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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DESMOND ROMELL PRYER, Defendant and Appellant.	B283602 (Los Angeles County Super. Ct. No. MA068111)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joel L. Lofton, Judge. Reversed.

Alan Siraco, 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, Chung L. Mar and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Desmond Romell Pryer appeals from a judgment of conviction entered after a jury trial for multiple sexual and violent offenses against his girlfriend, including forcible oral copulation, assault by means likely to produce great bodily injury, felony false imprisonment, attempting to dissuade a witness, and inflicting corporal injury on a person in a dating relationship. On appeal he contends the use of a prior juvenile adjudication for purposes of sentencing under the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12)[1] violated his constitutional right to a jury trial. We disagree. However, Pryer is correct that the trial court erred in imposing a five-year sentence enhancement under section 667, subdivision (a)(1), because Pryer's prior juvenile adjudication does not constitute a prior serious felony conviction for purposes of the enhancement.

Pryer also contends substantial evidence does not support his conviction for attempting to dissuade a witness under section 136.1, subdivision (a)(2), and the trial court committed instructional error. We agree and reverse Pryer's conviction for this offense.

We also remand for resentencing for the trial court to exercise its discretion whether to impose or strike pursuant to section 1385 the sentence enhancement for having served a separate prison term for a felony under section 667.5, subdivision (b). The trial court should also correct Pryer's prejudgment custody credit to reflect 776 actual days of credit.

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

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Pryer was charged in an information with forcible oral copulation (§ 288a, subd. (c)(2)(A); count 1), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 2), false imprisonment by violence (§ 236; count 3), attempting to dissuade a witness (§ 136.1, subd. (a)(2); count 4), and inflicting corporal injury on a person in a dating relationship (§ 273.5, subd. (a); count 5). The information further alleged as to the offenses charged in counts 2 and 5 that Pryer personally inflicted great bodily injury on T. Robinson under circumstances involving domestic violence (§ 12022.7, subd. (e)). The information alleged that Pryer suffered a prior conviction of a serious or violent felony, which constituted a strike within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), specifically, a 1991 juvenile adjudication for robbery (§ 211). The information also alleged the prior juvenile adjudication for robbery was a serious felony under section 667, subdivision (a).[2] It further alleged that Pryer had a 2013 conviction for possession for sale of cannabis for which he served a prison term (§ 667.5, subd. (b)). As to count 4, the information alleged Pryer had "attempt[ed] to dissuade a witness, in violation of Penal Code section 136.1(a)(2)" (capitalization omitted), by "knowingly and maliciously attempt[ing] to prevent and dissuade [Robinson], a witness and victim, from attending and giving testimony at a trial, proceeding, and inquiry authorized by law."

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[2] The information was amended on February 27, 2017 to add the allegations under section 667, subdivision (a).

B. *Evidence at Trial*

Robinson testified that on January 12, 2015 she and Pryer went to a motel together for privacy. They were in a romantic relationship. In the motel room, Pryer attempted to force Robinson to smoke crack cocaine with him. When she refused, Pryer struck Robinson in the face with his open hand. Robinson slapped him back. Pryer responded by punching Robinson repeatedly with his closed fist. As Pryer continued to assault Robinson, she attempted to reach the door and leave the room. Pryer pulled her away from the door, ripping her hair from her head. Pryer struck Robinson again, and she fell to the floor. Pryer continued to punch her body, head, and face.

Eventually Robinson crawled away and attempted to break a window with a chair. Pryer took the chair from her and used it to barricade the door. He continued to assault Robinson. When Robinson crawled to the phone and attempted to call 911, Pryer took the phone from her and unplugged the line. Pryer continued to assault Robinson for several hours.

At one point Pryer rubbed his penis on Robinson's face, and told her he would beat her if she did not perform oral sex. Robinson complied, but then bit down hard on Pryer's penis until he agreed to stop hitting her.

Early the next morning Pryer left after asking Robinson whether she would call the police. After Pryer left, Robinson attempted to call 911 on her cell phone, but the battery had been removed. Robinson then reconnected the motel phone line, and called the motel office for help. The office connected her with 911.

After the People rested, Pryer introduced a stipulation regarding Robinson's prior arrest for an unspecified offense in 2014. Pryer did not testify or call any witnesses.

C. *Jury Instructions and Verdict*

As relevant here, the jury was instructed with CALCRIM No. 2622 that to find Pryer guilty of attempting to dissuade a witness as charged in count 4, it must find "one, the defendant maliciously tried to prevent . . . Robinson from making a report that she was a victim of a crime to law enforcement; two, . . . Robinson was a crime victim; and three, the defendant knew he was trying to prevent . . . Robinson from reporting victimization and intended to do so."

