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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. DAVID CRUZ ALVARADO, Defendant and Appellant.	B281886 (Los Angeles County Super. Ct. No. KA109802)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed in part, modified in part, vacated in part, and remanded with directions.

Masor Law Group and Caneel C. Fraser, 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, Senior Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant David Cruz Alvarado of transportation for sale of a controlled substance, possession for sale of a controlled substance, first degree residential burglary, and felony unlawful driving or taking of a vehicle. The trial court sentenced appellant to a total term of 44 years and four months to life in state prison.

On appeal, appellant contends: (1) the trial court abused its discretion and violated his right to due process by consolidating the drug and auto theft charges with the burglary charge; (2) the court abused its discretion and violated his right to counsel of his choice by denying his request to discharge his retained counsel; (3) his conviction for felony unlawful driving or taking of a vehicle must be reduced to a misdemeanor; (4) the court abused its discretion by refusing to strike either of his two prior strike convictions; and (5) the court attached two sentencing enhancements for prior serious felonies to the wrong charges. In a supplemental brief, appellant also argues that we should remand for the trial court to exercise its discretion

under Senate Bill No. 1393 (2017-2018 Reg. Sess.) whether to strike the serious felony enhancements.

We conclude appellant's conviction for felony unlawful driving or taking of a vehicle must be reduced to a misdemeanor, and thus vacate the sentence and remand for resentencing. At his resentencing, appellant may raise his arguments regarding the serious felony enhancements before the trial court. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Charges and Consolidation*

An information charged appellant with possession for sale of a controlled substance (Health & Saf. Code, § 11351), grand theft of an automobile (Pen. Code, § 487, subd. (d)(1)),[1] and transportation for sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)). A separate information charged appellant with first degree residential burglary (§ 459).

On the prosecution's motion, the trial court subsequently consolidated the cases, and the prosecution then filed an amended information including all charges against appellant. As relevant here, the amended information also alleged that appellant had been convicted of two robberies, in 1996 and 2005, constituting "strikes" for

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

purposes of the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12). The amended information further alleged, as to the burglary charge only, that appellant had been convicted of two serious felonies (the robbery convictions) for purposes of section 667, subdivision (a)(1). At the close of evidence at trial, the court granted the prosecution's motion to dismiss the charge of grand theft of an automobile and add a felony charge of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)).

B. *Evidence at Trial*

1. *The Burglary*

In April 2015, Matthew Okeyo, who lived with his parents in Covina, left home to run errands. Both his parents were at work. When he returned, Matthew found the back door ajar, the rear window shattered, and the window's screen removed. The house had been ransacked and many items were missing.

Officers later found two fingerprints on pieces of glass from the broken window. According to multiple fingerprint experts called by the prosecution, subsequent testing showed that those fingerprints matched appellant's. The experts could not say whether the fingerprints were on the interior or exterior side of the window or how long they had been there. Police also found a footprint in the backyard of the house but did not pursue it further.

In his opening statement, defense counsel asserted that appellant was a plumber. Trial testimony established

that workers would come to the house when something needed to be repaired and that during the year before the burglary, workers had been at the house to construct a wall. However, the last time any plumbing work had been done at the house was a few years before the burglary, and appellant was not the person who had done that work. Joseph and Selina Okeyo, Matthew's parents, did not know appellant and had never seen him at their house.

2. *The Drug and Vehicle Charges*

In May 2015, Sandra Mendoza left her work at a Toys "R" Us store in West Covina and discovered that her 1993 Mazda pickup truck was missing from the parking lot. She returned to the store and viewed surveillance video of the parking lot. The video showed two men approaching Mendoza's truck; one of them somehow opened the driver's door and proceeded to drive it out of the parking lot.

About a week later, an officer conducted a traffic stop of Mendoza's truck and detained the driver, Robert Dominguez, and appellant, the only passenger. Dominguez gave the officer the car key he was using. The officer observed that it was a "shaved key," a tool burglars use to defeat car locks. The officer then recovered a backpack from the truck. Among other items, the backpack contained screwdrivers, flashlights, pliers, two-way radios, a ski mask, a pry tool, and gloves. The officer proceeded to search appellant and found a latex glove containing heroin.

During a recorded interview, appellant admitted that he "stole" the truck because he wanted to "[m]ake money somehow," and that he was "thinking about selling it." When asked how he had learned to steal cars, appellant responded, "Hey -- I'm a criminal. . . ." Appellant also admitted that he had been paid to deliver the heroin found in the glove. Finally, he stated that the tools the officer found in the backpack were his. The recorded interview was played to the jury.

