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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JOSEFLORENDINO TELLEZ GARCIA, Defendant and Appellant.	C101016 (Super. Ct. Nos. 23CF03978, 23CF03979, 24CF00098)

After a jury found defendant Joseflorendino Tellez Garcia guilty of all charges, including three counts of Penal Code[1] section 666.5, subdivision (a) (auto theft with a prior auto theft conviction), the trial court sentenced him to an aggregate term of 16 years in prison. On appeal, Garcia argues his section 666.5 convictions must be reversed because the accusatory pleadings failed to provide notice of the offenses of which he was

[1] Undesignated statutory references are to the Penal Code.

convicted. This argument is based on the failure of the parties and the trial court to realize that section 666.5, subdivision (a) is not a substantive offense, but rather an alternate punishment scheme. Garcia also argues the trial court prejudicially erred at sentencing when it relied on aggravating circumstances to increase his punishment without obtaining a waiver of his right to a jury trial on those circumstances and when it failed to find his drug addiction was a mitigating circumstance. Finally, he argues the trial court's cumulative errors at sentencing require remand for resentencing.

We reject the first claim, but modify the three section 666.5 convictions to three counts of violating Vehicle Code section 10851, subdivision (a). We agree with the second claim. Accordingly, we will remand for a full resentencing on the modified judgment. This disposition makes it unnecessary to address the remaining claims.

BACKGROUND

The underlying facts of Garcia's crimes are largely immaterial to our resolution of this appeal. It suffices to say that on five separate occasions from August to September 2023, Garcia stole snowmobile equipment from one person, stole hunting equipment from another person, and drove three different stolen vehicles, though no one saw him take the vehicles.

In cases that were consolidated and presented to a single jury, the prosecution accused Garcia of multiple offenses, including three counts of "GRAND THEFT AUTO WITH PRIOR, in violation of PENAL CODE SECTION 666.5[, subdivision](a)," by "unlawfully tak[ing] and driv[ing]" three different vehicles.

I

Jury Instructions

After the close of evidence at trial, the parties and the trial court discussed jury instructions, including how to instruct the jury on section 666.5, subdivision (a). The prosecutor explained that when drafting his proposed instruction on the section 666.5, subdivision (a) counts, he "did the elements for [Vehicle Code section] 10851 and then

added the prior gran[d] theft auto conviction . . . as an element."[2] When the trial court offered its own proposed instruction on section 666.5, subdivision (a), the prosecutor worried it would confuse the jury, saying: "[T]here's . . . different theories that could go on for [Vehicle Code section] 10851, a grand theft auto, and it could . . . just be a joy riding, the defendant driving the vehicle for a period of time." The trial court and the parties ultimately agreed it was proper to instruct the jury that unlawfully taking *or* driving a vehicle was an element of section 666.5, subdivision (a). Specifically, defense counsel stated: "Your honor, I would submit on the 'or' applying to those three [section 666.5, subdivision (a)] charges. I can understand the People's theory."

Consistent with the parties' agreement, the trial court instructed the jury as follows:

"The defendant is charged . . . with Grand Theft Auto With A Prior Conviction, in violation of Penal Code section 666.5[, subdivision](a).

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant took someone else's vehicle without the owner's consent;

"2. When the defendant took the vehicle, he intended to deprive the owner of possession or ownership of the vehicle for any period of time;

"3. The vehicle was worth more than $950;

"AND

"4. The defendant has been previously convicted of a felony violation of Vehicle Code Section 10851[, subdivision](a);

"OR

"1. The defendant drove someone else's vehicle without the owner's consent;

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[2] Portions of the reporter's transcript appear in all capital letters. Quotations from that transcript in this opinion have been modified to reflect conventional capitalization.

"2. When the defendant drove the vehicle, he intended to deprive the owner of possession or ownership of the vehicle for any period of time;

"AND

"3. The defendant has been previously convicted of a felony violation of Vehicle Code section 10851[, subdivision](a)."

