery requirements by imposing sanctions of a continuance of trial or

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[3] Respondent assumes that appellant filed a complaint with the California State Bar concerning Mr. Roberts's conduct. However, in looking at appellant's statement again, while that interpretation is most likely, this court cannot be certain where appellant filed his complaint.

delaying eyewitness G.C.'s testimony until G.C. was interviewed by the defense investigator.

a. *The applicable law*.

Section 1054.1 requires the prosecuting attorney to disclose to the defense the names and addresses of the persons he intends to call as witnesses at trial. Section 1054.7 requires such disclosure 30 days prior to trial, unless good cause is shown why a disclosure should be denied, restricted or deferred. If the information becomes known within 30 days of trial, it must be immediately disclosed.

A trial court may enforce discovery provisions with sanctions, such as by ordering immediate disclosure, contempt proceedings, continuance of the matter and delaying or prohibiting a witness's testimony or the presentation of real evidence. (§ 1054.5, subds. (b) & (c).) A normal sanction for nondisclosure is a continuance; exclusion of evidence is appropriate only if all other sanctions are exhausted. (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1264.) A consideration in imposing sanctions is whether the sanctions are adequate to dispel the prejudice. (*People v. Robbins* (1988) 45 Cal.3d 867, 884.)

"Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information." (§ 1054.5, subd. (b).)[4]

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[4] Section 1054.1 provides, as follows. "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) *The names and addresses of persons the prosecutor intends to call as witnesses at trial*. [¶] (b) Statements of all defendants. [¶] (c) *All relevant real evidence seized or obtained as a part of the investigation of the offenses charged*. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or

comparisons which the prosecutor intends to offer in evidence at the trial." (Italics added.)

Section 1054.2, subdivision (a)(1), provides: "Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause."

Section 1054.5 states: "(a) No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties. [¶] (b) *Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information.* If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. [¶] (c) *The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States.* (Italics added.)

Section 1054.7 provides: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. [¶] Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. . . ."

b. *Background*

On September 6, 2012, after jury selection and just prior to the commencement of the trial testimony, Mr. Roberts raised a few minor trial issues. Mr. Roberts observed a neighbor of Hall's, eyewitness G.C., was present in court. Trial counsel claimed his investigators had been unable to locate G.C. for a pretrial interview and said he was unaware G.C. would be appearing as a witness. Mr. Roberts acknowledged a week earlier, the prosecutor had supplied Mr. Roberts with a witness list containing G.C.'s name. Trial counsel knew the content of G.C.'s prospective testimony as he had police reports and the prosecutor had provided Mr. Roberts with a summary of the witness's latest statement, made that morning to the prosecutor. Trial counsel indicated "his only concern" was as to whether G.C. made a reliable identification of appellant. Mr. Roberts asked for an *Evans* lineup before the witness testified. (*Evans v. Superior Court* (1974) 11 Cal.3d 617 (*Evans*).)

The prosecutor argued a pretrial lineup was not compelled as appellant lived in the same area as G.C., and G.C. had seen appellant numerous times in the neighborhood during the year preceding the assault. The prosecutor said the reliability of appellant's identification was not really at issue.

The trial court denied the request.

Then Mr. Roberts requested a photographic lineup, and the trial court refused to order it. It said Mr. Roberts could conduct a photographic lineup if he could arrange it before G.C. testified, but they were not delaying the commencement of testimony.

Mr. Roberts asked the trial court to at least give his investigator, who would be there sometime after 1:30 p.m. that afternoon, an opportunity to interview G.C. before G.C. testified. Mr. Roberts complained that he previously had been unable to locate G.C., but somehow miraculously, the prosecution had produced G.C. out of the air on the first day of trial.

The prosecutor commented he was unaware the defense believed G.C. would not appear as a witness. The prosecutor had been in touch with G.C., and G.C. was on the prosecutor's witness list. The prosecutor added that G.C. had appeared in court and was in the courtroom a number of times when appellant was present.

