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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

Wael R. QAHHAZ,

Defendant and Appellant.

A130398

(Solano County Super. Ct.
No. VCR204881)

INTRODUCTION

Defendant Wael R. Qahhaz, a visitor in the 72-year-old victim's apartment, suddenly surprised her while she was preparing tea. He sexually assaulted her multiple times as they struggled throughout the apartment and she tried to escape from him.

A jury found defendant guilty of two counts of forcible penetration with a foreign object (Pen. Code, § 289) and found true certain enhancement allegations. The court found true defendant had suffered a prior serious felony conviction for making criminal threats. Defendant was sentenced to 67 years to life in prison. On appeal, defendant's arguments include claims of *Marsden*¹ error, denial of his right to testify, instructional error, evidentiary error, insufficiency of the evidence to prove the prior conviction, and abuse of discretion in denying a *Romero*² motion to dismiss the prior strike conviction. As we explain below, we reject defendant's contentions and affirm the judgment.

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

STATEMENT OF THE CASE

By amended information, defendant was charged with two counts of forcible sexual penetration with a foreign object on S.J. (Pen. Code, § 289, subd. (a)(1).)³ The information also alleged that defendant reasonably should have known that the victim was 65 years old or older, and that he committed the second offense during the commission of a first degree burglary with intent to commit sexual penetration. (§§ 667.9, subd. (a), 667.61, subds. (a) & (d).) Finally, the information alleged that defendant had a prior strike conviction. (§§ 667, subd. (a), 1170.12, subds. (a)-(d)/ 667, subds. (b)-(i).) Jury trial commenced April 12, 2010, and concluded April 19, 2010 with guilty verdicts and true findings on all charges and allegations.

On October 21, 2010, the court sentenced defendant to 67 years to life in state prison. Defendant timely appeals.

STATEMENT OF FACTS

In 2009, S.J. lived alone in a one-bedroom apartment located in a senior citizen housing complex in Vallejo. Defendant, whom she knew as Willy, also lived in the complex, and S.J. would see him around the complex and say hello to him. Defendant visited S.J. in her apartment twice in the two weeks before September 21. She told defendant she was 72, and defendant said he was 56. During both of those visits, defendant offered to rub her neck, but S.J. declined. There was no physical contact between them. Defendant was a one-legged amputee who used an electric wheelchair.

Prosecution Case

On September 21, 2009, between 5:00 and 5:30 p.m., defendant rang S.J.'s doorbell and asked her if he could come in. She was reluctant to let him in because she had been feeling sad, as September 21 is her deceased son's birthday. Defendant said he would stay just a few minutes, so she let him in.

S.J. was in the kitchen making tea when, all of a sudden, she felt herself being pulled back hard by the belt of her slacks. She fell into defendant's lap and both fell to

³ Unless otherwise indicated, all statutory references are to the Penal Code.

the floor as the wheelchair tipped over. S.J. was on her back and they “wrestled for a little bit.” Defendant “was trying to kiss me, and I was trying to keep my mouth closed, and I bit myself” on the lip. Defendant kept saying, “I wanna come, I wanna come,” while S.J. kept saying “Stop. Stop. Please, no.” Defendant pulled S.J.’s pants down and very “forceful[ly]” “inserted his hand into my vagina . . . one finger in the vagina and one in the anus.” Defendant kept his fingers inside her, “moving, moving” them for about half a minute. He cut her vagina with his fingernails, causing her to bleed and feel pain. He was very strong, much stronger than she was. At some point, defendant removed the shorts he was wearing. After penetrating her digitally, he put hand lotion from her kitchen counter on his penis and around her vagina. He was on top of her and his face was red and full of perspiration. S.J. punched him in the face.

Somehow, S.J. was able to get away from defendant by scooting backwards on her elbows and standing up. Her pants were around her knees, but she was able to get up and run to the bathroom in her bedroom. She noticed she was bleeding from the vagina and had blood spots on her underwear. Defendant followed her, hopping, and telling her to stop. She tried to shut the bathroom door and lock herself in, but defendant “was pushing on the door with his hands” and she was unable to lock the door. He left a handprint on the dress mirror hanging on the bathroom door.

Defendant pushed open the door, pulled her out of the bathroom, and hopped through the bedroom and living room back into the kitchen with her, where he pushed S.J. down to the floor. He then pulled her pants all the way down and again forcefully inserted his fingers into her vagina and anus, hurting her. This time, S.J. was able to crawl on her hands and knees back to the bedroom and lock the door.