II

Parties' Arguments to the Jury

Defense counsel urged the jurors to ask themselves why the prosecution "need[ed] multiple theories on what happened with the cars. Why multiple theories? It's because they don't know what happened." Counsel emphasized there was no "direct evidence . . . where someone saw [Garcia] take" the vehicles. Further, counsel maintained that while the prosecution proved Garcia possessed vehicles that did not belong to him, "we don't know how" he obtained the vehicles. "Someone could have loaned" the cars to him, counsel theorized. Therefore, Garcia "could have been under the mistaken impression that he . . . had the authority to use" the cars.

In rebuttal, the prosecutor focused on Garcia's guilt under the "driving" theory, arguing the defense had basically conceded that Garcia "was driving stolen property." And if Garcia drove a stolen vehicle without the owner's consent, the prosecutor argued, he thereby intended to deprive the owner of possession of the vehicle. The prosecutor also urged the jury to view the section 666.5, subdivision (a) counts in the context of Garcia's two-month "crime spree" that included stealing the snowmobile and hunting equipment.

III

Verdicts and Sentencing

After the jury found Garcia guilty on all counts, the trial court sentenced him to an aggregate term of 16 years in prison, which consisted of: (1) a principal term of eight years for one of the section 666.5, subdivision (a) convictions (the upper term of four years, doubled because of a prior conviction that Garcia admitted qualified as a "strike" under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12)); (2) two consecutive terms of two years for the other section 666.5, subdivision (a) convictions (one-third of the middle term, doubled); and (3) a total of four years for the other felonies. Before pronouncing the sentence, the trial court found no mitigating circumstances but found four aggravating circumstances, including that Garcia's "prior convictions as an adult are numerous" and that his "prior performance on supervision has been unsuccessful." Garcia filed a timely notice of appeal in May 2024. His opening brief was filed in April 2025, and this case was fully briefed on October 24, 2025.

DISCUSSION

I

Sufficiency of the Notice of the Charges

Garcia argues his section 666.5, subdivision (a) convictions must be reversed because the accusatory pleadings failed to provide the constitutionally required notice of the offenses that he was convicted of. He reasons: (1) the filed charges alleged he unlawfully took *and* drove vehicles in violation of section 666.5, subdivision (a), without reference to Vehicle Code section 10851; (2) the jurors were instructed they could find him guilty on those charges based on the posttheft driving theory contemplated in Vehicle Code section 10851 ("taking *or* driving"); (3) he indeed "was convicted of a modified version of the offense of unlawfully taking or driving a vehicle" under Vehicle Code section 10851; (4) a pure "driving" violation of Vehicle Code section 10851 is not

necessarily included in section 666.5, subdivision (a); therefore (5) he was denied notice of the charges against him.

We agree with the People that his argument is forfeited on appeal, because Garcia at least implicitly consented to have the jury consider criminal liability under Vehicle Code section 10851 when defense counsel agreed the theory was valid and could be presented to the jury.

A. *Legal Background*

1. *Section 666.5, Subdivision (a) and Vehicle Code Section 10851*

Vehicle Code section 10851 provides that anyone "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 . . . shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code." (Veh. Code, § 10851, subd. (a).)

Section 666.5, subdivision (a), provides in relevant part that anyone who, "having been previously convicted of a felony violation of Section 10851 of the Vehicle Code, or felony grand theft involving an automobile in violation of subdivision (d) of Section 487," or other enumerated offenses, who "is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years." Thus, section 666.5 "is an alternate punishment scheme that prescribes an elevated sentencing triad for recidivist car thieves who have a prior felony conviction for car theft or related conduct. [It] does not define a new offense . . . it simply increases the punishment for the crime." (*People v. Lee* (2017) 16 Cal.App.5th 861, 869, fn. omitted; see *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165-1166 [§ 666.5 "simply increases the punishment for violation of [Vehicle Code] section 10851, subdivision (a) by a recidivist"].)