The trial court observed its records disclosed a body attachment had issued for G.C., and thereafter G.C. had appeared on July 24, 2012. The trial court said it believed Hall had been present at the same time. Mr. Roberts indicated he did not recall ever having seen G.C.

Mr. Roberts asked whether his investigator could at least interview G.C. at 1:30 p.m. that day before G.C.'s testimony.

The trial court replied it would not order the interview; it was leaving it up to the prosecutor as to whether he would rearrange the order in which he called his witnesses. The prosecutor informed Mr. Roberts he was calling G.C. as his first witness to "get him out of [t]here before noon, if possible." The prosecutor added he did not know whether G.C. would cooperate in a defense interview.

Mr. Roberts said there was no reason to try the case "by ambush." He asked the trial court for an opportunity to know what G.C. might say before G.C. testified. The trial court refused to issue an order requiring the interview or to interfere with the prosecutor's discretion to choose the order in which he called his witnesses.

Mr. Roberts claimed in the absence of the interview, he was no longer ready to proceed. He claimed he could not effectively represent appellant in the absence of the pre-testimony interview, and he moved for a mistrial. The trial court ignored Mr. Roberts's objections he was not ready to proceed and moved on to discuss other matters.

After the discussion moved on to other matters, appellant personally interjected that G.C. had seen him around the neighborhood several times, just like G.C. has seen everyone else who lived across the street from G.C.'s and Hall's apartments.

Shortly before the noon recess, the prosecutor called G.C. as his initial trial witness. Thereafter, the trial court recessed for lunch until 1:35 p.m. At that time, G.C. resumed his trial testimony.

During G.C.'s testimony, G.C. said he was one of Hall's neighbors. He had seen appellant around the neighborhood for about six or seven months preceding the assault. G.C. testified to what he had seen of the assault from his position outside the door of his second floor apartment. Contreras was unable to see the door of Hall's apartment from where he was positioned on the second floor balcony. He said he had seen Browning, and then appellant, entering Hall's apartment. Then, a short while later, appellant and Browning left, and he heard Hall yelling. He and the other onlookers helped Hall after hearing him moaning and after Hall had walked outside his apartment bleeding. Earlier, when G.C. initially heard yelling during the assault, G.C. had telephoned 9-1-1. Later, G.C. made another 9-1-1 call.

G.C. testified that after the police arrived, G.C. made a statement and provided his name and address. He had lived in the same unit in Hall's apartment complex for several years; he had moved about four months ago. G.C. acknowledged he was unaware of appellant's name, but he was familiar with appellant's appearance, he knew where appellant lived, and he recognized appellant as the man who had followed Browning into Hall's apartment at the time of the assault.

Two or three other persons were present that night with G.C. They also heard the ruckus and the yelling and saw the aftermath of the assault. These eyewitnesses did not speak to the police. Mr. Contreras explained the police did not approach his companions as they were Spanish-speaking. He alone was interviewed as he was the only person with his group who spoke English. G.C. saw appellant leave the scene with the same stick he had in his hand when he arrived and walked into Hall's apartment.

The parties stipulated the defense did not contact G.C. prior to trial.

c. *The analysis.*

Appellant's contention is flawed. In the trial court, Mr. Roberts never identified his eleventh-hour requests concerning G.C. as discovery violations pursuant to the

reciprocal discovery law. Critically, Mr. Roberts failed to make an informal request to the prosecutor to obtain the prosecutor's cooperation in discovering G.C.'s address prior to trial. Having failed to take that critical step of complying with section 1054.5, subdivision (b), his contention necessarily fails. Appellant is not entitled on appeal to complain of a failure to impose sanctions when he never asked for a continuance in the context of invoking the discovery law, or complied with section 1054.5, subdivision (b). (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1237; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 366-377; see also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, fn. 12 (*Zambrano*), overruled on other grounds in *People v. Doolin*, *supra,* 45 Cal.4th at p. 421, fn. 22 [defendant arguably forfeited his statutory claim by failing to mention it when he objected in the trial court].)