S.J. stayed in her bedroom a long time because she never heard him leave. When she eventually came out and discovered he was gone, S.J. showered “to get clean.” She did not call the police, and was not going to tell anyone, because she “felt such shame and didn’t want it known around where I live.” However, when her daughter called her at approximately 10:00 p.m. and “she could tell there was something wrong,” S.J. told her daughter what had happened. S.J.’s daughter encouraged her to call the police. S.J.

called 9-1-1. The dispatcher was “kind of rude,” and that upset S.J. S.J. told the dispatcher she had not been penetrated because she “wanted [the dispatcher] to know, it was not with his penis, but with his fingers.” When the police arrived, she gave a statement to Officer Herndon. She gave the police the clothing she had on, and went to the hospital for an examination.

The police officers went to defendant’s apartment. Defendant answered the door while sitting in an electric wheelchair. Informed that the police were there to talk to him about the assault on S.J., defendant said he would come outside because he did not want to talk in front of his girlfriend. Defendant then got out of the wheelchair without difficulty and hopped outside, moving really well. Defendant denied assaulting S.J.

Defendant was taken to the hospital, where he had no trouble putting on a hospital gown, or hopping over to the examination table. After waiving his *Miranda*⁴ rights, defendant told police that he was 46 years old. He said S.J. had called him and invited him to come by to talk and buy some tea. He was at S.J.’s apartment for no more than two minutes and never touched or assaulted her. He had no explanation for her injuries. Defendant was arrested and his clothes were collected as evidence.

S.J. was examined by a nurse trained and qualified as an expert in sexual assault examinations. S.J. told the nurse what had happened. Her statement was consistent with what she told the police. The nurse observed an abrasion on S.J.’s lower lip, multiple sub-mucosal hemorrhages on her breasts, lacerations on her inner thighs along the panty line, and above that on one side an abrasion where some skin had been scraped off. There were bruises on S.J.’s forearms, wrists, and elbow, and she complained of pain in her right arm. In addition, the nurse noted a laceration on the posterior fourchet (the bottom portion of the vaginal area), and two abrasions on her hymen. The nurse took a saliva swab from S.J.

The same nurse examined defendant, collected his clothing, and took a saliva swab from him.

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

An expert in forensic DNA analysis and DNA statistics examined S.J.'s underwear and determined there was human blood on them. He examined defendant's shirt and determined that the blood stains on the right shoulder matched S.J.'s DNA profile. He also analyzed a swab from a mirror and determined that the DNA matched S.J.'s profile. There was also a trace amount of male DNA. According to the expert, fingerprints generally do not carry a lot of DNA, but cells in the vaginal vault do. He opined that the amount of DNA he found was consistent with someone putting a finger inside a vagina. There was not enough male DNA to establish a donor.

Defense Case

Defendant did not testify. The defense called as an expert witness a certified sexual assault nurse and forensic examiner who reviewed the findings made by the prosecution's sexual assault nurse examiner. According to the defense expert, there is no way to determine if an injury is caused by consensual or nonconsensual sex. She criticized the prosecution expert's documentation as confusing and conflicting, concluding that "there's a lot wrong with the way the documentation was done or not done." According to the defense expert, there were no abrasions or tearing on the hymen: at most there was redness. On the posterior fourchet she did see an area that was abraded. Abrasions are friction type injuries that are caused by rubbing. The posterior fourchet "is still called external genitalia. It's not actually into the vaginal canal." She did not see any bleeding associated with these injuries. She did not see any laceration of the posterior fourchet. The injuries on the "inner thighs" were actually on the gluteal fold and could have been caused by the elastic on the underwear. "Those areas were abraded and looked as if they could have had a little oozy-type bleeding going on."

The defense expert acknowledged that the injuries were consistent with digital penetration, but maintained that the injuries S.J. sustained could have been caused by consensual or nonconsensual sex. She testified that the decrease in hormones after menopause make the tissues in the genital area dryer, thinner and more fragile and, therefore, more susceptible to injury.

The defense also called as a character witness a woman who lived in the same apartment complex and had known defendant for two years. She described their relationship as “good friends.” He had been to her apartment many times and had always been a complete gentleman, never violent or threatening towards her, and very helpful when her car had broken down. She was not aware that defendant had been convicted of making felony criminal threats in 1997, but it did not change her opinion of him.

DISCUSSION

Marsden Error Analysis

Defendant argues that the court twice erred in failing to hold *Marsden* hearings, once during trial, and once postverdict. After examining the context in which defendant made his requests to fire his attorney, we conclude that the trial court did err, but any error was harmless beyond a reasonable doubt, as discussed below.

