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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMAL LEE GILMORE, Defendant and Appellant.	B284043 (Los Angeles County Super. Ct. No. NA105314)

APPEAL from a judgment of the Superior Court of Los Angeles County, Julian C. Recana, Judge. Affirmed and remanded with directions.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, appellant Jamal Lee Gilmore was convicted of felony battery on a peace officer and misdemeanor battery on a custodial officer. He contends the prosecution engaged in racial discrimination in exercising a peremptory challenge to a prospective African-American juror; additionally, he challenges the trial court's denial of his motion for acquittal and asserts the existence of sentencing error. In supplemental briefing, he also contends we should remand the matter for resentencing pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393), which becomes effective January 1, 2019, and provides the trial court with discretion to strike enhancements for serious felony convictions. We agree with the last contention. Accordingly, we remand for resentencing, but in all other respects affirm the judgment.

RELEVANT PROCEDURAL BACKGROUND

In an amended information, appellant was charged in count 1 with battery on a peace officer, namely, Darren Williams (Pen. Code, § 243, subd. (c)(2)), and in count 2 with battery on custodial officers, namely, Williams and Xochitl Walden-Ramirez (Pen. Code, § 243, subd. (c)(1)).[1] Accompanying count 1 was an allegation that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). The information further alleged that appellant had suffered one prior conviction constituting a strike under the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12, subd. (b)) and a serious felony (§ 667, subd. (a)(1)), as well as a prior conviction for which he had served a prison term (§ 667.5,

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

subd. (b)). Appellant pleaded not guilty and denied the special allegations.

Trial was bifurcated regarding appellant's prior convictions. A jury found appellant guilty as charged in count 1, and found the great bodily injury allegation to be true. As to count 2, the jury found appellant guilty of the lesser included charge of misdemeanor battery on a custodial officer, namely, Walden-Ramirez (§ 243, subd. (b)). After appellant admitted the prior conviction allegations, the trial court sentenced him to a total term of 14 years, comprising a three-year upper term, doubled pursuant to the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus a five-year prior conviction enhancement (§ 667, subd. (a)) and a three-year enhancement for the infliction of great bodily injury (§ 12022.7, subd. (a)).

FACTS

A. *Prosecution Evidence*

The prosecution's witnesses were Los Angeles County Deputy Sheriffs Darren Williams and Albert Rodriguez, and Los Angeles County Custody Assistant Xochitl Walden-Ramirez. During their testimony, the jury viewed video recordings of the pertinent events.

The witnesses provided the following account of the underlying events: On October 19, 2016, at approximately 11:00 a.m., Deputy Sheriff Williams was the lockup supervisor at the Long Beach courthouse. Deputy Sheriff Rodriguez and Custody Assistant Walden-Ramirez were also assigned to the lockup. At the time, appellant was in the lockup sally port, awaiting transportation by bus.

Upon learning that the bus was full, appellant became upset, sat down, and demanded a place on the bus. When Custody Assistant Walden-Ramirez and other lockup personnel told him to return to the lockup, he refused to do so. Although appellant asserted that he felt chest pain, Deputy Sheriff Williams saw no signs of that condition. According to Williams, appellant seemed to be seeking a place on the bus.

Appellant soon stood up, lunged at the deputy sheriff assigned to drive the bus, and said, "I will show you, gangster." Deputy Sheriff Williams grabbed appellant, who again sat down. Williams then directed other deputy sheriffs to return appellant to the lockup. As the deputy sheriffs dragged appellant into the lockup, he thrashed his head, kicked his feet, and tried to turn around. Appellant said to Custody Assistant Walden-Ramirez, "Bitch, I'm going to kill you. Fucking bitch. I'm going to get you."

Inside the lockup, Deputy Sheriff Williams instructed Deputy Sheriff Rodriguez and another deputy sheriff to place appellant in a cell. At the door of the cell, appellant hooked or locked his legs in an effort to avoid entering it. The deputy sheriffs and Custody Assistant Walden-Ramirez nonetheless moved appellant into the cell, where he continued to resist them.

In order to allow the deputy sheriffs and Custody Assistant Walden-Ramirez to back out of the cell, Deputy Sheriff Williams put his legs against appellant, who had braced his feet on a bench attached to the cell's wall. Appellant then pushed off from the bench, causing Williams's knees to hyperextend. As a result, Williams suffered a torn meniscus in his right knee. Also injured was Custody Assistant Walden-Ramirez, who was shoved into the cell's benches and suffered bruises on her calves.

