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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VERDELL KEGLER,

Defendant and Appellant.

B291677

(Los Angeles County
Super. Ct. No. BA456417)

APPEAL from a judgment of the Superior Court of Los Angeles County, Douglas Sortino, Judge. Affirmed in part and remanded in part.

Bahar Law Office and Sarvenaz Bahar, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Pamela C. Hamanaka and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Verdell Kegler was convicted by jury of four counts: count 1, stalking (Pen. Code, § 646.9, subd. (b));¹ count 2, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)); count 3, criminal threats (§ 422, subd. (a)); and count 4, simple assault, a misdemeanor (§ 240). Appellant challenges the trial court's admission of evidence that he had a knife when he was arrested. He also challenges the trial court's denial of his motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to strike his prior convictions. Finally, appellant contends, and the People concede, that the matter should be remanded to the trial court to exercise its discretion whether to strike a five-year felony enhancement under section 667, subdivision (a)(1). We remand for the trial court to exercise its discretion and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

Appellant was charged with four counts related to his conduct toward a woman named Michelle whom he met through a mutual friend in about 2015. The counts were based on three incidents in 2017. The

¹ Unspecified statutory references will be to the Penal Code.

² We set forth only sufficient details of the prosecution and defense evidence to provide a background and to address the issues on appeal. The evidence relevant to the issues will be addressed in more detail in the discussion section.

prosecutor also presented evidence of three uncharged incidents in 2016.³

I. *Prosecution Evidence*

A. *Charged Incidents in 2017*

1. *Count 2: March 22, 2017 Assault*

On March 22, 2017, around 11:00 p.m., Michelle was at the home of her friend Jaide with Jaide's brother, Cary, Jaide's boyfriend, Gene, and another friend named Kevin. Appellant arrived, but Michelle did not want him there, so Jaide asked him to leave. Believing that appellant had left, Michelle went to the front porch of the house to wait for a ride.

Appellant suddenly struck Michelle in the face, causing her to fall and hit her head. Appellant repeatedly stomped on Michelle's face while she was on the ground, telling her she was getting what she deserved. When Michelle went home, her fiancé called 911, and she was taken to the hospital, where she received stitches for the wounds on her face. Michelle told the police and hospital personnel that appellant had attacked her.

³ The uncharged incidents were admitted as relevant to elements of the stalking and criminal threats charges, including the defendant's motive, the victim's state of mind and her sustained fear, and whether the threat was credible.

2. *Count 3: March 25, 2017 Criminal Threats*

On March 25, 2017, Michelle was on her way to a pharmacy to fill her prescription from the hospital when she stopped to talk to a friend at a homeless encampment. Appellant approached her and said, “Bitch, you called the white man on me,” and threatened to kill her, pulling out a pocket knife and pointing it toward her. Michelle understood the phrase “the white man” to refer to the police. She was afraid and began crying.

Michelle ran into a nearby library and called 911. The police officer who responded to the call testified that Michelle told him that appellant approached her from behind and grabbed her, causing her to turn around. He had a knife in his hand and told her, “Bitch, you about to die. You called the white man on me.” Michelle also told the officer that she knew appellant and that she had a restraining order against him.

3. *Count 4: April 7, 2017 Assault*

Michelle did not recall the April 7 incident and needed to refresh her memory with the police report before testifying. Michelle was in Jaide’s bedroom with Jaide and Gene when appellant arrived. Appellant and Michelle began arguing, and Michelle pepper sprayed him because she thought he was going to hit her. Appellant began hitting Michelle in the face, and she ran away. Michelle called the police and was treated for her injuries. The 911 call was played for the jury.

B. *Uncharged Incidents in 2016*

1. *July 8, 2016*

On July 8, 2016, Michelle was serving food to homeless people near a library when appellant approached, shouted at her, grabbed her, and walked her to the sidewalk, telling her he would send someone to blow up her house.