Apart from any violation of the reciprocal discovery laws, appellant also was not entitled to a short continuance of trial so that he could interview G.C. before G.C. took the witness stand. Trial had commenced, the jury was selected and sworn, and the prosecutor was ready to start testimony, when Mr. Roberts made his requests concerning eyewitness G.C. The record discloses G.C. was available at his apartment in Hall's apartment complex until four months before trial. Thereafter, G.C. was available to the defense between July 24, 2012, and September 6, 2012, upon a simple request to the prosecutor, who apparently also had lost track of G.C. until a body attachment was set aside on July 24, 2012. The trial court was not required to postpone trial or to order the prosecutor to change the order of calling witnesses to accommodate the defense's untimely, midtrial requests. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105-1107 [it is not an abuse of discretion to refuse midtrial continuances to interview trial witnesses where the lack of preparedness is attributable to a lack of diligence by trial counsel].)

The request for the *Evans* or a photographic lineup was untimely as it was made at trial and was unwarranted in light of the well-corroborated identification evidence. (See *People v Baines* (1981) 30 Cal.3d 143, 146-149 [a request for a pretrial lineup must be timely; a request made 15 days prior to trial is untimely]; *Evans, supra*, 11 Cal.3d at

p. 626 [the motion for the lineup should be made as soon as possible after arrest or arraignment as is practicable].)

3. *The wooden stick*

Appellant contends the trial court committed prejudicial error when it admitted into evidence, People's exhibit No. 7, a wooden stick purportedly used by appellant during the assault to strike Hall. Appellant argues the failure of the prosecution to identify the stick as a potential exhibit in the case prior to trial effectively prevented the defense from conducting any tests on the stick that appellant might have wished if he had known the item would be produced in evidence at the trial.

a. *Background.*

At the preliminary hearing, Hall testified appellant hit him several times over his back with "this stick."

During cross-examination at the preliminary hearing, Mr. Roberts attempted to impeach Hall with a statement Hall made at the hospital following the assault. Mr. Roberts asked Hall whether he had previously told the police appellant struck him with a "2 x 4." Appellant replied, "With a 2 x 4. I got the stick at my house right now." Hall described the "stick" as "like an axe handle," about "3 1/2- to 4-feet long." Hall acknowledged he had told the officer the stick was a 2 x 4, but claimed the item was actually similar to an axe handle, not a 2 x 4.

On direct examination at trial, Hall testified Browning came to his apartment door and asked him for money. He refused and started to move her toward the door. Appellant arrived and started beating him "with this thing." Hall described the object as an "axe handle or some type of instrument handle" about three feet long. The prosecutor asked where the object was, and Hall replied, "It's still at my house."

The following day, during Hall's redirect testimony, at sidebar, Mr. Roberts complained the prosecutor was about to introduce a "stick" into evidence, exhibit 7. Mr. Roberts indicated the prosecutor had just given him a supplemental police report indicating the previous night Officer Kelvin Higa (Officer Higa) had retrieved the stick, exhibit 7, from Hall at home and booked it into evidence. Mr. Roberts claimed surprise.

He argued that by the prosecution's delay in securing the stick, the defense had been deprived of any opportunity to do forensic testing to determine whether this was the stick used during the assault. Also, prior to exhibit 7's admission into evidence, he wanted the opportunity to have an expert examine the item for fingerprints, DNA, blood, hair and any other physical evidence.

The prosecutor explained at the preliminary hearing, Hall had testified the stick was used during the assault, and it was still at Hall's apartment. On the day of the assault, Hall was unaware of its presence, and thus Hall had not mentioned to the officers the instrumentality used during the assault was at his apartment. The prosecutor urged Mr. Roberts could not complain that prejudice flowed from the delay in securing the stick. At the preliminary hearing, the defense was put on notice of Hall's claim he had the stick used during the assault. If the defense wanted testing, it should have accomplished its testing before trial; the item was equally available to the defense.

Mr. Roberts replied he was puzzled by the prosecution's lack of diligence in obtaining the stick, but he was taken aback entirely that the prosecution had waited until the middle of trial to bring the item to court.

The trial court commented waiting to secure the instrumentality until trial is not the preferred procedure. However, it overruled Mr. Roberts's objection as it found no prejudice.