After directing the deputy sheriffs and custody assistant to leave the cell, Deputy Sheriff Williams tried to close the cell door. The door moved slowly, enabling appellant -- who was lying on his back -- to move himself into the doorway. Appellant leaned up and spit at Custody Assistant Walden-Ramirez, but hit Deputy Sheriff Rodriguez. A lockup sergeant then appeared and ordered Rodriguez to pepper spray appellant, which rendered him "semi-compliant."

B. *Defense Evidence*

Appellant testified that he is six feet, two inches tall and weighs 220 pounds.[2] On October 19, 2016, two days after having been arrested, he was transported by bus from a jail to the Long Beach courthouse. He waited for several hours in a small lockup cell, but was not taken to a courtroom. Because appellant suffered from ulcers and acid reflux, he felt sick. When an officer checked on him, he complained of chest pains. The officer told him that his case "got D.A. reject," and that he was going "home" by bus.

Appellant further testified that when he tried to board the bus, the driver refused to take him because he was in pain and required an ambulance. According to appellant, there were many spaces on the bus, and no one said that the bus was full. Appellant then received conflicting orders to return to the lockup and board the bus, which he tried to obey. Appellant maintained that the deputy sheriffs "sen[t him] back and forth" because they could not decide whether to place him on the bus or call an ambulance.

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[2] Appellant acknowledged that he had suffered prior convictions for domestic abuse and transportation of drugs for sale.

Appellant further testified that a feeling of frustration and his stomach pain eventually prompted him to "make [a] stand" by refusing to move. He did not resist violently, and sat down only because he felt nauseated.[3] According to appellant, Custody Assistant Walden-Ramirez advised him to move in order to avoid being pepper sprayed. Appellant replied, "I'm not going anywhere. I need to get to a mother fucking hospital."

Appellant further testified that after the deputy sheriffs directed him to return to the lockup, he stood up and tried to block the bus's departure in protest. As he moved toward the bus, the deputy sheriffs grabbed him, causing him to fall. When they forcibly moved him through the lockup to the cell, his own body movements reflected "mostly pain . . . and . . . a little bit of anger." According to appellant, inside the cell the deputy sheriffs conducted a search of his body, had control of him, and "slamm[ed him] around." Appellant also maintained that Deputy Sheriff Williams pulled him into the cell doorway. He denied attempting to hurt the officers, and denied spitting at them. After appellant was pepper sprayed, he was taken to a hospital.

C. *Rebuttal Evidence*

Deputy Sheriff Rodriguez testified that he is five feet, seven inches tall and weighs between 165 and 170 pounds. According to Rodriguez, appellant never complained of stomach pains to him. Inside the lockup cell, it took all of Rodriguez's strength to restrain appellant, who was very strong, and showed no signs of suffering pain.

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[3] On direct examination, appellant stated that his feet and hands were shackled in a manner that restrained their movement. When cross-examined, appellant acknowledged that he could walk in his shackles.

Custody Assistant Walden-Ramirez denied threatening to pepper spray appellant when she talked to him in the sally port. When he reported that he had chest pains, she replied that he needed to return to the lockup because the bus would not take him to a hospital.

DISCUSSION

Appellant contends (1) that the prosecution engaged in racial discrimination during the selection of the jury, (2) that his motion for acquittal was improperly denied, and (3) that the trial court erred in imposing the upper term on his conviction for the battery of Deputy Sheriff Williams (count 1). For the reasons discussed below, we reject his contentions, but remand the matter for resentencing under S.B. 1393.

A. *Jury Selection*

Relying on *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), rejected on another ground in *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*), appellant contends the trial court erred in finding that the prosecutor's peremptory challenge to a prospective African-American juror was nondiscriminatory.

1. *Governing Principles*

A prosecutor's use of peremptory challenges to excuse prospective jurors on the basis of race denies the defendant his or her rights to a representative jury under the California Constitution (art. I, § 16) and equal protection under the Fourteenth Amendment of the United States Constitution. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 101.) Generally, "[t]here is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to

demonstrate impermissible discrimination." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341 (*Bonilla*).)