2. *July 11, 2016*

Michelle's testimony about this incident differed from the police officer's testimony, and her account was somewhat inconsistent with her prior statements. Michelle testified that she was visiting her friend Marvin in a tent at a homeless encampment when appellant walked into the tent and hit Michelle and Marvin. The police officer testified that Michelle had told the police that appellant held her at knife point. At trial, she acknowledged that she also had a knife with her, but that appellant "had a knife first. His knife was out."

3. *August 3, 2016*

Michelle was at Jaide's house on August 3, 2016 when she got into an argument with appellant. Appellant hit Michelle and Jaide. Although Michelle's testimony was somewhat inconsistent as to whether appellant placed a knife against her throat, she testified that he had a knife and threatened repeatedly to kill her. When the police arrested appellant, they found a pocket knife on him and asked Michelle if it was the knife she saw. Appellant was charged with five counts related to this incident and pled no contest to one count of

assault in exchange for dismissal of the other four counts. On October 19, 2016, the trial court issued a protective order requiring him to stay away from Michelle.

C. Appellant's Arrest

Over appellant's objection, the prosecutor introduced evidence that the police found a pocket knife in appellant's pocket when he was arrested on April 11, 2017.

II. Defense Evidence

Appellant testified on his own behalf that he and Michelle were dating in late 2015 and 2016 and that he bought drugs for her. She did not "want to be bothered" with him if he did not have drugs for her. Appellant worked in construction and carried knives and box cutters for his work that he had shown to Michelle. After he began spending time with Michelle, who used crack cocaine, he started using crack cocaine and eventually lost his job because of his drug use. Gene and Kevin were drug dealers, and Gene sold drugs from Jaide's house.

Appellant denied threatening or assaulting Michelle or using a knife during any of the 2016 uncharged incidents, instead stating that Michelle became belligerent if she did not get her way and if he did not have drugs for her. He pled no contest to the assault charge in October 2016 in order to be released from jail. After his release, he tried to avoid Michelle because of the protective order, but she sought him out every day and told him she would have him arrested based on the protective order.

Appellant similarly denied that the charged incidents in 2017 occurred as Michelle and the other witnesses testified. For example, he testified that Kevin was the one who hit Michelle and knocked her to the ground on March 22, 2017. He denied threatening Michelle with a knife on March 25, 2017 or striking her on April 7, 2017.

III. *Procedural Background*

The jury found appellant guilty of count 1, stalking; count 2, assault by means of force likely to produce great bodily injury; count 3, criminal threats; and count 4, simple assault. The jury found true the allegation as to count 2 that appellant personally inflicted great bodily injury on Michelle (§ 12022.7, subd. (a)), and the allegation as to count 3 that he personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)).

The trial court denied appellant's *Romero* motion. Appellant was sentenced to a total of 96 years. As to count 2, the court imposed an indeterminate term of life imprisonment with a minimum term of 27 years, based on the high term of four years, plus three years for the great bodily injury allegation, plus four five-year prior conviction enhancements under section 667, subdivision (a). The court also imposed a consecutive determinate term of 23 years on count 2, based on four five-year priors, plus three years for the great bodily injury allegation. As to count 3, the court imposed a Third Strike sentence of 25 years to life, plus one year for the knife allegation, plus 20 years for the four five-year enhancements, to run consecutively. The court stayed

the sentence on count 1 under section 654 and imposed a 180-day sentence on count 4.

DISCUSSION

Appellant raises three issues on appeal. First, he contends the trial court erred in admitting evidence of the knife recovered from him when he was arrested. Second, he contends the trial court abused its discretion in denying his *Romero* motion. (*Romero, supra*, 13 Cal.4th 497.) Third, appellant contends that the matter should be remanded for the trial court to exercise its discretion whether to strike a five-year felony enhancement under section 667, subdivision (a)(1).

I. *Admission of Knife Evidence*

Appellant contends the trial court violated his right to due process by admitting evidence of the knife found on him when he was arrested. He argues that the trial court applied an incorrect legal standard in determining that the knife was relevant.