The trial court resumed the trial proceedings before the jury. The prosecutor asked Hall about exhibit 7. Hall explained Officer Higa had obtained the stick from his apartment overnight. Hall described the item as an "axe handle" or another sort of handle that previously had been attached to some tool. Hall testified he had discovered exhibit 7 inside his former apartment when he was released from the hospital after the assault. He had recently moved. When he moved, he took the ax handle with him. Hall said exhibit 7 was the axe handle appellant used to beat him over the back. At the preliminary hearing, he had notified the authorities he had later found exhibit 7 in his apartment.

During the trial on September 6, 2012, he was asked to bring exhibit 7 to court the following day. However, as Officer Higa had driven him home last night, he simply gave exhibit 7 to Officer Higa last night.

At trial on September 10, 2012, Officer Higa testified he had secured the stick from Hall's new apartment on September 6, 2010.

b. *The analysis.*

In support of his claim, appellant argues discovery provisions require disclosure of any item the prosecution intends to use at trial 30 days prior to trial or upon discovery. (§§ 1054.1, 1054.7.) He argues there was a discovery violation as the prosecution may not avoid disclosure by refraining from obtaining readily available information. (*In re Littlefield* (1993) 5 Cal.4th 122, 134-135.)

However, as respondent points out, until midtrial, the stick was not in the possession of the authorities. (*Zambrano, supra*, 41 Cal.4th at p. 1133.) The prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense. (*In re Littlefield, supra*, 5 Cal.4th at p. 135; see also, *People v. Panah* (2005) 35 Cal.4th 395, 459 [the defense delay in obtaining additional information prosecutor had developed by speaking personally to the coroner did not constitute prosecutorial misconduct, and the content of the coroner's evaluation was equally accessible to the defense prior to and during the trial]; *People v. Hogan* (1982) 31 Cal.3d 815, 851, overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836 [there is no general duty on the part of the police or the prosecution to obtain evidence, conduct any tests, or to gather up everything which might ultimately prove useful to the defense].)

The failure to obtain the stick after the preliminary hearing was obviously a prosecutorial snafu – two different prosecutors conducted the preliminary hearing and the trial. As soon as the current prosecutor discovered the location of exhibit 7, Officer Higa obtained the stick, Officer Higa brought it to court, and its existence there was disclosed to the defense. The defense had adequate notice of the item's existence and its location in Hall's possession. If testing had any evidentiary value to the material issues in the

case, which we doubt, the defense had an ample opportunity to make arrangements with the prosecution to secure the stick and conduct testing. The prosecution may not withhold favorable and material evidence from the defense. But neither does it have a duty to conduct the defense investigation. If material evidence is available to the defense through an exercise of due diligence, a defendant has all that is necessary to ensure a fair trial. (*Zambrano*, *supra*, 41 Cal.4th at p. 1134.)

4. *The finding of the personal infliction of great bodily injury*.

Appellant contends the evidence is insufficient to support a finding of the personal infliction of great bodily injury. He complains appellant made inconsistent statements regarding his loss of consciousness and the jury entered an inconsistent verdict of not guilty on the charge of felonious assault with the knife. He argues accordingly, this court must exclude from its consideration the supporting evidence all the injuries appellant claimed at trial were inflicted upon him with the knife.

a. *The relevant legal principles.*

Section 12022.7 provides: "(a) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years. [¶] . . . [¶] (f) As used in this section, 'great bodily injury' means a significant or substantial physical injury."

"In determining whether the evidence is sufficient to support a conviction or an enhancement, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; see also *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Under this standard, 'an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Rather, the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson, supra*, at p. 578.)" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

The issue of whether great bodily injury was inflicted is a factual issue for the jury. (*People v. Cross* (2008) 45 Cal.4th 58, 64.) The injury need not cause permanent, prolonged or protracted bodily damage in order to support a great bodily injury finding. (*People v. Escobar* (1992) 3 Cal.4th 740, 750 (*Escobar*).) "Proof that a victim's bodily injury is 'great'— that is, significant or substantial within the meaning of section 12022.7 — is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury. [Citations.]" (*People v. Cross*, *supra*, at p. 66.)