"'In ruling on a motion challenging the exercise of peremptory strikes, the trial court follows a three-step procedure. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" [Citation.]'" (*People v. DeHoyos*, *supra*, 57 Cal.4th at p. 101, quoting *People v. Clark* (2011) 52 Cal.4th 856, 904.)

2. *Underlying Proceedings*

At the commencement of voir dire, 18 prospective jurors were seated in the jury box. Although appellant's *Batson-Wheeler* objection concerned only one of those jurors -- Juror No. 18 -- the trial court's ruling also implicated three others -- Juror Nos. 5, 7, and 10.[4] As discussed further below, the court initially identified all four jurors as African-American, but later found that only Juror Nos. 5, 7, and 18 were African-American.[5] Appellant is also African-American.

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[4] Juror No. 5 was a disabled former Xerox employee, Juror No. 7 was a divorced semi-retired bank employee, Juror No. 10 was an unmarried cashier, and Juror No. 18 was a divorced social worker.

[5] In the course of voir dire, a new number was assigned to Juror No. 18 before the prosecutor exercised a peremptory

During voir dire, when the trial court inquired whether any prospective juror had "very, very" negative or positive views regarding law enforcement, the following colloquy occurred:

> "[]Juror No. 18: Yeah, I haven't always had the best experience with policemen, especially in the neighborhood that I grew up in. [¶] . . . [¶] I . . . grew up in South Central.
>
> "The Court: . . . [¶] . . . I take it you've had personal experience, yourself or your family?
>
> "[]Juror No. 18: Watching family and friends just be harassed by the police.
>
> "The Court: And because of that, do you think that you are automatically going to discredit or not trust police officers as opposed to any other witness?
>
> "[]Juror No. 18: . . . I would do my best to be fair. But just to answer, that is the first thing that comes to mind."

In response to the court's further inquiries, Juror No. 18 acknowledged that some police officers were good and stated that she would make an effort to "have an open mind."

The trial court then inquired whether any prospective jurors had family or friends who worked in law enforcement or had legal training. Juror No. 18 stated that her nephew worked for the Los Angeles County Sheriff's Department and that a friend practiced immigration law.

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challenge to her. For the sake of simplicity, we refer to her by her original number.

In response to defense counsel's questions, Juror No. 5 reported a prior incident of rough treatment by police officers. She stated, "I don't really trust [police] officers," but acknowledged, "All officers aren't the bad guys."

When the prosecutor asked whether any prospective jurors would reject testimony offered by deputy sheriffs, Juror No. 10 stated that she would do so even if the testimony were corroborated by a video recording. Juror No. 10 explained that some deputy sheriffs had suspected her cousin of robbery "just because she passed by."

At a bench conference, defense counsel challenged all 18 of the original prospective jurors on the ground that they constituted an inadequate cross-section of the community. Before addressing that contention, the trial court denied all but one of the parties' challenges for cause to individual jurors, including a challenge by the prosecutor to Juror No. 10. The court then rejected appellant's objection to the remaining prospective jurors in the box, noting that four -- Juror Nos. 5, 7, 10, and 18 -- appeared to be African-American.

The prosecutor asserted peremptory challenges to Juror Nos. 10 and 5 -- to which defense counsel raised no objection. After the prosecutor exercised an additional two peremptory challenges, he exercised a peremptory challenge to Juror No. 18, to which defense counsel objected, contending the prosecutor sought to excuse Juror No. 18 because she was African-American. Counsel argued that although there appeared to be an "articulable reason" for the prosecutor's peremptory challenge to Juror No. 5, the prosecution had no such reason for a peremptory challenge to Juror No. 18

The trial court denied the objection on the ground that appellant offered no prima facie showing of discrimination. In so concluding, the court initially observed that prior to the peremptory challenge to Juror No. 18, the prosecutor had exercised four such challenges, two of which were directed at Juror Nos. 10 and 5. After consulting the name of Juror No. 10, the court determined that she was, in fact, Hispanic.[6] The court further stated that Juror No. 5 had expressed her dislike for police officers, that Juror No. 18 had ties to law enforcement, that Juror No. 7 was still in the jury box, and that there were other potential African-American jurors in the courtroom. On the basis of those facts, the court found no prima facie case of discriminatory purpose.