Marsden Motion During Trial

While defense counsel was giving her opening statement, defendant interrupted her to say, “Excuse me, Judge, I want to fire her please.” The following exchange then occurred:

THE COURT: “Sir, I want you to be quiet. Let your lawyer speak, please.

DEFENDANT: “Oh, my God, are you with me or against me?”

THE COURT: “Mr. Qahhaz, I want you to be quiet.

DEFENDANT: “I want to take the stand. I want to take the stand.

THE COURT: “Mr. Qahhaz, I want you to be quiet, all right?”

DEFENDANT: “I want to take the stand. This is my life.

THE COURT: “Sir—

DEFENDANT: “I have to explain to them everything.

THE COURT: “Sir, I want you to be quiet. Okay. Mr. Qahhaz, be quiet. Okay. Thank you very much, sir. You be quiet. You’ve got to behave yourself, Mr. Qahhaz, if you want to remain. If you don’t, I’m going to send you on out of here. So please relax. Thank you very much, sir. I know you don’t enjoy this, but just sit down. [¶] You go ahead, [Defense Counsel].”

After defense counsel concluded her remarks, a hearing was held outside the jury's presence during which the court admonished defendant at length about speaking out while trial was in session. Defendant tried unsuccessfully several times to interrupt the court. Eventually, the court permitted him to speak. Defendant stated: "When he said about the blood and stuff, there is never blood. And about the stand, I want to take the stand. I can, you know, I want to tell everybody, you know, what happened exactly." The court responded, "Well, you may take the stand," before continuing to admonish defendant about interrupting trial. The court then explained the order of trial concluding with: "At some point, [the prosecutor's] going to be done. And then, on your behalf, she can put on some testimony. That may include you. The two of you have to talk about that. I don't know what her advice to you is, but we'll cross that bridge when we get to it. But it ain't going to be today, and it probably won't be tomorrow." Trial resumed.

On the following day, before testimony resumed, defense counsel, the prosecutor, and the court discussed the court reporter's uncertified draft of defendant's previous day statement. No one but the court reporter and Detective Herndon had heard defendant say he wanted to fire his attorney.

After other matters were discussed, defendant was brought into the courtroom. The court said, "[O]ne of the things you said yesterday, among a lot of things you said, [is] that you wanted to fire your lawyer." After more discussion of other matters, the court asked defendant, "Did you want to fire her?" Defendant replied, "Just, I want her to swear in front of you that she protect me from her heart. *That's all.*" (Italics added.) The court went on to tell defendant that defense counsel had been in practice before the court for 20 years, was a good lawyer, ethical, and smart, and that juries seemed to like her. Defense counsel did not swear, but defendant did not say anything more when the court asked the prosecutor if he was ready to call his first witness.

Defendant argues that at this juncture the trial court had a duty under *Marsden, supra*, 2 Cal.3d 118, to allow defendant to "voice his dissatisfaction with his trial counsel" and conduct a hearing outside the presence of the prosecutor, where defendant "could speak freely about the facts of the case." We agree with defendant that *Marsden*

imposes on the trial court a duty to afford the defendant “the opportunity to tell the trial judge the reasons underlying his belief that his appointed attorney was providing ineffective assistance of counsel.” (*People v. Sanchez* (2011) 53 Cal.4th 80, 87 (*Sanchez*)). This is so because “the trial court cannot thoughtfully exercise its discretion in this matter without listening to his reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant’s request for substitution of attorneys unless he is cognizant of the grounds which prompted the request.” (*Marsden, supra*, 2 Cal.3d at p. 123.) However, this duty must be triggered by something that gives the court “ ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ ” (*Sanchez, supra*, 53 Cal.3d at p. 90. See also *People v. Martinez* (2009) 47 Cal.4th 399, 421 [no duty to conduct a *Marsden* inquiry on court’s own motion].)