For example, in *Escobar, supra*, 3 Cal.4th 740, the California Supreme Court upheld the imposition of a term for the personal infliction of great bodily injury where a rape victim suffered extensive bruises and abrasions to her legs, knees and elbows, a stiff neck and vaginal soreness that temporarily affected her walking. (*Id*. at p. 750.) In *People v. Wallace* (1993) 14 Cal.App.4th 651, 665, the court upheld the enhancement where one of the victims had suffered cuts to her wrists and ankles and numbness in one finger lasting two months. (*Id.* at pp. 665-666; see also, *People v. Wade* (2012) 204 Cal.App.4th 1142, 1146-1149 [loss of consciousness constituting a "serious impairment of physical condition" is a "serious bodily injury" under § 243, subd. (f)(4); evidence of serious bodily injury sufficient when defendant choked victim until she passed out, even though she did not know how long she had been unconscious].)

b. *The analysis.*

Hall testified appellant came at him with a knife in one hand and a stick in the other. On Hall's front stoop, appellant tried to hit Hall over the head with the stick, but appellant raised an arm defensively. Hall suffered a blow to his arm between wrist and elbow that split open his skin three to four inches. Hall was able to avoid a blow to the head. However, appellant hit him over the back and neck three to four times with the stick. Hall lost consciousness. Hall fell to the stoop on top of some flower pots. He apparently cut his back on a pottery shard when he fell. He claimed when appellant

attacked him with the stick or axe handle, appellant also was steadily hitting Hall with the knife.

Hall regained consciousness as appellant dragged him into the apartment in a choke hold. Appellant threatened to cut Hall's throat and was running the knife along Hall's neck; Hall still had the marks on his neck from appellant's cutting him as appellant did this. Hall was bleeding all over and did not know how serious his wounds were; he was aware he had cuts all over him from the knife. He was "scared" appellant would kill him. But Browning entered the room and said, "Let's go." Appellant took his cellular telephone and released Hall, and appellant and Browning left.

Appellant stumbled outside to contact a neighbor and to get medical help. He was bleeding so much he could not be sure of the severity of his injuries.

G.C. said he saw appellant inside Hall's apartment swinging a bat at Hall. After the assault, G.C. observed that Hall had a swollen arm and was bleeding. A.N. saw appellant approach Hall with a six- to eight-inch knife. After the assault, she heard Hall scream, "They stabbed me. They got me." According to A.N., when Browning entered the apartment, she was holding a bat.

Appellant was transported by ambulance to the hospital and was kept there until his release the following evening. The doctor used 66 stitches to close Hall's wounds; Hall voiced uncertainty as to exactly how he had suffered the many cuts on his body.

A police officer spoke to Hall after the assault. The officer testified that appellant had difficulty speaking. The officer took a photograph of Hall, which was shown to the jury at trial.

The above evidence is ample in supporting the jury finding of the personal infliction of great bodily injury.

c. *The claim of an inconsistent verdict with respect to the finding of the enhancement.*

Appellant makes a claim the jury's finding of not guilty as to the additional charge of felonious assault with a knife affects this court's analysis of his insufficiency of the

evidence claim.[5] However, it is settled that inconsistent verdicts provide no grounds for a reversal where there is sufficient evidence to support the verdicts. "The law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence." (*People v. Palmer* (2001) 24 Cal.4th 856, 858, 860; see also § 954; *Standefer v. United States* (1980) 447 U.S. 10, 25-26; *People v. Superior Court* (*Sparks*) 48 Cal.4th 1, 8-14.)

It makes no difference that we are addressing a claimed inconsistency between a verdict and finding here. The same rule applies. (*People v. Lopez* (1982) 131 Cal.App.3d 565, 569-571 [rejecting the claim the appellate court's evaluation of the sufficiency of the evidence is limited by the jury's inconsistency in finding him guilty of the offense of assault with a deadly weapon, but finding he was not personally armed with a weapon].)