The trial court then invited the prosecutor to explain his peremptory challenge to Juror No. 18. The prosecutor stated: "Like we stated before with . . . Juror No. 5 . . . , [Juror No. 18] stated she did have [some] very negative experience with police officers. [Juror No. 5] mentioned . . . an incident where male police officers did touch her in inappropriate ways . . . . [¶] . . . [Juror No. 18] stated that she grew up in South Central

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[6] In addressing the *Batson-Wheeler* objection, the trial court initially characterized the prosecutor's first, second, and fifth peremptory challenges as against African-American prospective jurors, that is, the challenges to Juror Nos. 10, 5, and 18. Later, when the court remarked that Juror No. 10 looked Hispanic, defense counsel directed the court's attention to that juror's name. The court ordered the name stricken from the record, but stated that it appeared to be a Hispanic name. The court then stated that the *Batson-Wheeler* objection hinged on peremptory challenges "No. 2 and [No.] 5," that is, the second and fifth challenges to Juror Nos. 5 and 18.

and had a very negative experience with police officers . . . . [S]he stated that [her friends are] harassed by . . . police officers and that she tried -- [to] do [her] best, quote unquote -- in order to . . . be fair."

The trial court did not rule on the credibility of that explanation. In further proceedings, the prosecutor exercised one more peremptory challenge, but neither side challenged Juror No. 7, who became a member of the jury.

3. *Analysis*

As explained below, we see no error in the trial court's ruling on the *Batson-Wheeler* objection regarding Juror No. 18. Our focus is on the first stage of the three-stage analysis, as the trial court found no prima facie case of a discriminatory purpose. (*People v. Scott* (2015) 61 Cal.4th 363, 386 (*Scott*) ["[A]n appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the juror, but refrains from ruling on the validity of those reasons."].)

"A defendant establishes a prima facie case of discrimination 'by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' [Citation.] An inference is a logical conclusion based on a set of facts. [Citation.]. When the trial court concludes that a defendant has failed to make a prima facie case, we review the voir dire of the challenged jurors to determine whether the totality of the relevant facts supports an inference of discrimination." (*People v. Lancaster* (2007) 41 Cal.4th 50, 74, quoting *Johnson*, *supra*, 545 U.S. at p. 168.)

"Although we examine the entire record when conducting our review, certain types of evidence are especially relevant.

These include whether a party has struck most or all of the members of the venire from an identified group, whether a party has used a disproportionate number of strikes against members of that group, whether the party has engaged those prospective jurors in only desultory voir dire, whether the defendant is a member of that group, and whether the victim is a member of the group to which a majority of remaining jurors belong. [Citation.] We may also consider nondiscriminatory reasons for the peremptory strike that 'necessarily dispel any inference of bias,' so long as those reasons are apparent from and clearly established in the record. [Citation.]" (*People v. Reed* (2018) 4 Cal.5th 989, 999-1000, quoting *Scott*, *supra*, 61 Cal.4th at p. 384.)

Generally, when a jury pool contains only a few members of a protected group, the use of peremptory challenges to strike one or two members of that group, by itself, is a "bare circumstance" insufficient to support an inference of discrimination. (*People v. Parker* (2017) 2 Cal.5th 1184, 1212 (*Parker*).) That is because ""'[t]he small absolute size of [such a] sample makes drawing an inference of discrimination from this fact alone impossible. '[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge to one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'"'" (*Ibid.*, quoting *Bonilla*, *supra*, 41 Cal.4th at p. 343; see *Parker*, *supra*, at pp. 1212-1213 [prosecutor's use of peremptory challenges to excuse only two African-American members of 126-person jury pool did not support inference of discrimination]; *Bonilla*, *supra*, 4th at pp. 342-343 [prosecutor's use of peremptory challenges to excuse only two African-American members of 78-person jury pool did not support inference of discrimination].)

We find guidance regarding appellant's contention from *People v. Jones* (2017) 7 Cal.App.5th 787 (*Jones*). There, the defendant, an African-American, was charged with murder. (*Id.* at p. 793.) After the prosecutor exercised peremptory challenges to excuse what were apparently the first two African-American prospective jurors seated in the jury box, the defendant asserted a *Batson-Wheeler* objection, which the trial court denied for want of a prima facie case. (*Id.* at pp. 799-800.) Later, when the prosecutor exercised a peremptory challenge to another African-American prospective juror, the defendant asserted a second *Batson-Wheeler* objection, which was denied for the same reason. (*Id.* at p. 801.)