C. *Verdict and Sentence*

Following trial, the jury convicted appellant of all charges. Before sentencing, appellant admitted all prior conviction allegations. At sentencing, the court denied appellant's motion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) to strike either of his two prior strike convictions. Thus, the court imposed a third-strike sentence of 25 years to life in state prison for the burglary. The court also imposed a total determinate prison sentence of 19 years and four months, to be served consecutively: eight years for the transportation of a controlled substance, one year and four months for the felony unlawful driving or taking of a vehicle, and two five-year enhancements for prior serious felonies under section 667,

subdivision (a).[2] Accordingly, the court sentenced appellant to a total term of 44 years and four months to life. Appellant timely appealed.

DISCUSSION

A. *Consolidation of Burglary Charge with the Auto Theft and Drug Charges*

1. *Background*

As previously noted, the prosecution moved to consolidate the two cases in which appellant was initially charged. Over appellant's objection, the trial court granted the motion, and the prosecution filed an amended information incorporating all of the charges against appellant. At the time of the court's ruling, it had before it the preliminary hearing transcripts for each of the two originally filed cases.

The preliminary hearing transcript for the drug and vehicle charges established that appellant had confessed to stealing the truck and transporting the drugs for money. As to the burglary charge, the preliminary hearing transcript reflected that police had found appellant's fingerprints on glass from the broken window, that the burglar had used that window to gain entry, and that there were no workers

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[2] Pursuant to section 654, the court stayed appellant's sentence for the charge of possession for sale of a controlled substance.

"in or around [the] house that would have had access to that particular window . . . in the weeks prior to this incident."

Appellant claims the trial court abused its discretion in granting the prosecution's motion to consolidate his auto theft and drug charges with his burglary charge. He also asserts that even if it were not an abuse of discretion at the time, the trial court's ruling resulted in a trial so grossly unfair that he was denied due process.

2. *Governing Principles*

"Section 954 authorizes the joinder of 'two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts . . . .' The statute further provides that 'if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.'" (*People v. Merriman* (2014) 60 Cal.4th 1, 36, quoting § 954.) "The law favors the joinder of counts because such a course of action promotes efficiency." (*Id.* at p. 37.) However, even if separate accusatory pleadings meet the statutory requirements for consolidation, the trial court retains discretion to require separate trials "in the interests of justice and for good cause shown . . . ." (§ 954.)

"To succeed on a claim that the trial court abused its discretion in . . . ordering consolidation [of eligible charges,] the defendant must make a "'clear showing of prejudice'" and establish that the ruling fell """"outside the bounds of reason."""""" (*Merriman*, *supra*, 60 Cal.4th at p. 37, quoting

Alcala v. Superior Court (2008) 43 Cal.4th 1205, 1220 (*Alcala*).) "The chief source of potential prejudice is 'spillover effect,' i.e., the risk that evidence not admissible as to one of the charges, but admitted in connection with another, will affect the verdict on the charge as to which it is inadmissible." (*People v. Earle* (2009) 172 Cal.App.4th 372, 387 (*Earle*).) Thus, "[i]f the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to [require separate trials]." (*People v. Soper* (2009) 45 Cal.4th 759, 774-775 (*Soper*).) "If the jury will be exposed to evidence that is *not* cross-admissible, then the possibility of spillover effect is present and the court must proceed to evaluate the risk that the jury will be unfairly influenced by it." (*Earle, supra*, at p. 388.) The court must then consider whether "'the benefits of joinder [are] sufficiently substantial to outweigh'" that risk. (*Soper, supra*, at p. 775.) "[A] party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." (*People v. Arias* (1996) 13 Cal.4th 92, 127 (*Arias*).)

We evaluate claims that the trial court abused its discretion in ordering a consolidated trial "in light of the showings made and the facts known by the trial court at the time of the court's ruling." (*Merriman*, *supra*, 60 Cal.4th at p. 37.) "However, '[e]ven if a trial court's . . . joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the "defendant shows that joinder

actually resulted in 'gross unfairness' amounting to a denial of due process.'"'" (*People v. Macklem* (2007) 149 Cal.App.4th 674, 698.)