The evidence of Hall's injuries support a claim appellant inflicted great bodily injury on Hall during an assault with a stick. It is irrelevant to our consideration of the evidence that a portion of his injuries may also have been inflicted by the use of a knife. Hall testified that appellant assaulted him by use of a knife and the axe handle. We assume the jury concluded it was overkill in this assault, which arose from a domestic dispute, to convict appellant of both counts of felonious assault, especially as the alleged assaults were really one continuous act of assaulting Hall, and it was apparent Hall did not always tell the truth.

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[5] Appellant was charged in the amended information in count 1 with second degree robbery (§ 211), in count 2 with assault with a deadly weapon in violation of section 245, subdivision (a)(1), in that appellant assaulted Hall with a "knife," and in count 3, with assault with a deadly weapon in violation of section 245, subdivision (a)(1), in that appellant assaulted Hall with a "wooden stick." The prosecution alleged the enhancement of the personal infliction of great bodily injury as described in section 12022.7, subdivision (a), with respect to counts 2 and 3. The jury returned verdicts of not guilty as to counts 1 and 2 and found appellant had committed the offense alleged in count 3, and made the additional finding appellant had personally inflicted great bodily injury in connection with count 3.

5. *Ineffective assistance of trial counsel.*

Appellant contends Mr. Roberts rendered him constitutionally ineffective representation. He urges Mr. Roberts failed to impeach Hall with prior inconsistent statements made at Browning's preliminary hearing and (b) cross-examined Hall in such a way as to enhance the evidence supporting the finding for the personal infliction of great bodily injury. Appellant argues he should prevail with these claims on appeal as there is no rational tactical purpose underlying Mr. Roberts's conduct of the trial.

a. *Pertinent legal principles.*

The decision in *People v. Gamache* (2010) 48 Cal.4th 347, 391-392, sets out the relevant standards of review.

"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. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington, supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

b. *The analysis.*

Appellant claims Mr. Robert's failure to use one isolated statement made by Hall at Browning's preliminary hearing constituted ineffective trial counsel. He argues that statement, indicating all of Hall's injuries arose from appellant's use of the knife, should have been used in impeachment as it demonstrates appellant inflicted no injuries with the board or stick. He also argues Mr. Roberts's cross-examination of appellant at trial was constitutionally ineffective as it fully established Hall was injured with the stick, in lieu of merely by the knife.

This contention rests on appellant's effort to argue there is an inconsistency between the jury's finding of great bodily injury and its acquittal of appellant concerning count 2, the assault by knife. Appellant is contending that since Mr. Roberts's failed to exploit at trial the possibility the jury would return a guilty verdict only as to the allegation in count 3, the assault with the wooden stick, as contrasted with a verdict on count 2, the assault with the knife, Mr. Roberts rendered ineffective assistance to appellant. This entire contention rests on appellant's faulty assumption that it makes a difference whether Hall's injuries were inflicted by stick or by knife. But as we explained, *ante*, for purposes of evaluating substantial evidence supporting the great bodily injury enhancement, it makes no difference whether the injuries were inflicted by knife or stick. Any alleged failure in impeaching appellant with a statement indicating all his injuries occurred by knife, or in sarcastically asking Hall whether he was hit with the stick, fail to establish prejudice. If appellant cannot establish the failure by trial counsel would have made a difference to the outcome of the case, he cannot prevail in his ineffective assistance of counsel claim.

6. *Sentencing under the Three Strikes law.*

Appellant contends he is entitled to a new hearing for the trial court to properly exercise its discretion pursuant to *Romero, supra*, 13 Cal.4th 497.

a. *Background.*

Before sentencing, appellant moved to strike strikes and for a more lenient Three Strikes term than 25 years to life. The probation report indicated appellant was 44 years old when he committed the instant offense. At the time, he was on parole with a discharge date of April 22, 2012, and was a registered sex offender. He was a transient. His section 969b package indicated that when appellant was 22 years old, in 1989, in case No. A817857, he was convicted in 1987 for multiple counts of a serious felony. He apparently committed these offenses with a buck knife: three counts of forcible rape, one count of forcible oral copulation, assault by means of force likely to commit great bodily injury and with a deadly weapon, first degree burglary, kidnapping and second degree robbery. He served a 24-year prison term for these offenses. Released on parole sometime before 2004, in 2005, he was convicted of another serious felony, a 2004 attempted arson (§ 455).