In affirming the rulings on the *Batson-Wheeler* objections, the appellate court concluded that the prosecutor's overall employment of peremptory challenges -- namely, the use of three of nine such challenges to excuse African-American prospective jurors -- involved too few challenges to support an inference of discriminatory purpose. (*Jones*, *supra*, 7 Cal.App.5th at pp. 803-804.) The court also identified other circumstances undercutting any such inference, including remarks by the jurors that provided nondiscriminatory reasons for excusing them, and the prosecutor's eventual acceptance of a jury with African-American members. (*Id.* at pp. 804-807.)

That rationale applies here. The record contains no evidence sufficient to support a statistically-based inference of discriminatory purpose, as it shows only that the prosecutor exercised two of five peremptory challenges to excuse African-American prospective jurors -- a ratio similar to that in *Jones*, based on even fewer challenges. Furthermore, Juror No 18 -- like Juror No. 5 -- acknowledged negative views regarding law

enforcement, which is a nondiscriminatory reason for excusing a juror (*People v. Winbush* (2017) 2 Cal.5th 402, 432; see *Bonilla*, *supra*, 41 Cal.4th at p. 343 [affirming finding of no prima facie case on basis of juror's reluctance to follow law noted by prosecutor]). Additionally, the prosecutor ultimately accepted a jury with at least one African-American member. Accordingly, the trial court did not err in denying the *Batson-Wheeler* objection.

B. *Motion for Acquittal*

Appellant contends the trial court improperly denied his motion under section 1118.1 for acquittal on the charges of battery on a peace officer (§ 243, subd. (c)(2)) and battery on custodial officers (§ 243, subd. (c)(1)). We disagree.

Section 1118.1 provides that the court "shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." Under the statute, "a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, '"whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." [Citations.]'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) Because appellant asserted his motion for acquittal after the prosecution's case-in-chief, the sufficiency of the evidence is tested on the basis of that evidence. (*People v. Cole*, *supra*, at p. 1213.)

On appeal, appellant contends the prosecution's case-in-chief was insufficient to establish the mental state necessary for battery, which is a general intent crime (*People v. Lara* (1996) 44 Cal.App.4th 102, 107). "The mental state required for battery is the same as that required for assault. 'An assault is an incipient or inchoate battery; a battery is a consummated assault. "An assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim." [Citations.]'" (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180 (*Hayes*), quoting *People v. Colantuono* (1994) 7 Cal.4th 206, 216-217.)

The relationship between battery and assault determines the precise mental state required for the two offenses. (*People v. Williams* (2001) 26 Cal.4th 779, 785 (*Williams*).) Our Supreme Court has explained: "[A] defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.' [Citation.] Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery." (*Id.* at pp. 787-788.)

Accordingly, to establish the requisite mental state for assault, the prosecution need only show that the defendant engaged in "an intentional act" and had "actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Williams*, *supra*, 26 Cal.4th at p. 790.) However, because assault requires neither a specific intent to injure nor a subjective awareness of the risk that a battery might occur, the existence of the requisite mental state does not hinge

on the defendant's own subjective assessment of the likelihood of a battery. (*Id.* at pp. 782-783, 788.) "For example, a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id.* at p. 788, fn. 3.) Nonetheless, "mere recklessness or criminal negligence is still not enough [citation] because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know." (*Id.* at p. 788, fn. omitted.)

An instructive application of these principles to battery is found in *Hayes*. There, the defendant was charged with battery on a deputy probation officer (§ 243, subd. (c)(1)). The evidence at trial showed the defendant was arrested for a probation violation by his probation officer, who placed him in handcuffs. (*Hayes*, *supra*, 142 Cal.App.4th at p. 179.) When defendant resisted, the probation officer received assistance from other probation officers and two deputy sheriffs. (*Ibid.*) The defendant was very combative toward the officers. (*Ibid.*) In an effort to get away, he kicked wildly and tried to fight as well as he could with his hands behind his back. (*Ibid.*) When one probation officer held open a door, the defendant intentionally kicked a concrete ashtray close to the officer. (*Ibid.*) As a result, the ashtray toppled over, causing injury to the officer.