3. *Analysis*

a. *The Trial Court Did Not Abuse its Discretion in Consolidating the Charges*

Whether charges meet the statutory requirements for consolidation is a legal question subject to de novo review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.) As to this issue, respondent argues, and appellant does not contest, that the burglary and the auto theft charges were statutorily eligible for consolidation because they involved offenses of the same class for purposes of section 954. We agree. Burglary and auto theft are both crimes against property and are therefore of the same class and eligible for consolidation. (See *People v. Grant* (2003) 113 Cal.App.4th 579, 586 [burglary and receiving or concealing stolen property are both "crimes against property" and therefore eligible for joinder].)[3]

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[3] While neither party addresses the inclusion of the drug offenses in the consolidated charges, we observe that appellant was apprehended with the drugs after being stopped in the stolen vehicle that was the subject of the auto theft charge. The drug offenses were therefore "connected together in their commission" with the auto theft offense and thus properly joined. (See § 954; *Merriman*, *supra*, 60 Cal.4th at p. 37 [drug offense properly
(*Fn. is continued on the next page*.)

Appellant nonetheless contends that consolidation of the charges constituted an abuse of the trial court's discretion. Specifically, he argues that consolidation created an unacceptable spillover effect, leading to an unfair risk that the jury would convict him of the burglary charge based on the evidence underlying the auto theft and drug charges.

The parties disagree on whether the evidence underlying the charges against appellant was cross-admissible. We need not decide this issue, however, as even assuming the evidence was not cross-admissible, we conclude there was little risk that any spillover effect would have unfairly influenced the jury.

As relevant here, two inquiries guide the evaluation of that risk: (1) "whether the spillover evidence is likely to "'unusually inflame the jury against the defendant,'" and (2) "whether any of the charges as to which the evidence is not admissible rests on a "'weak case'" that may be unfairly bolstered by the spillover evidence." (*Earle*, *supra*, 172 Cal.App.4th at p. 388, quoting *Alcala*, *supra,* 43 Cal.4th at pp. 1220-1221.) "In essence these are specific articulations of two broader variables: How likely is the spillover evidence to influence the jurors, and how susceptible is the charge to

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joined where it "occurred in conjunction with the other crimes stemming from defendant's arrest"]; *People v. Johnson* (1988) 47 Cal.3d 576, 587 [joinder of an additional charge connected in its commission to one of several properly joined counts met the requirements of § 954].)

such influence?" (*Ibid.*) Here, neither factor suggests a significant risk of unfair effect on the jury.

i. *Nature of the Charges*

Appellant argues the evidence underlying the drug charges was unusually inflammatory. However, unlike "serious offenses such as child molestation [citation] or 'gang warfare,' [citation]," which courts have found to be inflammatory, "[c]harges of possession and transportation of narcotics are not inherently inflammatory." (*People v. Breault* (1990) 223 Cal.App.3d 125, 134.)

Appellant cites *People v. Cardenas* (1982) 31 Cal.3d 897 and *People v. Davis* (1965) 233 Cal.App.2d 156 for the proposition that evidence of a defendant's narcotics involvement can be highly prejudicial. These cases, however, hold only that such evidence should be excluded if it "'tends only remotely or to an insignificant degree to prove a material fact in the case . . . ." (*People v. Cardenas*, *supra*, at p. 906, quoting *People v. Davis*, *supra*, at p. 161.) As noted, the standard governing challenges to consolidated trials is more demanding. (*Arias*, *supra*, 13 Cal.4th at p. 127.) The evidence underlying appellant's drug charges is simply not of the kind courts have found to be unusually inflammatory. (See *People v. Breault*, *supra*, 223 Cal.App.3d at p. 134.)

ii. *Strength of the Burglary Charge*

"A mere imbalance in the evidence . . . will not indicate a risk of prejudicial 'spillover effect'" as long as "the proffered evidence was sufficiently strong in both cases." (*Soper*, *supra*, 45 Cal.4th at p. 781.) Appellant contends that the auto theft and drug charges were "airtight," while the evidence supporting the burglary charge was "weak." We agree with appellant that the evidence supporting the burglary charge was not as robust as that supporting the other charges. We do not, however, consider the burglary charge so weak as to require separate trials, particularly given that the other charges were not especially inflammatory.

Police found appellant's fingerprints on glass from the broken window of the burglarized house. In the preliminary hearing, the prosecution presented testimony that there were no workers "in or around [the] house that would have had access to that particular window . . . in the weeks prior to this incident." Thus, at the time of the trial court's ruling on the motion to consolidate, there was no indication of any plausible innocent explanation for the presence of appellant's fingerprints on the broken window (nor was there such indication at trial). Evidence that appellant committed the burglary was therefore compelling. (See *People v. Gardner* (1969) 71 Cal.2d 843, 849 ["Fingerprint evidence is the strongest evidence of identity"]; *In re O.D.* (2013) 221 Cal.App.4th 1001, 1003, 1010 [it was "eminently reasonable" to conclude the defendant

participated in burglary because "there was no plausible explanation" for his palm print's presence on the window used as point of entry].)