2. *Case Law*

The parties agree that *People v. Toro* (1989) 47 Cal.3d 966 is important for understanding the legal framework within which we must resolve the question of Garcia's consent to submission of an uncharged crime to a jury. But they fail to appreciate the importance of *People v. Anderson* (2020) 9 Cal.5th 946 (*Anderson*), which discusses *Toro* and the case's concepts that are pertinent here.

In *Toro*, the court "held that the defendant's failure to object on notice grounds to the inclusion of a lesser related offense on the verdict form forfeited his inadequate notice claim on appeal. [Citation.] [The court] considered this failure to object to be implied consent to treat the information as informally amended to include the lesser offense." (*Anderson*, *supra*, 9 Cal.5th at p. 958.) Our Supreme Court reasoned in part that "[t]here is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*People v. Toro*, *supra*, 47 Cal.3d at p. 976, fn. omitted.)

In *Anderson*, our Supreme Court emphasized that *Toro* presented a scenario of defense counsel's *silence* when given an opportunity to object to proposed jury instructions on a lesser offense that was related to a count contained in the operative accusatory pleading. (See *Anderson*, *supra*, 9 Cal.5th at p. 958 ["our willingness to imply the defendant's consent to amend from his silence rested on considerations specific to that situation"]; *id.* at p. 959 ["There is therefore no reason to presume from defense counsel's silence that Anderson consented to this procedure"]; *id.* at p. 960 ["For all the record shows, the drafting of the instructions and verdict forms may have simply been a mistake the parties did not manage to catch before it was too late"].) *Anderson* also posits that the "informal amendment doctrine" may even "allow for the addition of greater crimes or additional enhancement" for the jury's consideration, not just lesser related offenses, so long as the record clearly indicates the parties and the trial court agreed. (*Id.* at p. 960 [discussing and distinguishing *People v. Sandoval* (2006) 140

Cal.App.4th 111, explaining that, "[h]ere, in contrast to *Sandoval*, there was no hearing in open court where the prosecution asked to make an oral amendment to the information to add the section 12022.53[, subdivision](e) enhancements as to the robbery counts, nor was Anderson asked if he consented to the amendment, nor did the trial court ever grant such a request"].)

B. *Analysis*

Garcia concedes that *Toro* stands for the proposition that a failure to object to "erroneous jury instructions" may amount to implied consent to submission of an uncharged crime to the jury, but insists that this case is distinguishable from *Toro*, because the jury in *Toro* was correctly instructed on the uncharged crime, whereas here "[n]either the court nor the prosecution stated the elements" the jury was instructed with "were . . . for a . . . [Vehicle Code] section 10851 violation." Further, the verdict forms did not mention Vehicle Code section 10851.

Garcia's contentions are unpersuasive. First, defense counsel was not merely silent when the prosecutor and the trial court discussed how to instruct the jury on the section 666.5, subdivision (a) charges; he explicitly addressed and did not contest the validity of jury instructions that contemplated criminal liability for driving a stolen vehicle under Vehicle Code section 10851. After the prosecutor referenced both Vehicle Code section 10851 and a pure "driving" theory of criminal liability during a discussion on jury instructions, defense counsel basically agreed to instructing the jury that Garcia could be found guilty of taking *or* driving a vehicle without the owner's consent, stating: "I would submit on the 'or' applying to those three" section 666.5, subdivision (a) charges, and "I can understand the People's theory." Counsel's acknowledgment of the People's theory and acceptance of it here is much more significant than the mere silence at issue in *Toro*. (See *Anderson*, *supra*, 9 Cal.5th at pp. 958-960.)