The trial court's rulings on the admission and exclusion of evidence are reviewed for abuse of discretion. (*People v. Chism* (2014) 58 Cal.4th 1266, 1291.) “[I]f the ruling was correct on any ground, we affirm.” [Citation.]” (*Id.* at p. 1295, fn. 12.) We find no abuse of discretion.⁴

⁴ Appellant argues that the trial court's ruling should be reviewed de novo, not for an abuse of discretion. We disagree. The abuse of discretion standard of review for the admission of evidence is well-established. (See *People v. Sanchez* (2019) 7 Cal.5th 14, 54 (*Sanchez*) [“The trial court enjoys

A. *Relevant Procedural Background*

1. *Preliminary Hearing Testimony*

Michelle testified at the preliminary hearing that appellant used a knife against her on March 25, 2017. She testified that the knife was a pocket knife but that she had seen him with pocket knives multiple times, so she was not sure if she had seen this exact knife previously. The knife was a folding knife, and she saw him open it. She testified that appellant had pulled a knife on her four or five times before and threatened to kill her numerous times. Michelle stated that appellant “has a lot of pocket knives, so he carries pocket knives, but he has all different kinds, so it might not be the same kind, but they’re the same size, the same everything, just different colors. [¶] . . . [¶] Or shapes sometimes.”

2. *Pretrial Proceedings*

The prosecutor sought to introduce into evidence the knife the officers found when they arrested appellant on April 11, 2017. The prosecutor argued that appellant was arrested “relatively close in time to the [March 25th] incident” and that the knife “could have been the weapon used.” He further argued that Michelle would testify to a prior incident in 2016 when appellant threatened her with a knife, and appellant was arrested at that time with a knife. He argued, “the fact that she has seen him with knives on multiple occasions is going to

broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence”].)

come in, because it goes to the extent of the fear, and part of the corpus of the crime. So the fact that he later has the knife in his possession . . . is still circumstantial evidence to corroborate he had a knife in his possession at the time of the” incident. Defense counsel objected on the grounds that Michelle’s description of the knife was “vague at best,” and that appellant was arrested more than two weeks after the incident.

The trial court admitted the knife, reasoning as follows: “[W]hen a person is found in possession with something roughly consistent with what is described by the victim, and it’s relatively close in time . . . about 16, 17 days between the incident and his arrest, it would be relevant. Any delay of time and discrepancies of description would go to weight and not admissibility. Additionally, the act of carrying a pocketknife is not so inherently prejudicial. A lot of people carry knives. . . . So I don’t see a large degree of prejudice there. To the extent that it corroborates her testimony that she often sees him with a knife which is—obviously goes to her sustained level of fear for the 422, it corroborates her general testimony about the way he carries a knife. [¶] . . . [¶] Its probative value outweighs the prejudicial effect. . . . [B]ased upon the general description it could be the knife used against her in the 422. He’s in possession of it shortly thereafter, and for that reason, it’s relevant under case law. [¶] Secondly, even if she were to exclude it was the weapon on that day, it corroborates her testimony about the earlier incident where he was carrying a knife.”

3. *Trial Testimony*

As to the March 25 incident, Michelle testified that she was going to get a prescription filled when appellant “came out of nowhere and said, ‘bitch, you called the white man on me,’ which is the police, and hit me in my face again.” He pulled out “a little pocket knife, switchblade,” and threatened to kill her. She testified that she “was not payin’ attention to [the knife] that much, but it was a knife. I seen when he opened up the blade, the length of it.”

The prosecutor showed Michelle the knife for the first time after her direct and cross-examination, outside the presence of the jury. He asked if it looked familiar to her, and she replied, “Vaguely. [¶] . . . [¶] I mean, he had it. It’s his [referring to appellant].” When asked how certain she was that it was the knife appellant used when he threatened her, she stated that she was “[n]ot 100 percent, but I’m certain.”