The jury convicted Pryer on all counts. As to the charge of attempting to dissuade a witness, the jury found Pryer guilty "in violation of Penal Code Section 136.1(a)(2), a Felony, as charged in Count 4 of the Information." The jury also found true as to counts 2 and 5 that commission of the offenses resulted in great bodily injury to Robinson under circumstances involving domestic violence.

D. *Bench Trial on Alleged Prior Convictions*

The trial court bifurcated the trial on the alleged prior convictions. Pryer waived his right to a jury trial. At the priors trial, the People introduced, and the court admitted, certified copies of records from a 1991 juvenile proceeding, as well as a certified 969b packet.[3] The records included a 1991 juvenile

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[3] Under section 969b the prosecution may prove an allegation of a prior felony conviction by introducing into evidence a packet of certified prison records.

petition against Pryer under Welfare and Institutions Code section 602. Counts 1 and 2 of the petition alleged Pryer committed a robbery in violation of section 211. The records also included a delinquency detention minute order from the 1991 juvenile proceeding, in which Pryer admitted counts 1 and 2 of the petition and the juvenile court found Pryer was 17 years old at the time of the offense. Finally, the records included a delinquency disposition minute order adjudicating Pryer a ward of the state. The trial court found the allegations as to the 1991 robbery and the 2013 possession for sale convictions to be true.[4]

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[4] After admitting the exhibits introduced by the prosecution, the trial court continued the priors trial to allow the court to review the exhibits. Although the trial court did not make an explicit finding at the continued proceeding that the prior conviction allegations were true, at the sentencing hearing the trial court impliedly found the priors to be true by its imposition of the enhancements on the express basis of the alleged priors. (See *People v. Clair* (1992) 2 Cal.4th 629, 691, fn. 17 ["At sentencing, the court impliedly—but sufficiently—rendered a finding of true as to the allegation when it imposed an enhancement *expressly* for the underlying prior conviction."]; *People v. Chambers* (2002) 104 Cal.App.4th 1047, 1050 ["[T]he oral pronouncement of judgment 'speaks' to impliedly affirm the truth of the [enhancement] allegation."].) Specifically, as to the sentence on count 1 the court stated, "six years, will be doubled for a total of 12 years pursuant to the three strikes law." The court's subsequent doubling of each term similarly reflects its finding true Pryer's juvenile prior adjudication. Neither party disputes that the trial court found the allegations as to the prior juvenile adjudication to be true. As to Pryer's prior conviction for possession for sale of cannabis, the trial court stated that the "prison prior is stayed, pursuant to Penal Code 1385." Although the record on appeal does not include documents regarding this

E. *Sentencing*

The trial court sentenced Pryer to an aggregate state prison sentence of 33 years four months. The trial court selected count 1 for forcible oral copulation as the base term and imposed the middle term of six years, doubled as a second strike based on the prior juvenile adjudication (§§ 667, subds. (b)-(i), 1170.12), plus an additional five years under section 667, subdivision (a)(1), for a total of 17 years.

The trial court imposed consecutive terms of eight years eight months, 16 months, and six years four months on counts 2, 3, and 4, respectively. The trial court imposed on count 2 for assault by means likely to produce great bodily injury a consecutive sentence of one year (one-third the middle term of three years), doubled as a second strike, plus five years under section 667, subdivision (a)(1), plus 20 months (one-third the upper term of five years) for the great bodily injury enhancement under section 12022.7, subdivision (e), for a total of eight years eight months. On count 3 for false imprisonment by violence, the court imposed a consecutive term of eight months (one-third the middle term of two years), doubled as a second strike, for 16 months. On count 4 for dissuading a witness, the court imposed a consecutive term of eight months (one-third the middle term of two years), doubled as a second strike, plus five years under section 667, subdivision (a)(1), for a total of six years four months.

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prior conviction, Pryer does not contend on appeal the trial court erred in finding this prior conviction true.

As to count 5 for inflicting corporal injury, the court imposed and stayed an eight-year term (the upper term of four years, doubled as a second strike) pursuant to section 654.[5]

The trial court stated it stayed under section 1385 imposition of a one-year prior prison term enhancement under section 667.5, subdivision (b).

The trial court calculated Pryer's prejudgment custody credit as 775 days actual custody plus 116 days of conduct credit under section 2933.1. Pryer timely appealed.