In concluding there was sufficient evidence of the state of mind required for battery, the appellate court stated: "A reasonable trier of fact could find beyond a reasonable doubt that [the defendant] intentionally kicked the ashtray with great force knowing that [the probation officer] was standing beside the ashtray. Based on these findings, a reasonable trier of fact could

further find beyond a reasonable doubt that appellant knew facts sufficient to establish that his intentional act 'would directly, naturally and probably result in a battery' by causing the ashtray to fall on [the probation officer]." (*Hayes*, *supra*, 142 Cal.App.4th at p. 80, quoting *Williams, supra,* 26 Cal.4th at p. 788, fn. 3.)

We reach a similar conclusion here. The prosecution's case-in-chief disclosed that appellant vigorously resisted the deputy sheriffs and Custody Assistant Walden-Ramirez as they moved him from the sally port to the cell in the lockup. Indeed, appellant threatened to kill Walden-Ramirez. Inside the small and crowded cell, appellant braced his feet on a bench attached to the wall and pushed off against the officers, injuring Deputy Sheriff Williams and Custody Assistant Walden-Ramirez. Appellant then spat at Walden-Ramirez. In view of this evidence, a reasonable fact finder could have concluded (1) that appellant intentionally pushed off from the wall against the officers, and (2) that when he did so, he knew facts objectively establishing the likelihood of injury to them. Accordingly, the trial court did not err in denying appellant's motion for acquittal.[7]

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[7] For the first time on appeal, appellant's reply brief raises two other challenges to the sufficiency of the evidence. Because he failed to raise them in his opening brief, they are forfeited. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

We would reject the contentions were we to address them. Appellant's first contention is that no battery occurred because "[a]ll the touching was initiated by the officers." However, the offenses charged against appellant proscribe a battery upon an officer "engaged in the performance of his or her duties" (§ 243, subd. (c)(1) & (2)), including the lawful application of force (*People v. Lara* (1994) 30 Cal.App.4th 658, 664, 670-671). Nothing before us suggests the officers here acted outside the

C. *Imposition of Upper Term*

Appellant contends the trial court erred in imposing the upper term on his conviction for battery on Deputy Sheriff Williams (count 1). As explained below, we disagree.

1. *Governing Principles*

When a sentence of imprisonment is imposed, the trial court is required to select the lower, middle, or upper term. (Cal. Rules of Court, rule 4.420(a).) Generally, "[a] single factor in aggravation will support imposition of an upper term. [Citation.]" (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) The trial court, in determining the term appropriate for a crime, "need not state reasons for minimizing or disregarding circumstances in mitigation." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) We review the trial court's findings concerning aggravating and mitigating factors for the presence of substantial evidence (*People v. Gragg* (1989) 216 Cal.App.3d 32, 46), and the trial court's balancing of aggravating and mitigating factors for abuse of discretion (*People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1140-1141).

2. *Underlying Proceedings*

After the jury returned its verdicts, the prosecution submitted sentencing memoranda requesting that the court deny probation, select count 1 as the principal count, and impose the upper term on that conviction. The prosecution argued that

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scope of their duties.

Appellant's second contention is that no battery occurred absent the application of force likely to produce great body injury. That is not an element of the offenses charged against appellant, which required only a demonstration of a simple battery on the officers resulting in injury to them. (*People v. Longoria* (1995) 34 Cal.App.4th 12, 16.)

probation must be denied because appellant's conviction on count 1, coupled with the jury's finding that he had inflicted great bodily injury, rendered that conviction a strike. (§ 1170, subd. (h)(3).) The prosecution further argued that six aggravating circumstances supported the imposition of the upper term on count 1, namely, that the crime involved great bodily harm (Cal. Rules of Court, rule 4.421(a)(1)); that appellant had engaged in a pattern of violent conduct, including uncharged misconduct (Cal. Rules of Court, rule 4.421(b)(1)); that appellant's prior convictions as an adult were numerous and of increasing seriousness (Cal. Rules of Court, rule 4.421(b)(1)); that appellant had served a prior prison term (Cal. Rules of Court, rule 4.421(b)(3)); that appellant was on probation when he committed the crime (Cal. Rules of Court, rule 4.421(b)(4)); and that appellant's prior performance on probation was unsatisfactory (Cal. Rules of Court, rule 4.421(b)(4)).