In this case, however, sometime between the time defendant interrupted defense counsel’s opening statement to say he wanted to fire her, and the next day, defendant evidently changed his mind. During the hearing after defense counsel’s opening statement, defendant talked about the blood evidence and his desire to explain to the jury what really happened, but he did not express dissatisfaction with his attorney, or repeat his request to fire her, or ask for substitute counsel. Similarly, when the court asked him the next day whether he did want to fire his attorney, he replied, “Just, I want her to swear in front of you that she protect me from her heart. *That’s all.*” (Italics added.) We note defendant had previously made a *Marsden* motion to fire his first attorney and the court had held a *Marsden* hearing.⁵ The record here demonstrates defendant knew how to indicate he wanted substitute counsel, and the trial court did afford defendant two opportunities—one immediately after defense counsel’s opening statement, and one the next day—to explain why he wanted to fire his attorney. At those points in time, defendant gave no indication he wanted to fire her and, when asked directly whether he

⁵ The court denied that *Marsden* motion and proceedings were suspended after the trial court declared a doubt about defendant’s competency. When proceedings resumed two and a half months later, defendant was represented by different counsel.

did want to fire her, he effectively said he did not. Given that defendant did not give the court any clear indication at either point in time that he wanted to substitute attorneys, the court had no further obligation to hold a *Marsden* hearing to probe defendant's reasons for having apparently felt differently about his counsel during her opening statement.

Postconviction Marsden Motion

The jury returned its verdicts on April 19, 2010. On May 13, 2010, the day defendant's *Romero* motion was scheduled to be heard, defense counsel "wanted to make a record as to whether the court thought it prudent to appoint counsel to determine if there is a new trial motion" on the issue of her own ineffective assistance. The court did not appoint other counsel, and continued the matter to May 20.

On May 20, trial counsel filed a motion to continue sentencing. In her declaration in support of the motion, she stated that on May 13 she informed the court that defendant was requesting a *Marsden* hearing so that he could request new counsel and a new trial, but the court, outside defendant's presence, declined to hold a hearing that day. On defendant's behalf, she was renewing his request for a *Marsden* hearing. She averred that defendant had refused to meet with her since the verdicts were returned, and she "believe[d] the relationship with Mr. Qahhaz cannot be repaired until he has had an opportunity to air his grievances with the court and hear the court's analysis of my legal assistance at trial."

Both trial counsel and proposed interim counsel appeared in court on May 20. Although it was the last day for sentencing without a time waiver, defendant was not brought to court from the jail. Trial counsel reminded the court defendant wanted to be heard on his *Marsden* motion, and urged the court to appoint someone to look into filing a motion for new trial. When the court asked counsel if there was a "viable issue" that would give rise to "an affirmative duty to appoint somebody," trial counsel replied: "Let me just offer this, there were a lot of negotiations with him over whether he would testify. Ultimately, he decided not to. And now I think he regrets that decision. So his issue is over my advice and maybe another lawyer looking at that might think it was ill advised to tell him not to testify." The court appointed Ms. Barton and the conflict defender's office

“for the sole purpose of viewing the record and/or discussions with the defendant and/or [trial counsel], or anyone, for a motion for a new trial based on ineffective assistance of counsel.”

On May 21, 2010, the court confirmed Ms. Barton’s appointment “to look into [a] possible motion for new trial.” Defendant and both trial and interim counsel appeared in court on that day. Trial counsel waived time for sentencing on defendant’s behalf, and sentencing was continued to July 1 to permit her to file a sentencing motion. Defendant did not voice an opposition to the dual counsel procedure.

On July 1, defendant appeared in court with trial counsel. Ms. Loy, standing in for Ms. Barton, was also present. As soon as trial counsel started to speak, defendant apparently became agitated and interrupted her, stating “*Marsden* motion, please. Please, Judge, on her,” meaning trial counsel. Defendant was removed from the court room to calm down and the matter was passed. When proceedings resumed, the court asked all counsel: “[G]enerally when a defendant brings a *Marsden* motion, it’s important that the court address that and listen to the defendant and so forth. But would that apply at this time?” Trial counsel stated, “I think not because the issue is being looked into. He has other counsel right now. . . . So unless he were bringing it against interim counsel, I don’t think so.” She opined that if, after looking into the matter, interim counsel decided not to file a motion for new trial, at that point trial counsel would still be defendant’s attorney and “[a]t that time, I think his motion would have merit.” The prosecutor agreed. The court continued sentencing for three weeks to allow interim counsel to prepare a new trial motion.

On July 23, 2010, both trial counsel and interim counsel appeared. Interim counsel indicated she had spoken with defendant that morning and that trial counsel was “the source of most of [defendant’s] problems when he comes out here.” She indicated she was almost ready to file the new trial motion, but that she and defendant were having “a little disagreement.” She asked to be appointed for all purposes, not just for the limited purpose of filing a new trial motion, because defendant wanted trial counsel off the case for all intents and purposes. When asked by the court how she and defendant

were “getting along,” trial counsel replied that she and defendant had “no relationship” and there was “no communication.” Trial counsel had no objection to the court appointing interim counsel for all purposes. The court then relieved trial counsel, appointed interim counsel for all purposes, called defendant into the courtroom and informed him of the substitution of attorneys for all purposes. Defendant made no comment. The court continued the matter to September 3 for hearing on the new trial motion.