DISCUSSION

A. *The Trial Court's Enhancement of Pryer's Sentence on the Basis of His Prior Juvenile Adjudication Did Not Violate His Sixth Amendment Rights*

1. *The trial court properly used Pryer's prior juvenile adjudication to enhance his sentence*

Pryer contends because he did not have a right to a jury trial in his 1991 juvenile adjudication for robbery, the trial court's reliance on that adjudication to enhance his sentence under the three strikes law in the present proceeding violated his Sixth Amendment right to a jury trial. Pryer acknowledges the Supreme Court has held that use of prior juvenile adjudications

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[5] The trial court stayed punishment for count 5, finding the offense "was necessarily included to the defendant's intent to commit the ultimate offense alleged in count 1," the base term. The trial court did not address as to count 5 the great bodily injury enhancement under section 12022.7, subdivision (e). On remand the trial court should address whether it is striking the great bodily injury enhancement or imposing but staying the enhancement under section 654.

to enhance a defendant's sentence, notwithstanding the lack of a right to a jury trial, does not violate the defendant's Sixth Amendment right to a jury trial. (See *People v. Nguyen* (2009) 46 Cal.4th 1007, 1028 (*Nguyen*) ["[T]he absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi*,[6] preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person."].) However, Pryer contends recent decisions by the United States and California Supreme Courts have undermined the holding of *Nguyen*. We disagree.

Relying on *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*), *Mathis v. United States* (2016) 579 U.S. ___ [136 S.Ct. 2243] (*Mathis*), and *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), Pryer contends *Nguyen* is no longer controlling precedent. However, these cases did not involve the validity of using prior juvenile adjudications rendered without the right to a jury trial to enhance a sentence subsequently imposed on an adult convicted of a felony. Instead, each involved limits on judicial factfinding with respect to whether a prior conviction was for conduct that qualifies as a sentence enhancement.

"A series of United States Supreme Court decisions, beginning with [*Apprendi*], establishes an adult criminal defendant's general right . . . to a *jury* finding beyond reasonable doubt of any fact used to increase the sentence for a felony conviction beyond the maximum term permitted by conviction of the charged offense alone." (*Nguyen, supra*, 46 Cal.4th at p. 1010.) Notably excepted from *Apprendi*'s general rule is "the

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6 *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

fact of a prior conviction," which may properly be determined by the sentencing court. (*Apprendi, supra*, 530 U.S. at p. 490.) In *Nguyen*, the California Supreme Court held that ". . . *Apprendi* does not bar the use of a constitutionally valid, fair, and reliable prior adjudication of criminal conduct to enhance a subsequent adult sentence simply because the prior proceeding did not include the right to a jury trial." (*Nguyen*, at p. 1025.)

Subsequently, the United States Supreme Court decided *Descamps* and *Mathis*, both of which interpreted the federal Armed Career Criminal Act (ACCA; 18 U.S.C. § 924(e)) in light of *Apprendi*'s Sixth Amendment limits on judicial factfinding. These cases involved the "categorical" and "modified categorical" approaches to a sentencing court's determination of whether a prior conviction qualifies as a predicate offense to enhance a subsequent sentence under the ACCA. (*Descamps, supra*, 570 U.S. at p. 257; *Mathis, supra*, 136 S.Ct. at p. 2248.) The Supreme Court concluded in each case that the sentencing courts were generally barred from looking beyond the statutory elements of the prior offenses to determine whether the defendant's conduct qualified for imposition of a sentence enhancement under the ACCA. (See *Descamps*, at pp. 259, 268-269 [sentencing court impermissibly relied on record of plea colloquy to find defendant's prior conviction for burglary involved unlawful entry]; *Mathis*, at p. 2250 [sentencing court impermissibly relied on records of prior conviction to determine that defendant had burglarized structures, rather than vehicles].)

In *Gallardo*, the California Supreme Court reevaluated its prior precedent in *People v. McGee* (2006) 38 Cal.4th 682 in light of *Descamps* and *Mathis*. The Court held: ". . . *McGee* is no longer tenable insofar as it authorizes trial courts to make

findings about the conduct that 'realistically' gave rise to a defendant's prior conviction. The trial court's role is limited to determining the facts that were necessarily found in the course of entering the [prior] conviction." (*Gallardo, supra*, 4 Cal.5th at p. 134.) The Supreme Court concluded the trial court erred in relying on the preliminary hearing transcript to determine "the nature of [the] prior conviction[]," which was "to be made by the court, rather than a jury, based on the record of conviction." (*Id.* at pp. 136-138.)