Prior to the sentencing hearing, defense counsel submitted psychological evaluations of appellant, letters from a mental health homeless assistance program, and a letter from appellant. The psychological evaluation upon which appellant relied at the sentencing hearing described him as hostile to law enforcement, and suggested that he might be bipolar.[8] The letters from the

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[8] Although we have augmented the record with all psychological reports submitted prior to sentencing, the record lacks a copy of the evaluation noted above. Because appellant has not suggested that the complete report is necessary for his appeal, he has forfeited any such contention. (See *People v. Chessman* (1950) 35 Cal.2d 455, 460-461.)

The record as augmented also discloses that the trial court received a second psychological evaluation that was originally submitted to the court in March 2015, after appellant had been

mental health homeless assistance program noted that appellant was interested in receiving services through the program. Appellant's letter stated: "I'm very sorry for what happen[ed] with the [deputy] sheriff. There has been a problem with me ever[] since I was born on drugs. I first was put into a mental hospital when I was just [six] years old for about a month. My whole life I have been abused." According to the letter, prior to the underlying action, appellant had attended a Long Beach mental health program, taken medication, and discussed his issues with a mental health doctor.

At the sentencing hearing, the trial court stated that it had reviewed the prosecution's sentencing memorandum and the documents submitted by appellant.[9] The prosecutor urged the court to impose the upper term on count 1, arguing that appellant has been "a danger to society for many many years." Defense counsel contended that but for the injury to Deputy Sheriff Williams, "a lay person would probably say there is no crime there"; that appellant had committed the offense while struggling with the deputy sheriffs, not while "criming"; and that appellant had been evaluated as potentially bipolar.

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charged with an act of domestic violence, but before he committed the crime alleged in count 1. The second evaluation stated: "There is nothing to suggest that [appellant] cannot maintain himself in court if he wants to, or that he is seriously mentally ill . . . ."

[9] At the commencement of the hearing, the trial court also explained that appellant was secured in a "safety chair" due to his conduct during the proceedings, including a posttrial incident in which he attempted to break free of restraints while being transported in a special vehicle separate from the custody bus.

Before pronouncing sentence, the court heard from appellant, who expressed remorse for the incident involving Deputy Sheriff Williams, stating, "I don't know what happened right there." He further stated: "I made efforts to better myself. I'm tired of coming to jail and getting into it with the police . . . ." Appellant maintained that aside from a domestic violence charge, he had no criminal record of violence, and that he was not involved in any violent incidents in jail.[10]

The trial court imposed an aggregate term of 14 years on count 1, comprising a three-year upper term doubled pursuant to the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)) due to appellant's prior strike, plus a five-year prior conviction enhancement (§ 667, subd. (a)) and a three-year enhancement for the infliction of great bodily injury (§ 12022.7, subd. (a)).[11] The court also imposed a concurrent two-year term on count 2.

Regarding count 1, the trial court observed that it had little discretion over the aggregate term other than in the selection of the base term. As the court noted, it was required to double the term selected due to appellant's prior strike, and impose enhancements for a prior conviction and infliction of great bodily injury.

In selecting the upper term, the court stated: "I have taken into consideration[] seeing [appellant] on multiple occasions[.] [S]ome days [he] has been very pleasant, some days not so much. Maybe that is attributed to his psychological history [as related

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[10] Appellant also stated that there was "no justification" for the restraints placed on him in court.

[11] The trial court stayed punishment for appellant's prior prison term (§ 667.5, subd (b)).

in] the evaluation [regarding] . . . his bipolar and manic depressive state. . . . I will also note . . . there were two portions in the report where it was stated, one, that he struggles now with anger and wants to fight the police[,] and two, that quote, 'He has a general anger towards law enforcement.' Unquote. I am fully sympathetic as to [appellant's] history. There [are] allegations of . . . the death of his mother early on, physical abuse, [and] sexual abuse . . . that may have contributed to his personality. The court can look at that as a source of mitigation. But based on even [appellant's proffered] psychologist evaluation[, he] poses a danger to society. . . . [I]f he is a danger to law enforcement, then how is he going to be towards the regular citizens of the community? That is something the court takes into consideration."

The court further stated: "The court also takes into consideration that . . . he was on probation when the crime was committed[;] [that] [h]is probation was unsatisfactory during that time; [and] that he [has] served a prior prison term. All of those are circumstances that make the high term the appropriate term."