In support of his contention that evidence of the burglary charge was so weak as to require separate trials, appellant cites *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129 (*Coleman*). There, the trial court denied the defendant's motion to sever charges of sex crimes against two minors from a murder charge. (*Id.* at p. 133.) The only evidence connecting the defendant to the murder was his palm and thumb prints identified at the scene of the crime, a bungalow at a local high school. (*Ibid.*) The Court of Appeal found the trial court had abused its discretion in denying severance because the evidence supporting the murder charge was relatively weak, and evidence of the defendant's sex crimes against minors was "especially likely to inflame a jury." (*Id.* at p. 138.)

The evidence here, however, was stronger than the evidence in *Coleman*. While the defendant's palm and thumb prints in *Coleman* were found at the crime scene -- a high-school bungalow -- nothing connected those prints specifically to the murder that took place there. (See *Coleman*, *supra*, 116 Cal.App.3d at p. 133.) By contrast, appellant's fingerprints were found on glass from the window -- at the rear of the private residence -- that the burglar had used to gain entry, tying appellant more directly to the commission of the offense. Moreover, the charges the defendant in *Coleman* sought to sever -- sex crimes against

minors -- were indeed "likely to inflame [the] jury" (see *id.* at p. 138), a factor that is not present in appellant's case.

Given the lack of unusually inflammatory charges and the strength of the charges against appellant, based on the evidence at the time of the trial court's ruling, we find no clear showing of prejudice. (See *Soper*, *supra*, 45 Cal.4th at pp. 780-781, 783 [no clear showing of prejudice where charges were not unusually inflammatory and evidence for each was strong].) Accordingly, the trial court did not abuse its discretion in granting the prosecution's motion to consolidate.

b. *Consolidation Did Not Result in Gross Unfairness*

Even when we conclude that the trial court acted within its discretion in consolidating charges, "we must also determine 'whether events after the court's ruling demonstrate that joinder actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.'" (*People v. Simon* (2016) 1 Cal.5th 98, 129, italics omitted, quoting *Merriman*, *supra*, 60 Cal.4th at p. 46.) Gross unfairness results only if there is a strong likelihood that without the joinder, the defendant would have obtained a more favorable result. (See *People v. Jackson* (2016) 1 Cal.5th 269, 307, 308 (*Jackson*) [no gross unfairness where there was "sufficient independent evidence of guilt against [defendant] for . . . murder without evidence of [joined] sex

crimes" and thus no "strong likelihood" that defendant would have escaped conviction in the murder case without the joinder].)

Appellant contends that events following the trial court's ruling made it likely that the consolidation of charges influenced the jury. First, he argues that the evidence adduced at trial for the burglary was weaker than what was before the court at the time of its ruling. Appellant notes testimony that workers would come to the house when something needed to be repaired and that workers had been at the house during the year before the burglary to build a wall. He also highlights the prosecution's expert witnesses' acknowledgment they could not determine when appellant placed his fingerprints on the window or whether he placed them on its interior or exterior side. Finally, appellant observes testimony that police had not followed up on a footprint in the backyard of the house.

None of this evidence meaningfully impacted the strength of the burglary case. Testimony that workers had been at the house before the burglary to construct a wall or do repair work had no meaningful tendency to exculpate appellant. Defense counsel asserted in his opening statement that appellant was a plumber, but no evidence was introduced to support that assertion. Nor was there evidence that appellant had done construction or repair work anywhere, let alone at the burglarized home. The evidence did show, however, that appellant was not the person who

had done plumbing work at the house, and that the owners did not know him and had never seen him there.

As for the expert testimony about the fingerprints, regardless of whether they were on the interior or exterior side of the window, appellant's fingerprints placed him in direct contact with the window used to gain entry to the house. The experts' inability to determine when appellant had left his prints on the window was immaterial, given the absence of plausible innocent explanations for their presence there. (See *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1247 [determination for the jury was "not a very difficult one" where burglarized home's owner did not know defendant, whose fingerprints were found on wristwatch box that had been in home for eighteen months].) As to the footprint appellant references, it showed only that someone had at some point been in the backyard of the house. Appellant makes no attempt to explain how the footprint tended to undermine the evidence against him. He has therefore forfeited any argument in this regard. (See, e.g., *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 [arguments not developed are forfeited].)

Next, appellant contends that the jury heard unfairly prejudicial evidence, noting that the prosecution played the entire recording of his police interview at trial, including appellant's admissions that the burglary tools police found were his and that he was "'a criminal.'" He asserts that the damage caused by these admissions was exacerbated by the

trial court's failure to instruct the jury to consider the charges separately under CALCRIM No. 3515.[4]

Initially, we note that appellant neither objected to the introduction of this evidence nor sought an instruction under CALCRIM No. 3515. He has therefore forfeited any argument in this regard. (See *People v. Landry* (2016) 2 Cal.5th 52, 80-81 [defendant forfeited claims that gross unfairness resulted from lack of instruction to consider each count separately and from prosecutor's alleged misconduct, by failing to object or seek the instruction below].)