On redirect, the prosecutor showed Michelle the knife and asked if she recognized it. She stated that she had seen it in appellant’s hand and that it looked similar to the object she saw in his hand on March 25, 2017.

B. *Discussion*

“Relevant evidence is evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ (Evid. Code, § 210.) The trial court has broad latitude in determining the relevance of evidence. [Citations.]” (*People v. Scott* (2011) 52 Cal.4th 452, 490 (*Scott*).)

“A trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. [Citations.] “‘Prejudice’ as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent’s position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption “substantially outweigh” the probative value of relevant evidence, a section 352 objection should fail. [Citation.] “The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.] [Citation.]” (*Scott, supra*, 52 Cal.4th at pp. 490-491.)

Appellant contends that the knife found on appellant when he was arrested “was not relevant to any issue in this case, because too much time . . . had lapsed between the incident on March 25, 2017 and appellant’s arrest on April 11, 2017.” He further argues that “Michelle’s description of the knife that was used against her was too vague and the knife described too commonplace to allow for a meaningful identification of the knife recovered at the time of appellant’s arrest.” We conclude that the trial court did not abuse its discretion in admitting the evidence.

Appellant relies on *People v. Riser* (1956) 47 Cal.2d 566 (*Riser*), overruled in part on other grounds by *People v. Morse* (1964) 60 Cal.2d 631, to argue that the knife was inadmissible because it was bad character evidence. The trial court did not admit the knife as evidence of appellant's character. To the contrary, the court found that the evidence was relevant to the criminal threats charge because it supported the element of Michelle's fear by corroborating her testimony that appellant often carried a knife. The court also reasoned that the knife was relevant because its description was consistent with Michelle's description of the knife appellant used in the March 25 incident, and it was found only 16 to 17 days after the incident. In addition the court considered whether the evidence was too prejudicial, concluding that simply carrying a pocket knife is not inherently prejudicial because many people do so.

We agree with the trial court. The criminal threats charge required the prosecution to establish, among other elements, that appellant's threats "actually caused [Michelle] 'to be in sustained fear for . . . her own safety'" and that her fear was "'reasonable' under the circumstances." [Citation.] (*People v. Fruits* (2016) 247 Cal.App.4th 188, 203-204, fn. 8.) As the trial court reasoned, the knife corroborated Michelle's testimony that appellant often carried a knife, which supports the elements that she was actually in fear and that her fear was reasonable. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1249 (*Prince*) ["the knives bore some relevance to the weapons shown by the evidence to have been involved in other charged crimes. They did not simply constitute bad character evidence"].)

Moreover, the facts of *Riser* are distinguishable from those presented here. There, the prosecution introduced evidence that “the defendant possessed a weapon that could not have been the one used in the charged crime.” (*Sanchez, supra*, 7 Cal.5th at p. 55.) Thus, “[t]he only purpose of admitting the evidence would be to demonstrate that the defendant is ‘the sort of person who carries deadly weapons.’ [Citations.]” (*Prince, supra*, 40 Cal.4th at pp. 1248-1249.) By contrast, the knife that was found at appellant’s arrest “could easily have been the one used” in the criminal threats offense. (*Sanchez, supra*, 7 Cal.5th at p. 55.) In *Sanchez*, the court concluded that “[e]vidence that shortly before the murders defendant possessed a firearm that could have been the murder weapon was similarly relevant and admissible as circumstantial evidence that he committed the murders. . . . [W]e see no abuse of discretion in not excluding the evidence as unduly prejudicial under Evidence Code section 352.” (*Id.* at p. 56.) Similar to *Sanchez*, the knife admitted here was relevant as circumstantial evidence that appellant committed the criminal threats, and it was not unduly prejudicial. (See also *People v. Homick* (2012) 55 Cal.4th 816, 877 [no abuse of discretion in admitting evidence because “the weapon defendant habitually carried may have been the same type of weapon used in the shooting,” and “such evidence was ‘circumstantial evidence the jury can use to determine whether the case is proven that this defendant is connected to the murder’”].)