On September 3, the hearing on the new trial motion was continued to September 30. On September 30, however, new counsel informed the court that the new trial motion was ready to file except that defendant was refusing to sign the declaration in support of the allegations of ineffective assistance of counsel made in the motion. She represented that defendant did not disagree with the contents of the declaration. “He disagrees that those are the only bases, and there’s a variety of other issues that I have explored that, as the attorney, I would say are not valid.” She asked the court to appoint an *additional* local defense attorney to assist her in working with defendant. The court appointed the new attorney on that limited basis and continued the matter to October 7, 2010. On that date, however, defendant still had not signed the declaration, and he now wanted the new attorney to visit him in jail, read the trial transcript, and give his opinion. The prosecutor objected to putting off the sentencing further. The court continued the matter for two weeks for judgment and sentence.

As of October 21, 2010, defendant continued to refuse to sign the declaration in support of the new trial motion. No new trial motion was ever filed. The court proceeded to hear defendant’s *Romero* motion, which had been filed by trial counsel. Current counsel submitted the motion on the pleadings. The court denied the *Romero* motion and sentenced defendant.

Defendant apparently argues that the court erred by failing to hold a *Marsden* hearing on July 1, 2010. That was the day on which “the court, with only the input of the counsel at whom the *Marsden* was directed, argued against her being relieved as counsel of record, citing to the existence of counsel who had been appointed to consider filing a

new trial motion.” In our view, if the court erred, any error was harmless beyond a reasonable doubt, as we now explain.

“[A]t any time during criminal proceedings, if a defendant requests substitute counsel, the trial court is obligated, pursuant to [the] holding in *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney.” (*Sanchez, supra*, 53 Cal.4th at p. 90.) It is clear now, as it may not have been in 2010, that “if the defendant makes a showing during a *Marsden* hearing that his right to counsel has been ‘ “substantially impaired’ ” ’ [citation], substitute counsel must be appointed as attorney of record *for all purposes*. [Citation.] In so holding, we specifically disapprove of the procedure adopted by the trial court in this case, namely, the appointment of a substitute or ‘conflict’ attorney solely to evaluate whether a criminal defendant has a legal ground on which to move to withdraw the plea on the basis of the current counsel’s incompetence.” (*Ibid.*, italics added.) We assume that the Supreme Court’s reasoning in the *Sanchez* decision applies to trials, as well as pleas, and that it would equally disapprove the practice used in this case of appointing substitute counsel for the sole purpose of evaluating whether a criminal defendant has a legal basis for bringing a new trial motion on the grounds that trial counsel was incompetent.

According to trial counsel’s declaration in support of a request to continue sentencing from May 20 to June 25, defense counsel first informed the trial court of defendant’s latest *Marsden* motion on May 13. According to counsel’s declaration, defendant was not present when she informed the court of his request for a *Marsden* hearing, or when she made an “on the record” request for appointment of interim counsel, which the trial court denied.⁶ The record on appeal is not clear on whether defendant was brought to court from jail on May 13. Obviously, if defendant was not present in the court house, the court could not have held a *Marsden* hearing on May 13.

⁶ The record suggests defendant was scheduled to appear the following day, May 14, for sentencing, but that the court vacated that date and continued sentencing to May 20.

Any failure to hold a *Marsden* hearing on May 13 was rendered moot on May 20, when the trial court *did* appoint substitute counsel, albeit for the limited purpose of looking into a new trial motion based on trial counsel's ineffective assistance. The record is clear defendant was not brought into court from the jail that day and, therefore, no *Marsden* hearing could have been held. But by appointing counsel on the basis of trial counsel's comments, the trial court gave defendant almost everything that he could have gotten if the court had held the hearing and granted his *Marsden* motion.

Instead of appointing interim counsel on the basis of trial counsel's statements in court and in her motion to continue, the court should have held a *Marsden* hearing to allow defendant to air his complaints about trial counsel. Had the court done so, it might have concluded that “ ‘ “ ‘failure to replace counsel would substantially impair the defendant's right to assistance of counsel.’ ” ’ [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when ‘the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result’ [Citations.]” (*People v. Myles* (2012) 53 Cal.4th 1181, 1207, quoting *People v. Clark* (2011) 52 Cal.4th 856, 912. See also *People v. Robles* (1970) 2 Cal.3d 205, 215 (*Robles*) [“in a few cases the disagreement as to whether a defendant should testify may signal a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel.”].) In either case, the court would have been obligated under *Marsden* to appoint substitute counsel for all purposes, not a limited purpose, at that juncture.