Second, to the extent Garcia contends that the absence of a citation to Vehicle Code section 10851 on the jury's verdict forms is determinative, we disagree. As the People observe, *People v. Jackson* (2014) 58 Cal.4th 724 stands for the proposition that the form of a verdict " 'generally is immaterial, so long as the intention of the jury to convict clearly may be seen' " by a review of the record, including the jury instructions.[3] (*Id.* at p. 750.) In that case, the defendant challenged his felony-murder conviction. (*Ibid*.) Although he conceded there was sufficient evidence to prove the murder occurred during an attempted robbery, he argued that because the verdict form referred to robbery instead of attempted robbery, and there was insufficient evidence he committed a robbery, he could not be convicted of felony murder. (*Ibid*.) The court disagreed, explaining "both the prosecution and the court told the jury to return the verdict form if it found true the robbery-murder special-circumstance allegation, and the court repeatedly instructed that the allegation could be found true if the prosecution proved the murder had been committed during the commission or attempted commission of a robbery. In returning the verdict form, the jury clearly manifested its intention to find true the allegation charged," and the "technical defect" in the verdict form could "be disregarded." (*Id.* at pp. 750-751.)

Similarly here, when ostensibly instructed on the offense of "Grand Theft Auto With A Prior Conviction, in violation of Penal Code section 666.5[, subdivision](a)," the jury was instructed on the elements of Vehicle Code section 10851 ("taking *or* driving") with the additional/superfluous element of a prior Vehicle Code section 10851 conviction. (See *People v. Young* (1991) 234 Cal.App.3d 111, 113 [the prior Vehicle Code conviction was not an element of § 666.5, and it did not need to be proven to the trier of fact].) And the prosecutor argued Garcia drove three vehicles without consent

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[3] Garcia does not respond to the People's *Jackson* argument.

and with the intent to deprive the owners of possession as part of a crime spree that included multiple acts of theft. The jury clearly manifested its intention to find Garcia guilty of three counts of unlawfully driving someone else's vehicle. Thus, it is merely a technical defect that the verdict forms referenced section 666.5 and used the phrase "grand theft auto."

Accordingly, Garcia has forfeited his claim of lack of notice.

II

Effective Assistance of Counsel

Garcia contends that if we conclude his lack of notice claim is forfeited, trial counsel rendered ineffective assistance. We are not persuaded.

To demonstrate ineffective assistance, a criminal defendant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. On direct appeal, a finding of deficient performance is warranted where (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. (*People v. Johnsen* (2021) 10 Cal.5th 1116, 1165.) Where trial counsel's tactics or strategic reasons for challenged decisions do not appear on the record, the court must not find ineffective assistance of counsel on direct appeal unless there could be no conceivable reason for the acts or omissions. (*Ibid*.)

Here, where it appears counsel was not asked for his reasons and the record does not affirmatively disclose a lack of a tactical purpose, we agree with the People there is a conceivable reason for trial counsel agreeing to the "or driving" jury instruction that articulated the elements of Vehicle Code section 10851: counsel reasonably may have determined that the trial court would have exercised its discretion to accept amendments to the informations to allege that Garcia had taken or driven vehicles in violation of

Vehicle Code section 10851.[4] (Cf. *People v. Fernandez* (2013) 216 Cal.App.4th 540, 553-554 [no denial of due process when the trial court permitted the prosecution to amend the information to conform to trial evidence].) In other words, trial counsel could have concluded that objecting to the "taking *or* driving" jury instruction would have accomplished nothing more than merely prolonging the proceedings without changing the ultimate outcome. (*People v. Price* (1991) 1 Cal.4th 324, 387 [defense counsel does not render ineffective assistance of counsel by declining to make objections that counsel reasonably determines would be futile].)

Accordingly, this claim is not persuasive.

III

Section 1260

Section 1260 provides: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, . . . and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

The statute is pertinent here, because the People acknowledge that section 666.5 is not a substantive offense. The People maintain we can direct the clerk of the trial court to issue an amended abstract of judgment that adds citations to Vehicle Code section 10851 for the three section 666.5 convictions. Garcia's reply brief is silent on these issues.