Appellant also argues that there must be expert testimony that the weapon could have been the weapon used to commit the crime.

However, the cases on which he relies do not require expert testimony in order to find the evidence admissible. For example, in *People v. Farnam* (2002) 28 Cal.4th 107 (*Farnam*), the court stated that, “[e]vidence that defendant possessed a knife two months after the . . . crimes, coupled with the evidence that the perpetrator of the . . . crimes used a sharp instrument, consistent with defendant’s knife, to slit a screen door and sever two telephone cords at the [victim’s] residence, tended to establish that defendant was the perpetrator.” (*Id.* at p. 156.) The court did not hold that expert testimony was a prerequisite to the weapon’s admission. The reason an expert did testify in *Farnam* was to establish that the knife “could have been the tool used to cut the telephone cords and the screen door” at the victim’s residence. (*Ibid.*)

Similarly, in *People v. Mills* (2010) 48 Cal.4th 158 (*Mills*), the court stated that, “[b]ecause defendant was accused of killing the victim by cutting her throat and shortly after the crime was found in possession of several cutting devices, any one of which could have been the murder weapon, the trial court acted within its discretion in finding the evidence to be relevant. [Citation.]” (*Id.* at p. 197.) Although an expert testified that knives found by the police could have been used to cause the fatal wounds, the court did not hold that expert testimony was required for the weapon to be admissible. (See also *People v. Cox* (2003) 30 Cal.4th 916, 957, overruled in part on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390 [concluding that guns were admissible because they were “relevant either as possible murder weapons, or as weapons that could have been used to coerce the victims into

defendant's car or otherwise subdue them," not because of expert testimony].)

In contrast to the cases cited by appellant, there was no need here to present evidence regarding whether the knife could have been used to cut telephone cords (*Farnam, supra*, 28 Cal.4th at p. 156) or to cause a certain type of injury (*Mills, supra*, 48 Cal.4th at p. 197). The only question was whether it could have been the knife appellant brandished when he threatened Michelle. No expert testimony was required.

We also find no merit to appellant's arguments that are, in essence, attacks on Michelle's credibility. For example, appellant makes much of the fact that Michelle was placed in custody for contempt of court for failing to come to court to testify at the trial. He points out that Michelle testified that she was "upset" about being placed in custody. He also states that, when she was shown the knife outside the presence of the jury, she asked if she would "get to leave today," and if she would need to stay in jail if her testimony took longer than one day. Appellant also cites Michelle's testimony that her memory of the March 25 incident was "vague and blurry." Michelle's testimony regarding her recollection of the events and her reluctance to testify raise questions of her credibility, a determination clearly within the jury's purview. (See *People v. Elliott* (2012) 53 Cal.4th 535, 585 ["Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends"].)

Appellant relies extensively on the prosecutor's remarks during opening and closing arguments about Michelle, supposedly establishing that Michelle was not credible. However, appellant has taken the prosecutor's remarks out of context and ignored the prosecutor's many arguments about why the jury should believe Michelle.

It is true that the prosecutor stated that Michelle has "made mistakes," has "issues" and a criminal record, and that she had "not been dependable about coming to court." Appellant particularly points out the prosecutor's statements during closing that Michelle "is probably not the person that the law had in mind when [it] says the testimony of a single witness can prove any fact beyond a reasonable doubt in a court of law," and that he would not ask the jury "to find that these charges were proved beyond a reasonable doubt on Michelle's word . . . alone." However, despite these isolated statements, the prosecutor outlined in detail why the jury should find Michelle credible, citing the lack of a motive for Michelle to lie, photographs of her injuries, the testimony of numerous other witnesses, and the 911 calls. The prosecutor also summarized the evidence he expected the jury to hear—such as photographs, 911 calls, and the testimony of other witnesses—supporting the charges against appellant. Contrary to appellant's claim that the prosecutor's statements were "legally binding concessions by the prosecution as to the unreliability of Michelle's testimony," these comments were simply argument. The determination of Michelle's credibility was up to the jury.