It is true that on July 1, the court missed another opportunity to hold a *Marsden* hearing which might have led to interim counsel's appointment for all purposes. However, the court's error in appointing interim counsel for a limited purpose instead of all purposes was remedied for once and for all on July 23, when the court did relieve trial counsel and appoint Ms. Barton for all purposes. From this point forward, defendant had achieved all that he could have from *Marsden* hearings on May 13, May 21, or July 1, 2010: substitute counsel, for all purposes.

Defendant acknowledges that Ms. Barton represented him for all purposes, including sentencing, from that point forward. However, he argues he was prejudiced because she was “appointed as [defendant’s] attorney for all purposes *just shortly* before [defendant’s] sentencing, and in fact made no arguments on [defendant’s] behalf” (Italics added.) Sentencing finally took place October 21, 2010, nearly three months after Ms. Barton’s appointment for all purposes was made. Defendant did not express any desire to fire Ms. Barton, and the trial court did not have a sua sponte duty to “ascertain whether the relationship between Barton and [defendant] was beyond repair.” Nor has defendant demonstrated on this record that Ms. Barton rendered ineffective assistance of counsel in connection with the sentencing hearing or the decision not to file a motion for new trial. In any event, the trial court even acceded to Ms. Barton’s request for the appointment of yet another attorney to help her deal with defendant. Any *Marsden* error was, on this record, harmless beyond a reasonable doubt. (*Sanchez, supra*, 53 Cal.4th at p. 92.)

Defendant’s Right To Testify Was Not Abridged.

Defendant next asserts that his right to testify was abridged. In his opening brief, he apparently asks us to infer from the record that he was prevented from testifying by his attorney. In his reply brief he argues that “[t]he record discloses a well-defined conflict between counsel and [defendant], which imposed a duty on the trial court to admonish and secure a waiver.” “[U]nder these distinct circumstances, . . . the trial court has a duty to inquire as to the defendant’s waiver of his right to testify.” We disagree with both arguments.

No one disputes that “the right to testify in one’s own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury. [Citation.] The defendant’s insistence upon testifying may in the final analysis be harmful to his case, [fn. omitted] but the right is of such importance that every defendant should have it in a criminal case. [N]ormally the decision whether a defendant should testify is within the competence of the trial attorney,” but where a defendant insists that

he wants to testify, “he cannot be deprived of that opportunity.” (*Robles, supra*, 2 Cal.3d at p. 215.)

However, it is also well-settled that a trial court does not have a duty to advise a defendant of his right to testify, or obtain an explicit waiver of the right to testify, “unless a conflict with counsel comes to its attention.” (*People v. Enraca* (2012) 53 Cal.4th 735, 762 (*Enraca*)). “ “[A] trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel’s trial strategy; otherwise, the judge would have to conduct a law seminar prior to every criminal trial.’ ” [Citation.] When the record fails to disclose a timely and adequate demand to testify, “a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.” [Citations.]’ ” (*Enraca, supra*, 53 Cal.4th at pp. 762–763.)

We apply these rules to the record before us. The record does not demonstrate trial counsel prevented defendant from testifying. Nor does it show that an express conflict about defendant’s testifying arose between the defendant and counsel, that should have been brought to the court’s attention in a timely fashion, i.e., before the window of opportunity for testifying closed. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1331–1333; *People v. Frierson* (1985) 39 Cal.3d 803, 818, fn. 8 [“Because an attorney’s authority to control the trial proceedings generally includes the power to decide when and if particular evidence should be introduced, there would ordinarily be no reason—in the absence of an explicit indication of a conflict—for a trial court to inquire into the defendant’s concurrence with his attorney’s actions. Thus, nothing in this opinion is intended to suggest that—in the absence of such an express conflict—a court is required to obtain an on-the-record, personal waiver from the defendant whenever defense counsel chooses to rest without putting on a defense.”])