The authority the People cite in support of their invitation to direct the clerk of the trial court to amend the abstract of judgment concerns an appellate court's correction of *clerical* errors in the trial court. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["a court has the inherent power to correct clerical errors in its records *so as to make these records reflect the true facts*" (italics added)].) But the abstract of judgment in this case

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[4] Garcia offers no direct response to the People's proposed hypothetical.

is not a result of *clerical* error. It accurately reflects what occurred in the trial court: Garcia was ostensibly charged with, convicted of, and sentenced to prison on three counts of violating section 666.5. But as explained above, and as Garcia appears to concede, the jury clearly manifested its intention to find him guilty of three counts of unlawfully driving someone else's vehicle, in violation of Vehicle Code section 10851.

Accordingly, while we have no duty to make arguments for Garcia (*People v. Abarca* (2016) 2 Cal.App.5th 475, 480, review granted Oct. 19, 2016, S237106), we believe it is proper and just to address this problem on direct appeal by *modifying* the ostensible section 666.5 convictions to Vehicle Code section 10851 convictions. (See *People v. Mitchell* (2011) 197 Cal.App.4th 1009, 1011-1013, 1016-1019 [holding a defendant's constitutional right to notice of the charges against him was violated when the trial court sentenced him on an offense he did not commit, with which he was not charged, and which he did not admit—first degree robbery *in concert*; but invoking § 1260 and modifying the sentence to what it would be for first degree robbery—the offense the defendant was charged with and admitted].)

Because we are remanding the matter to the trial court for a full resentencing, the trial court can ensure that the new abstract of judgment reflects the modified judgment.

IV

Sentencing

The parties agree the trial court erred by sentencing Garcia to an upper term absent Garcia's (a) stipulation to the aggravating facts the trial court relied on or (b) waiving a jury trial on those aggravating facts. (See *People v. Wiley* (2025) 17 Cal.5th 1069, 1076 [criminal defendants are entitled to a jury trial on *all* aggravating facts, other than the bare fact of a prior conviction and its elements, that expose them to imposition of a sentence more serious than the statutorily provided middle term].) The People maintain this error is harmless because a jury would have found true beyond a reasonable doubt

the aggravating facts the trial court relied on when imposing the upper term. We are not persuaded.

We cannot conclude beyond a reasonable doubt that a jury would have found true the facts underlying the aggravating circumstance that Garcia's "prior convictions as an adult . . . are numerous." (Cal. Rules of Court, rule 4.421(b)(2).) This aggravating circumstance rests on a somewhat vague and subjective standard, which makes it difficult "to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court." (*People v. Sandoval* (2007) 41 Cal.4th 825, 840.) For example, we cannot confidently say where the jury would have drawn the line for "numerous," how the jury would have weighed felonies or misdemeanors, or how the jury might have considered the passage of time and discounted older convictions. We are also mindful that we "cannot necessarily assume that the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury." (*Id*. at p. 839.) For example, had the defense told the jury more details about the offenses, the jury could have been more likely to count convictions as minor and thus less likely to add up to the "numerous" standard.

Having determined that the facts underlying one aggravating circumstance do not meet the standard for harmless error, we must vacate Garcia's sentence and remand for resentencing. (*People v. Wiley*, *supra*, 17 Cal.5th at p. 1091.)

This holding makes it unnecessary to consider Garcia's other appellate sentencing claims—that the trial court erred by failing to find that drug addiction was a mitigating circumstance or, alternatively, that trial counsel rendered ineffective assistance by failing to sufficiently make the argument. Because we are remanding for a full resentencing, these issues are rendered moot. Garcia will have the opportunity to raise any relevant arguments at his resentencing.

DISPOSITION

Garcia's convictions on three counts of violating Penal Code section 666.5 are modified to convictions on three counts of violating Vehicle Code section 10851, subdivision (a). The sentence is vacated, and the matter is remanded for a full resentencing. The judgment is otherwise affirmed.

/s/
BOULWARE EURIE, J.

We concur:

/s/
HULL, Acting P. J.

/s/
KRAUSE, J.