Even if the jury found that Michelle was not credible, the prosecutor did not rely solely on Michelle's testimony to establish the

charges. To the contrary, the prosecutor presented numerous witnesses, including Michelle's fiancé, Jaide, Cary, Gene, Kevin, and witnesses who testified about a telephone call appellant placed while imprisoned. The prosecutor also introduced testimony by the police officers, detectives and hospital staff who were involved. All of these credibility determinations were within the purview of the jury.

II. *Denial of Romero Motion*

Appellant contends we should remand the matter because the trial court abused its discretion in denying his *Romero* motion. We disagree.

Under section 1385, subdivision (a), and in furtherance of justice, a trial court may strike a prior felony conviction allegation under the Three Strikes law. (*Romero, supra*, 13 Cal.4th at pp. 529–530.) In doing so, “the court . . . must consider whether, in light of the nature and circumstances of [the defendant’s] 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 [Three Strikes] 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 (*Carmony*)). Our review is for an abuse of discretion. (*Id.* at p. 375.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

At the hearing on appellant's *Romero* motion, the trial court stated that it remembered the victim's testimony and was familiar with all the facts and circumstances of the case, including the probation report. The court acknowledged that appellant was "likely never to get out of prison. [¶] At the same time—and I don't do this lightly, . . . I cannot say based on his behavior up to this point that he's outside the spirit of the Three Strikes law. He stands convicted of very serious felonies." The court cited the severity of Michelle's injury and noted that "[y]ou had the stalking, criminal threats, . . . against a victim that he had already victimized and been found guilty of victimizing her for which he was on probation at the time he decided to commit the offenses. So he's on active probation for violent crime against the same [victim], and engages in a series of attacks on her which were incredibly brutal, . . . I think she's a vulnerable victim. . . . [¶] [T]he incidents themselves have the threat of great violence. . . . His prior performance on probation or parole has been bad. Whenever he is out of prison, it seems like he violates with a violation or picks up a new case and gets sent back on a new case. He's essentially been in and out of the penal system from 1977 to the present, and whenever he has an opportunity, he offends." The court acknowledged the defense argument that many of appellant's prior convictions were old, but reasoned that "the facts and circumstances of the present case are serious. He's on probation at the time when he commits this offense for assault on the same victim. His prior performance on probation or parole is unsatisfactory, and it's nine separate robberies in four separate cases; two counts involving a gun, one involving a weapon. They are serious, serious crimes. [¶] I

think in some ways the only thing he has going for him in terms of mitigation is his age, because I do feel badly about locking somebody up essentially for the rest of their lives at the age he's at. . . . But at the same time, it's what I think I have to [do] under the law, because given his criminal history and the facts and circumstances of this particular offense, I think it would be an abuse of discretion to strike the strikes in this case. . . . [¶] I don't think he is in any way, shape, or form outside the spirit of the Three Strikes law."

The record indicates that the court carefully considered "whether, in light of the nature and circumstances of [appellant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects," appellant is outside the spirit of the Three Strikes law. (*Carmony, supra*, 33 Cal.4th at p. 377.) The trial court's denial of appellant's *Romero* motion was not an abuse of discretion.

III. *Remand for Trial Court to Exercise its Discretion*

Under the versions of section 667, subdivision (a) and section 1385, subdivision (b) in effect when appellant was sentenced, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b) (effective January 1, 2015 to December 31, 2018.)) On September 30, 2018, while this appeal was pending, the Governor signed Senate Bill

No. 1393, amending section 667, subdivision (a) and section 1385, subdivision (b) to allow a court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The amendment applies to all cases that, like appellant's, were not final on its effective date. (*Id.* at p. 973.) The matter accordingly must be remanded to the trial court for resentencing pursuant to Senate Bill No. 1393. (*Ibid.*)

DISPOSITION

The matter is remanded to the trial court for it to exercise its discretion to resentence appellant pursuant to section 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.