On the contrary, the record shows that after defendant’s outburst during trial counsel’s opening statement, there was a recess during which defendant reiterated that he wanted to “take the stand. . . . I want to tell everybody, you know, what happened

exactly.” The court advised defendant he could take the stand, after the prosecution presented its case and he conferred with his attorney. The next day, before defendant was brought into the court room, counsel again discussed defendant’s desire to testify with the court. The court advised counsel, “[Y]ou know, he’s got an absolute right to testify,” to which counsel replied, “Absolutely.” The court acknowledged that “a defense lawyer has an affirmative obligation, out of the presence of the jury, to inform the court that, ‘Hey, I’m recommending for whatever reason that he not testify, and I’ve told him this, but he doesn’t want to follow my advice and he wants to testify.’ ” The court suggested that if it came to that, “he can get up here, be sworn and make a narrative. . . . [¶] You don’t have to ask him any questions” Trial counsel indicated that, if necessary, she was planning to do just that, but that she and defendant were still in conversation about what he wanted to do. The court observed that “sometimes defendants will tell you ‘I’m going to testify,’ and then when push comes to shove, and they’ve got to get in front of that jury, they go, ‘Nah, I don’t want to testify.’ Who knows?” Trial counsel responded, “That would be nice.”

When defendant was brought into the court room, the court again addressed defendant’s right to testify, saying: “[Y]ou have a right to do that, but you should only make that decision after you talk with your lawyer and think about whether you should or not” The court went on to explain that defendant would be cross-examined, and what that meant. Defendant told the court that “[t]he DNA clear me. . . . [¶] This woman—I just—I want to say something, like I was too nice to her. She think like I love her or something, and when she tried to do this to me, I back off from her.” The court responded that it understood such was his position, and that he wanted to tell the jury that. “[Y]ou’ll have an opportunity. But we do things in order here, and it’s not time for that yet.” Defendant said, “Okay.”

Defendant did not bring up his desire to testify again during trial.⁷ When the prosecutor rested his case, and the opportunity to testify arose, defendant did not say anything. When defense counsel announced that she had no further witnesses, defendant did not say anything. Counsel did not at any time inform the court that she and defendant had an unresolved conflict about whether he should testify. On this record, we see no basis to infer that defendant was prevented from testifying, or that an express conflict arose between the defendant and counsel over the defendant's right to testify, or that trial counsel simply failed to bring such a conflict to the court's attention in a timely fashion. So far as the record shows, defendant freely waived his right to testify on counsel's advice. The fact that after the verdict defendant apparently had a change of heart and decided he should have testified does not demonstrate that error occurred before the window of opportunity for testifying closed. We find that defendant's right to testify was not abridged, and the trial court did not have a sua sponte duty to obtain an on-the-record waiver of that right from defendant.

The Trial Court Did Not Err In Failing To Instruct On Battery And Sexual Battery As Lesser Included Offenses Of Sexual Penetration With A Foreign Object.

Defendant argues that the trial court erred prejudicially when it declined to instruct on battery (§ 242) as a lesser included offense of sexual penetration with a foreign object. Trial counsel's position was that a battery instruction was warranted because her expert would testify that S.J.'s physical injuries were not inconsistent with a consensual act. "Perhaps, there's consent to a certain point and then there's a battery. He did grab her arms." The court tentatively denied trial counsel's request, but agreed to wait until the expert testified to make its final ruling. In the end, the instruction was not given. On appeal, he also argues the court should have instructed sua sponte on sexual battery

⁷ During the discussion on instructions, the court asked if defendant was going to testify. Trial counsel replied that she hoped not; "because we were kind of moving in the right direction, we've had a lot of discussion about it," and she was hoping to have a few moments to talk "about that." Barring that, she asked to be allowed "to make [a] record as to my recommendation outside the presence of the jury," apparently, if defendant decided to testify against her advice.

(§ 243.4) as a lesser included offense of sexual penetration with a foreign object. We disagree.

An offense is a lesser included offense of the charged offense if (1) the statutory elements of the greater offense, or (2) the facts alleged in the accusatory pleading, include all the elements of the lesser offense so that the greater cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117; *People v. Reed* (2006) 38 Cal.4th 1224, 1227–1228.) We will assume for the purposes of addressing defendant’s argument that both simple battery and sexual battery are lesser included offenses of sexual penetration with a foreign object. (See CALCRIM No. 1045, Bench Notes [listing § 242, but not § 243.4, as a lesser included offense]. We, nevertheless, disagree that instructions on these crimes as lesser included offenses were warranted.