At sentencing, Mr. Batsatkis urged leniency, arguing the assault arose from a romantic triangle, Browning had inflicted the knife wounds, Hall may have precipitated the assault by attacking Browning, and Hall's testimony was incredible. Appellant spoke to the trial court personally. He said he had had no violations since he had been placed on parole. He was supervising two board and care facilities. He had been doing his utmost to better himself. His prior offenses occurred when he was young and stupid. Hall is a liar, and appellant did not do what Hall claimed. There were no injuries from a stick; Hall's injuries were incurred before appellant arrived and were all injuries inflicted by someone else (Browning) with a knife.

The trial court listened to the defense comments. It denied the *Romero* motion. It commented the currrent offense was serious and a strike itself, and Hall had suffered injuries. Appellant's rape case was older, but appellant had reoffended in 2004 in an attempted arson case. This was an appropriate case for the use of the Three Strikes law.

b. *The analysis.*

Before striking a strike, " 'the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) There is a presumption that "any sentence that conforms to [the] sentencing norms is both rational and proper." (*Id*. at p. 378.) As a result, "a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Ibid*.) The circumstances must be extraordinary before a career criminal will be deemed to fall outside the spirit of the law. (*Ibid*.)

In this case, appellant had a serious record arising from the commission of burglary, robbery, kidnapping and forcible sexual offenses. After appellant's release on parole, he committed a new serious felony in 2004, the attempted arson offense. While appellant apparently had been crime free for a time after his latest grant of parole for the 2004 attempted arson, he again committed the instant serious felony. The evidence at trial supported the jury's finding appellant hit Hall with the handle or an axe or a similar instrument, knocking Hall unconscious and at the very least, breaking Hall's skin open at the elbow. Appellant then held a knife to Hall's neck and threatened his life. Such conduct warrants the 25-years-to life term of imprisonment. Appellant's personal circumstances were unimpressive in showing he was entitled to leniency.

The trial court properly exercised its discretion when it chose to impose the Three Strikes term of imprisonment.

7. *Cumulative prejudice.*

Appellant argues the cumulative impact of the foregoing alleged trial errors create a reasonable probability that, but for the errors, appellant would have had a better outcome.

However, reversal based on cumulative error is required only if a high number of instances of error occurring at trial create a strong possibility that "the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*People v. Hill* (1998) 17 Cal.4th 800, 845.) For instance, *in People v. Hill, supra*, at pages 844-847, the court concluded that the cumulative impact of constant and outrageous misconduct by the prosecutor and several legal errors occurring at trial, "created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*Id*. at p. 847.)

We have rejected each claim of error individually and find no cumulative error sufficient to have affected the outcome of the case.

8. *The unauthorized sentence.*

The People raise an issue of unauthorized sentencing. They assert the trial court failed to impose a term for, or properly strike the finding of, the great bodily injury enhancement. We agree.

At sentencing, the trial court never imposed a term for the finding of the infliction of great bodily injury. Nor did it strike the finding so as to avoid imposing the term that necessarily must be imposed for the finding. The failure to impose or strike an enhancement for the infliction of great bodily injury is a legally unauthorized sentence subject to correction. (*In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254.) Respondent requests that we remand the matter for resentencing on the great bodily injury enhancement and a statement of reasons pursuant to section 1385, subdivision (a) if the trial court chooses to strike the enhancement. We shall make that order.

We express no view on whether the trial court should impose a term for the enhancement or strike the finding.

DISPOSITION

The order of sentencing is reversed insofar as the trial court failed to impose a term for, or to strike, the section 12022.7, subdivision (a), finding. In all other respects, the judgment is affirmed. The cause is remanded for sentencing on the enhancement.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.