Moreover, regardless of forfeiture, appellant has failed to show prejudice. As discussed, the evidence that appellant committed the burglary remained strong at trial, as the evidence supported no plausible innocent explanation for the presence of appellant's fingerprints on the broken window of the burglarized home. Thus, there is no strong likelihood that without consolidation of the charges, appellant would have avoided a guilty verdict on the burglary charge. (See *Jackson*, *supra*, 1 Cal.5th at p. 307 [no gross unfairness given "sufficient independent evidence" of defendant's guilt of the more serious charge].) Accordingly, consolidation of the charges against him resulted in no gross unfairness. (See *id.* at p. 308.)

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[4] CALCRIM No. 3515 provides: "Each of the counts charged in this case is a separate crime . . . . You must consider each count separately and return a separate verdict for each one . . . ."

B. *Denial of Motion to Discharge Retained Counsel*

1. *Background*

Appellant challenges the trial court's denial of his motion to discharge his retained counsel. In November 2015, the trial court granted appellant's request to relieve his public defender and substitute a retained attorney as his counsel of record. Due to multiple subsequent continuances, including five requested by the defense, the case was not called for trial until October 2016. In the morning of the first day of trial, defense counsel moved to bifurcate trial as to appellant's prior convictions, and the court granted the motion. The court and the parties then discussed the jury instructions and the parties' failure to reach a plea agreement. After the conclusion of these preliminary discussions, a panel of prospective jurors was brought into the courtroom. Over the next hour and a half, the court read the information to the prospective jurors and gave them preliminary jury instructions, and the parties began voir dire.

At the beginning of the afternoon session, appellant addressed the court, indicating he wished to discharge retained counsel and receive representation by a public defender. Appellant complained that counsel had not subpoenaed witnesses to testify in his defense. In response to the court's inquiry as to when he had decided to relieve counsel, appellant answered, "Yesterday and today." The court responded, "Well, the problem is this, you didn't raise it today before we had the jury come in. You didn't raise it

yesterday." Appellant then claimed he wrote a letter to counsel the previous week.

The trial court emphasized the parties were already in the process of jury selection and explained that if it were to grant appellant's request and appointed a public defender, the new counsel would need time to prepare for trial. In response to a question by the court, the prosecutor indicated that she had already notified several witnesses to appear for the first day of testimony, four days later. The court then denied appellant's motion as "not timely."

2. *Analysis*

On appeal, appellant argues that the trial court's denial of his request to discharge retained counsel denied him his rights to counsel and a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution. "The right to retained counsel of choice is -- subject to certain limitations -- guaranteed under the Sixth Amendment to the federal Constitution. [Citations.] In California, this right 'reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 310-311 (*Verdugo*), quoting *People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).) The Sixth Amendment therefore affords a defendant the right to discharge retained counsel "with or without cause . . . ." (*Ortiz, supra*, at p. 983.)

"The right to discharge a retained attorney is, however, not absolute. [Citation.] The trial court has discretion to 'deny such a motion if discharge will result in "significant prejudice" to the defendant [citation], or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice" [citations].'" (*Verdugo*, *supra*, 50 Cal.4th at p. 311.) In considering whether a defendant's request to discharge his retained counsel is timely, "the court should 'balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution.'" (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 429 (*Keshishian*), quoting *People v. Lara* (2001) 86 Cal.App.4th 139, 153 (*Lara*).) In so doing, the court """must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.'"""" (*Lara,* at p. 153, quoting *Ortiz*, *supra*, 51 Cal.3d at p. 984.) Appellant argues that his motion to discharge his retained counsel was timely. Despite his complaint below that counsel had subpoenaed no witnesses in his defense, appellant does not contend that the delay that would have resulted from his request to obtain substitute counsel would have been "'justifiable'" due to any problem with his retained counsel's representation. Rather, he asserts that his request would not have disrupted the orderly processes of justice because he made it "in the very preliminary stages" of trial. We disagree.

Keshishian is instructive. There, this court upheld the trial court's denial of the defendant's request to discharge his

retained counsel, which was made "on the day set for trial" and after numerous defense continuances had been granted. (*Keshishian, supra,* 162 Cal.App.4th at pp. 428-429.) Concluding the court was within its discretion to deny this "last-minute motion," we noted the case had been pending for two and a half years, an indefinite continuance would have been necessary because appellant had not identified new counsel, and witnesses whose appearances had already been scheduled would have been further inconvenienced by an indefinite delay. (*Id.* at p. 429.)