Although *Gallardo* limited the scope of permissible factfinding by the sentencing court in determining whether the defendant suffered a prior conviction, it did not disturb *Nguyen*'s holding that a sentencing court may validly impose a sentence enhancement based on the fact of a prior juvenile adjudication, despite the lack of right to a jury trial in that proceeding. *Nguyen* remains controlling precedent binding on this court. (*People v. Martin* (2018) 26 Cal.App.5th 825, 832-833 ["'Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.'"]; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712 [same].)

2. *The trial court did not engage in impermissible factfinding regarding Pryer's juvenile adjudication*

Section 667, subdivision (d)(3), provides as to the three strikes law: "A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the

Welfare and Institutions Code . . . . [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." Section 1170.12, subdivision (b)(3), contains the identical requirements.

Pryer contends the trial court violated his right to a jury trial by finding these circumstances to be true as to his prior juvenile adjudication. We disagree. As a threshold matter, Pryer waived his right to a jury trial as to his prior conviction allegations. Thus, he cannot now complain that the trial court improperly usurped his right to have a jury decide whether he suffered a prior conviction under the three strikes law. (See *Nguyen, supra*, 46 Cal.4th at p. 1012 ["California statutory law afforded defendant the right to have a jury determine the existence of the sentencing fact here at issue—whether he suffered a 'prior felony conviction' as defined by the Three Strikes Law—but he waived that right."].)

Even if Pryer had not waived his right to a jury trial, the trial court did not engage in impermissible factfinding. The records of conviction from Pryer's 1991 juvenile proceedings admitted into evidence during the bench trial unambiguously proved each of the factors necessary for the adjudication to constitute a strike under the three strikes law. According to a minute order from the juvenile proceeding, the juvenile court found Pryer's date of birth to be "as shown in the petition," or January 25, 1974, making him 17 years old on February 15, 1991, the date on which he committed the robbery. The juvenile court's

delinquency disposition minute order reflects that Pryer was adjudicated "a ward of the court under [Welfare and Institutions Code] Section 602." Finally, the crime of robbery is a listed offense under Welfare and Institutions Code section 707, subdivision (b)(3). Each of these factors was properly determined by the trial court.[7]

B. *Substantial Evidence Does Not Support Pryer's Conviction Under Section 136.1, Subdivision (a)(2)*

Pryer contends his conviction for attempting to dissuade a witness under section 136.1, subdivision (a)(2), is not supported by substantial evidence. We agree.

"'"[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt."'" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277; accord, *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 488 ["Although we assess whether the evidence is inherently credible and of solid value, we must also view the evidence in the light most favorable to the jury verdict and presume the existence of every fact that the jury could reasonably have deduced from that evidence."].)

Count 4 of the information charged Pryer with "attempting to dissuade a witness, in violation of Penal Code section

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[7] Pryer contended in the trial court that section 211 was added to Welfare and Institutions Code section 707 only after his juvenile adjudication, and therefore could not constitute a strike. The trial court rejected this argument, stating "the law changed." Pryer has not challenged this ruling on appeal.

136.1(a)(2)" (capitalization omitted), alleging Pryer "did knowingly and maliciously attempt to prevent and dissuade [Robinson], a witness and victim, from attending and giving testimony at a trial, proceeding, and inquiry authorized by law." At trial, however, the People presented evidence that Pryer had attempted to dissuade Robinson from reporting she had been the victim of a crime, by acting to prevent her from calling 911 during and after the incident.

The People concede no evidence was presented at trial that Pryer attempted to dissuade Robinson from "attending and giving testimony at a trial, proceeding, and inquiry authorized by law." Thus, substantial evidence does not support Pryer's conviction under section 136.1, subdivision (a)(2).[8]

C. *Pryer's Conviction Cannot Be Based on an Uncharged Violation of Section 136.1, Subdivision (b)(1)*

The People contend the information contained a "ministerial" error by charging Pryer with a violation of section 136.1, subdivision (a)(2), instead of subdivision (b)(1), which criminalizes "attempts to prevent or dissuade . . . the victim of a crime . . . [¶] [from] [m]aking any report of that victimization" to law enforcement, consistent with the instructions the jury received. Relying on *People v. Maury* (2003) 30 Cal.4th 342

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[8] In addition, as the People concede, although the jury returned a verdict finding Pryer guilty on count 4 of violating section 136.1, subdivision (a)(2), the trial court instructed the jury with CALCRIM No. 2622 on the elements of a violation of section 136.1, subdivision (b)(1), that to find Pryer guilty on count 4, the jury must find he "maliciously tried to prevent . . . Robinson from making a report that she was a victim of a crime to law enforcement."

(*Maury*), the People argue Pryer's conviction should stand because this variance between pleading and proof did not prejudice Pryer in the preparation of his defense. We disagree.