3. *Analysis*

Appellant's principal contention is that the trial court, in selecting the upper term, failed to give due weight to his mental illness and difficult childhood, the harshness of the mandatory aspects of appellant's sentence, and the consequences of a lengthy sentence for the possibility of his rehabilitation. As explained below, we see no error in the trial court's ruling.

In *People v. Delgado* (2013) 214 Cal.App.4th 914, 917, the defendant was charged with felony battery with injury on a peace officer (§ 243, subd. (c)(2)). After the defendant pleaded guilty,

the trial court imposed the upper term on the charge, which was doubled due to a prior strike. (*Ibid*.) On appeal, the defendant challenged the imposition of the upper term, contending that his offense was not the type for which a lengthy sentence was appropriate, that the court did not consider his background of untreated mental illness, and that a lengthy sentence would preclude his rehabilitation. (*Id*. at p. 919.) In rejecting that contention, after noting the violence of the charged offense and the defendant's history of criminal conduct, the appellate court stated: "We assume the court reviewed [the defendant's] mental health history . . . . The court also considered [his] difficult childhood. There were no other mitigating factors. We will not reweigh the valid factors that bore upon the decision below." (*Ibid*.)

The case before us presents similar circumstances. The court noted the limits of its discretionary authority to mitigate appellant's sentence, and attended carefully to appellant's showing of mitigating circumstances. After noting appellant's history of violence toward law enforcement, the trial court found at least two other aggravating factors supporting the imposition of the upper term, namely, that appellant was on probation when the crime was committed, and that his performance while on probation was unsatisfactory. The court expressly considered appellant's history of mental illness and difficult childhood as mitigating factors, and concluded that they did not outweigh the hazard that he posed to law enforcement and the public. The court thus did not err in selecting the upper term.

Appellant also contends the court misunderstood its discretion or applied an incorrect standard. He relies on subdivision (a)(1) of section 1170, which was amended in 2016 to

provide: "The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." The crux of appellant's contention is that the trial court, in selecting the upper term, misunderstood its discretion because it "rigidly followed a punishment model," and did not expressly discuss rehabilitation. We disagree.

Generally, "[d]efendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.] [¶] Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. [Citations.] Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.] '"[A] trial court is presumed to have been aware of and followed the applicable law." [Citations.]' [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229.)

There is no affirmative indication that the trial court misunderstood its discretionary authority. The Legislature, in adopting subdivision (a)(1) of section 1170, did not contemplate that the achievement of public safety through rehabilitation required rehabilitation outside of prison. As amended in 2016, subdivision (a)(2) of section 1170 states: "The Legislature further

finds and declares that programs should be available for inmates, including, but not limited to, educational, rehabilitative, and restorative justice programs that are designed to promote behavior change and to prepare all eligible offenders for successful reentry into the community."

Here, the record shows only that the court knew that prior to the battery on Deputy Sheriff Williams, appellant had tried to mitigate his mental health issues by participating in a community mental health program and taking medication. After considering appellant's mental health history, the court determined that imposing a shorter term would not promote public safety. In view of the evidence at the sentencing hearing, the court could reasonably have concluded that public safety was best served if appellant addressed his mental health issues while incarcerated. Accordingly, appellant has failed to demonstrate error in the imposition of his sentence.

D. *S.B. 1393*

On September 30, 2018, while this appeal was pending, the Governor signed S.B. 1393 which, effective January 1, 2019, amends section 667, subdivision (a), and section 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) At our request, the parties have submitted supplemental briefing regarding whether the matter should be remanded for resentencing under S.B. 1393. Appellant's supplemental brief asks for a remand, noting that the trial court expressed sympathy concerning appellant's personal history and mentioned its lack of discretion with respect to significant aspects of his sentence.

Although the parties agree that S.B. 1393 applies to all cases not final when it becomes effective on January 1, 2019 (*Garcia*, *supra*, 28 Cal.App.5th at p. 973), respondent contends appellant's claim under S.B. 1393 should be denied because it is not ripe for judicial action prior to that date. We disagree. As there is no reasonable likelihood that appellant's judgment will be final by January 1, 2019, it is appropriate to remand the matter with directions that he be resentenced under S.B. 1393 after January 1, 2019. (*Garcia*, *supra*, at p. 973.)

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to resentence appellant after January 1, 2019, pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by S.B. 1393, effective January 1, 2019.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J. MICON, J.*

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