A similar analysis applies here. As in *Keshishian*, appellant made his request to discharge counsel on the first day of trial after his case had been pending for an extended period, due in large part to multiple defense continuances. (See *Keshishian*, *supra*, 162 Cal.App.4th at pp. 428-429.) As in *Keshishian*, appellant did not have substitute counsel and thus would have needed an indefinite continuance. (See *ibid.*) And as in *Keshishian*, an indefinite continuance would have inconvenienced witnesses who had already been scheduled to appear. (See *ibid.*) Thus, the trial court did not abuse its discretion in denying appellant's request to discharge his counsel at that time. (See *ibid.*; see also *People v. Reaves* (1974) 42 Cal.App.3d 852, 856 [no abuse of discretion in denying motion for continuance to obtain different counsel "made on the very day of trial, after the matter has been pending for five months and the defendant has . . . successfully obtained numerous continuances

without indicating that there existed any reason to change attorneys"].)

Appellant contends that he made his request to discharge counsel "at the first actual opportunity afforded to him." That is incorrect. Appellant was present in the courtroom with his retained counsel at the start of the first day of trial, but rather than immediately inform the court that he wished to discharge his counsel, appellant allowed counsel to make a motion on his behalf and discuss various procedural matters with the court. Appellant then allowed a panel of prospective jurors to be brought into the courtroom, read the information, given instructions, and examined by the counsel he wished to discharge, before revealing his desire to obtain different counsel. These circumstances, not present in *Keshishian*, further support the trial court's ruling. (See *People v. Blake* (1980) 105 Cal.App.3d 619, 623 [defendant seeking substitute counsel must "act with diligence and may not demand a continuance if he is unjustifiably dilatory"].)

In support of his argument that his motion was timely, appellant cites *Lara, supra,* 86 Cal.App.4th 139 and *People v. Lopez* (2018) 22 Cal.App.5th 40 (*Lopez*). In each case, the Court of Appeal reversed the trial court's denial of the defendant's motion to discharge retained counsel. (See *Lara, supra*, at pp. 158-164; *Lopez, supra*, at p. 50.) Each case is readily distinguishable.

In *Lopez*, the defendant made his request to discharge counsel at a readiness conference the week before trial was

scheduled to begin. (*Lopez*, *supra*, 22 Cal.App.5th at p. 44.) A settlement offer was pending and the defendant "asked to discharge [his counsel] before it was clear whether the trial would proceed . . . ." (*Id.* at pp. 44, 48.) The *Lopez* court noted that the defendant had not then retained his counsel for trial, raising "the risk that [he] would '"get what he paid for"' if he was forced 'to go to trial with unpaid counsel against his wishes and those of his attorney.'" (*Id.* at p. 48.) Unlike in *Lopez*, appellant made his request on the day of trial, and there was no question of his counsel's readiness and willingness to proceed.

In *Lara*, although the defendant's request to discharge his counsel came on the day of trial, he "immediately expressed his dissatisfaction with his retained counsel prior to the court's consideration of any other motions or the commencement of jury selection." (Lara, *supra*, 86 Cal.App.4th at p. 162.) The trial court applied the wrong legal standard, concluding that there was no "breakdown in the attorney/client relationship" justifying counsel's discharge, rather than considering whether the motion was timely. (*Id.* at 148, 162.) On appeal, the respondent attempted to defend the ruling by arguing that "a motion to discharge retained counsel on the first day of trial was necessarily untimely," regardless of the trial court's failure to consider the issue. (*Id.* at 158-159, 162.) Reversing, the Court of Appeal stated that it was "left with an incomplete record upon which to conclude that [the defendant's] motion was *necessarily* untimely." (*Id.* at 164, italics added.) Unlike

in *Lara*, appellant waited until after the start of jury selection to express dissatisfaction with his attorney, and the trial court here exercised its discretion to deny the motion as "not timely." Accordingly, we find no abuse of discretion in the trial court's denial of appellant's request to discharge his retained counsel.

C. *Conviction for Violation of Vehicle Code Section 10851*

Appellant contends his conviction for felony unlawful driving or taking of a vehicle under Vehicle Code section 10851, subdivision (a), was for a form of vehicle theft.[5] Thus, he argues, under Proposition 47, the Safe Neighborhoods and Schools Act, the conviction must be reduced to a misdemeanor because the prosecution failed to prove the stolen vehicle was worth more than $950. Respondent agrees.