In *Maury*, the "information charged defendant with 'FORCIBLE RAPE, in violation of Section 261(a)(2) of the Penal Code, a felony' and alleged that he committed the willful and unlawful act of sexual intercourse 'by means of force and fear of immediate and unlawful bodily injury.'" (*Maury*, *supra*, 30 Cal.4th at pp. 426-427.) At trial, the court instructed the jury that it should find the defendant guilty if "he had accomplished the act of sexual intercourse 'by means of force, violence, or fear of immediate and unlawful bodily injury.'" (*Id.* at p. 427.) The court concluded the omission of the means of "violence" from the information was not reversible error because "rape by means of violence is *not* a different offense from rape by means of force or fear; these terms merely describe different circumstances under which an act of intercourse may constitute the crime of rape," and because the defendant had shown no prejudice from the variance. (*Id.* at pp. 427-428.)

By contrast, here the information charged and described a different offense—of attempting to dissuade a witness from testifying at a judicial proceeding—from the one for which the People presented evidence at trial and the trial court instructed the jury—of preventing or dissuading the victim of a crime from reporting the crime to law enforcement. The holding in *Maury* with respect to an allegation in the information for a single offense of forcible rape is therefore inapposite.

The trial court had no jurisdiction to enter a judgment of conviction for violation of section 136.1, subdivision (b)(1), for which Pryer was not charged. "'It is fundamental that "[w]hen a

defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime.'"'"[9] (*People v. Arias* (2010) 182 Cal.App.4th 1009, 1019 [reversing enhanced sentence for attempted murders where prosecution failed to plead offenses were willful, deliberate, and premeditated]; accord, *In re Fernando C.* (2014) 227 Cal.App.4th 499, 502-503 [reversing judgment for fighting in public place where prosecution offered proof only of fighting on school grounds, which could not be considered a "public place" under statutory scheme].) Indeed, to do so would be contrary to the jury's verdict finding Pryer guilty of violating subdivision (a)(2) of section 136.1, not subdivision (b)(1). We reverse Pryer's judgment of conviction as to count 4.

D. *The People Concede Error on the Remaining Issues*

Pryer contends the trial court erred by considering his juvenile adjudication a prior serious felony conviction for purposes of the five-year enhancement in section 667, subdivision (a)(1). As the People concede, Pryer is correct. (See *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080, fn. 10; *People v. West* (1984) 154 Cal.App.3d 100, 110.)[10]

The People also concede the trial court erred when it stayed pursuant to section 1385 imposition of the one-year enhancement under section 667.5, subdivision (b), for Pryer's prior prison term

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[9] The People do not contend subdivision (b)(1) of section 136.1 is a lesser included offense of subdivision (a)(2).

[10] Because we conclude the trial court erred in imposing the five-year enhancement under section 667, subdivision (a)(1), we do not reach Pryer's contention that the trial court erred in imposing the enhancement on three counts.

for possession for sale of cannabis. Under section 1385, the trial court may strike a prior prison term enhancement, but it has no authority to stay it. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Lua* (2017) 10 Cal.App.5th 1004, 1020.) The People also contend the trial court erred in failing to "state[] orally on the record" its reasons for striking the punishment. (§ 1385, subd. (a); *People v. Bonnetta* (2009) 46 Cal.4th 143, 150 [""""The statement of reasons is not merely directory, and neither trial nor appellate courts have authority to disregard the requirement."""].) Pryer does not contend otherwise. If the trial court strikes the enhancement on remand, it must state its reasons on the record.

Finally, the People concede the trial court erred in calculating Pryer's prejudgment custody credits at 775 days. Pryer was arrested on May 20, 2015 and sentenced on July 3, 2017. Counting both the day of arrest and the day of sentencing, Pryer was in custody for 776 days. (§ 2900.5, subd. (a); *People v. Denman* (2013) 218 Cal.App.4th 800, 814 ["Calculation of custody credit begins on the day of arrest and continues through the day of sentencing."].) On remand the trial court must correct Pryer's prejudgment custody credits to reflect 776 days of actual custody.

DISPOSITION

The judgment is reversed. We reverse Pryer's conviction for attempting to dissuade a witness in violation of section 136.1, subdivision (a)(2). We remand for resentencing with directions for the trial court (1) to vacate the five-year sentence enhancements under section 667, subdivision (a)(1); (2) to exercise its discretion under section 1385 whether to impose or

strike the prior prison term allegation under section 667.5, subdivision (b); (3) on count 5 to strike or impose but stay the enhancement on this count under section 12022.7, subdivision (e); and (4) to modify Pryer's prejudgment custody credits to reflect 776 actual days of credit.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.