"Approved by the voters in 2014, Proposition 47 . . . reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies." (*People v. Page* (2017) 3 Cal.5th 1175, 1179 (*Page*).) Among other changes, Proposition 47 added section

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[5] Vehicle Code section 10851, subdivision (a), provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense . . . ."

490.2, "which provides that 'obtaining any property by theft' is petty theft and is to be punished as a misdemeanor if the value of the property taken is $950 or less." (*Page, supra*, at p. 1179, quoting § 490.2.)

At the time of appellant's trial, Courts of Appeal disagreed on whether an offense under Vehicle Code section 10851 was a "theft" offense for purposes of Proposition 47. (See *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1289.) The prohibitions of Vehicle Code section 10851 "sweep more broadly than 'theft,' as the term is traditionally understood," as it "punishes not only taking a vehicle, but also driving it without the owner's consent, and 'with intent *either* to permanently or *temporarily* deprive the owner thereof of his or her title to or possession of the vehicle . . . ." (*Page*, *supra*, 3 Cal.5th at p. 1182, quoting Veh. Code, § 10851, subd. (a).) "Theft, in contrast, requires a taking with intent to steal the property -- that is, the intent to permanently deprive the owner of its possession." (*Page,* at p. 1182.)

In *Page*, our Supreme Court resolved the conflict among the Courts of Appeal, holding that "after the passage of Proposition 47, an offender who obtains a car valued at less than $950 by *theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.'" (*Page, supra*, 3 Cal.5th at p. 1183, quoting *People v. Van Orden, supra,* Cal.App.5th at p. 1288.) Proposition 47 does not, however, cover non-theft forms of the offense in Vehicle Code section 10851. (*Page*, at p. 1182.)

The parties agree that appellant's conviction under Vehicle Code section 10851 was for theft, as it was based on a theory that appellant "took" Mendoza's vehicle rather than "drove" it. The parties do not address the possibility that appellant took the vehicle with intent only to temporarily deprive the owner of it. But given appellant's admission that he "stole" the vehicle to "[m]ake money somehow" and was "thinking about selling it," we are persuaded there could be no reasonable dispute he had permanent deprivation in mind. The parties also agree there was no evidence that the value of the vehicle -- a 1993 Mazda pickup truck -- exceeded $950. Absent such evidence, appellant could not be convicted of a felony. (See § 490.2; *Page*, *supra*, 3 Cal.5th at p. 1182.) Accordingly, we reduce appellant's conviction under Vehicle Code section 10851 to a misdemeanor and remand for resentencing.[6] (See *In re D.N., supra,* 19 Cal.App.5th at p. 901 [reducing juvenile adjudication for theft under Vehicle Code section 10851 to misdemeanor where prosecution failed to prove value of stolen vehicle exceeded $950].)

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[6] Because respondent agrees that reduction to a misdemeanor is appropriate, we need not decide whether appellant could be retried for felony violation of Vehicle Code section 10851. (Compare *In re D.N.* (2018) 19 Cal.App.5th 898, 901 [principles of double jeopardy preclude retrial after post-*Page* reversal of adjudication for felony violation of Vehicle Code section 10851] with, e.g., *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 857 [the People may choose between retrial and reduction to misdemeanor].)

D. *Denial of* Romero *Motion*

1. *Background*

At sentencing, the court announced its tentative sentence and indicated it did not intend to exercise its discretion under *Romero, supra,* 13 Cal.4th 497 to strike either of appellant's two prior strike allegations. The court noted that appellant's criminal history "span[ned] his entire adult life," that he had served "multiple prison terms," and that his current convictions involved "separate criminal activity." Defense counsel urged the court to exercise its discretion to strike either of the prior strike allegations. Counsel acknowledged that appellant had a long criminal history, but asserted that appellant's struggle with drug addiction was at the root of his unlawful activities. Counsel added that even without a third strike, appellant, who was 53 years old, would remain in prison "until his late 70s," and he contended that a third-strike sentence was disproportionate to his current crimes.

Appellant also addressed the court. He stated that he was not a violent person and that he had a drug problem. Appellant further stated that he had been trying to address his drug problem and managed to stay drug free for three years but "fell into a different group" and "went right back into drugs again." He claimed he had tried to help Dominguez, who was "involved in a lot of stuff," and that is how he "ended up catching a case with" Dominguez.

The trial court responded that appellant was "deflecting responsibility" and blaming others for his bad

choices. It proceeded to list appellant's prior criminal offenses, which included a large number of various drug and property offenses, as well as several violent offenses.[7] The court concluded, "[T]he bottom line is that you are a 53-year-old man who hasn't taken charge of your life . . . ." It declined to strike either of appellant's prior strike allegations.

1. *Analysis*

Appellant claims the trial court abused its discretion in denying his motion to strike either of his two prior strike allegations. Under *Romero*, a trial court has discretion pursuant to section 1385, subdivision (a), to strike a prior conviction allegation under the Three Strikes law. (*Romero, supra*, 13 Cal.4th at p. 504.) In deciding whether to strike such an allegation, the trial court 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 [Three Strikes law's]

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[7] Appellant's prior offenses included: auto theft, vandalism, receiving stolen property, grand theft of money, disorderly conduct, possession of a dangerous weapon, possession of a firearm by a convicted felon, two assaults with a deadly weapon, escape from jail while charged with a felony, attempted escape from prison with force or violence, two robberies, burglary, and numerous drug offenses.

spirit . . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

We review a trial court's decision whether to strike a prior strike allegation for abuse of discretion and will reverse only if it "'falls outside the bounds of reason.'" (*Williams*, *supra*, 17 Cal.4th at p. 162.) "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*).)

In support of his contention that the trial court abused its discretion, appellant observes: (1) his prior strikes were old; (2) his long criminal history was tied to his history of addiction; (3) most of his prior convictions were nonviolent; and (4) the circumstances of his current convictions were not egregious, as no one was harmed or even present when appellant committed the offenses. Appellant also cites cases upholding trial courts' decisions to strike allegations of prior strikes. (See *People v. Garcia* (1999) 20 Cal.4th 490, 493; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 981; *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1247.)

The question here, however, is not whether striking appellant's prior strike allegations would have been within the trial court's discretion, but whether refusing to do so was an abuse of discretion. We conclude it was not. There is no indication the trial court failed to consider the circumstances on which appellant's argument relies. But the court

remained understandably concerned about appellant's extensive and persistent criminal history. The court noted that appellant's criminal history "span[ned] his entire adult life," and that he had served "multiple prison terms" but had not changed his behavior. Among appellant's prior offenses were multiple property offenses, numerous drug offenses, and a disturbing number of violent offenses. This criminal history might have been tied to appellant's history of addiction, but there was no sign that change was forthcoming. As the trial court noted, appellant's current convictions involved separate and varied criminal activity. Yet, before the trial court, appellant "deflect[ed] responsibility" and sought to blame others for his own actions.

Under these circumstances, the record reflects not only that the trial court "balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law," (see *Myers*, *supra*, 69 Cal.App.4th at p. 310), but that appellant "appears to be 'an exemplar of the "revolving door" career criminal to whom the Three Strikes law is addressed" (see *People v. Carmony* (2004) 33 Cal.4th 367, 379). Accordingly, the trial court did not abuse its discretion in denying appellant's *Romero* motion.

E. *Enhancements under Section 667*

As noted, appellant's determinate sentence for the drug and taking-of-a-vehicle offenses included two five-year enhancements under section 667, subdivision (a), for prior

serious felony convictions. Appellant claims the court erred in imposing the enhancements as part of his determinate sentence for those charges, rather than as part of his indeterminate sentence for the burglary charge. Respondent argues there was no error in the court's sentence.

In a supplemental brief, appellant contends that following the enactment of Senate Bill No. 1393, we must remand his case to the trial court, to permit that court to exercise its discretion whether to strike the two enhancements. He notes that under current law, which was in effect at the time of his sentencing, section 1385, subdivision (b), prohibits trial courts from striking enhancements under section 667. (See § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) However, effective January 1, 2019, Senate Bill No. 1393 will eliminate that prohibition, thereby permitting courts to exercise discretion to strike such enhancements. (See Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 [Senate Bill No. 1393 will "allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes"].)

The parties agree that Senate Bill No. 1393 will apply to all matters not yet final when the law becomes effective. (See *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973 [Senate Bill No. 1393 applies "to all cases not yet final when [it] becomes effective"].) Respondent emphasizes, however,

that Senate Bill No. 1393 is not yet effective, and thus argues that appellant's claim under that law is not ripe.

As we are remanding the matter for resentencing due to the misclassification of appellant's conviction under Vehicle Code section 10851, we need not decide the parties' contentions regarding the section 667 enhancements. After January 1, 2019, appellant will be able to raise all his claims as to these enhancements before the trial court.

DISPOSITION

The conviction for felony unlawful driving or taking of a vehicle under section 10851, subdivision (a), is reduced to a misdemeanor, the sentence is vacated, and the matter is remanded for resentencing consistent with this opinion. All other convictions are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

COLLINS, J.

MICON, J.*

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