Whether or not the defendant asks for an instruction on a lesser included offense, “[i]nstruction on a lesser included offense is required only when the record contains substantial evidence of the lesser offense, that is, evidence from which the jury could reasonably doubt whether one or more of the charged offense’s elements was proven, but find all the elements of the included offense proven beyond a reasonable doubt.” (*People v. Moore* (2011) 51 Cal.4th 386, 408–409.) Put more simply, substantial evidence in the context of lesser included offenses is evidence “from which a rational jury could conclude that the defendant committed the lesser offense and that he is not guilty of the greater offense.” (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) A corollary of this rule is that “if there is no proof, other than an unexplainable rejection of the prosecution’s evidence, that the offense was less than that charged, such instructions [on lesser included offenses] shall not be given.” (*People v. Friend* (2009) 47 Cal.4th 1, 51–52.) In such a case, the jury is properly left with an “all or nothing choice”—either the defendant committed the greater offense, or he committed no offense at all. (*Id.* at p. 52.)

There is a logical inconsistency in defendant’s argument. The evidence adduced at trial was such that a reasonable jury could not have found that defendant committed only the lesser offenses of battery or sexual battery, but did not commit the greater offense of sexual penetration with a foreign object, other than by inexplicably rejecting

S.J.’s testimony that defendant forcibly sexually assaulted her against her will, while still accepting her testimony that he inflicted injury on her. The defense expert’s testimony, by itself, did not support instructions on battery or sexual battery as lesser included offenses. She testified that such injuries as those sustained by S.J. *could have been* inflicted during consensual sex. But there was no evidence presented from which a rational jury could have inferred that the injuries *actually were* inflicted during consensual sex. Either the crime of sexual penetration with a foreign object was committed, or no crime at all was committed. There was no evidentiary basis, substantial or otherwise, for lesser included offense instructions, and the trial court did not err by refusing to instruct on battery, or failing to instruct sua sponte on sexual battery.

The Trial Court’s Instruction On Burglary Was Correct.

In this case, defendant was charged under section 667.61 with committing the sexual offense alleged in count two during the commission of a first degree burglary. The jury was accordingly instructed that if it found defendant guilty of the second count of sexual penetration with a foreign object, it was then to decide whether defendant entered an inhabited room within an inhabited house with the intent to commit sexual penetration by force or fear. The jury’s affirmative finding triggered a sentence of 25 years to life for the underlying crime of sexual penetration with a foreign object. (§ 667.61, subs. (a), (c)(5) & (d)(4).)⁸

⁸ Penal Code section 667.61 provides in relevant part: “(a) [A]ny person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life.

“(c) This section shall apply to any of the following offenses: [¶] . . . [¶] (5) Sexual penetration, in violation of subdivision (a) of Section 289.

“(d) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (4) The defendant committed the present offense during the commission of a burglary of the first degree, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).”

In a variant of the previous argument, defendant contends the trial court had a sua sponte duty to instruct the jury that entry into an inhabited room of an inhabited house with the intent to commit a *misdemeanor* offense—such as battery or sexual battery—does not constitute a first degree burglary. Defendant argues: “[T]here was substantial evidence supporting instruction on lesser included offenses of battery [and] sexual battery. The jury should have also been instructed on the possibility that [defendant’s] intent upon entry in S.J.’s bedroom was to commit a misdemeanor sexual battery.” For the reasons explained above, we have rejected the argument that there was substantial evidence to support instruction on the misdemeanor offense of sexual battery. For those reasons, there was also insubstantial evidence to support an instruction on entry with intent to commit a misdemeanor and we reject defendant’s argument.

The Trial Court Did Not Abuse Its Discretion In Permitting The Prosecutor To Ask Defendant’s Character Witness If She Knew Of Defendant’s Prior Conviction For Making Criminal Threats.

Defendant argues that the trial court abused its discretion under Evidence Code section 352 by permitting the prosecutor to ask defendant’s character witness, Mary Carter, whether she was aware that defendant had been convicted of making felony criminal threats in 1997, and if it affected her opinion of him. We disagree.

Prior to Ms. Carter’s testimony, trial counsel argued, unsuccessfully, that defendant’s conviction “ha[d] no bearing whatsoever to the nature of this case” because it was 14 years old, the crime was committed when he was much younger, and “it was sort of related to” a former girlfriend. The trial court ruled: “If you put on the character evidence and put his reputation for normal contact with women and nonviolence and he’s a good guy, I think the D.A. can ask that question in good faith. So I’m going to allow it. On the other hand, if your client testifies, I’m not going to allow him to be impeached with the prior conviction in that regard, because I think it’s too remote in that regard.”

During direct examination of Ms. Carter, defense counsel asked her if she was aware of defendant’s conviction, and if it changed her opinion of him. Ms. Carter replied she was not aware, but that it did not change her opinion of him; he had never been

threatening to her or caused her fear. On cross-examination, the prosecutor then asked Ms. Carter, “And so knowing what [trial counsel] just talked to you about, it would not change your opinion of Mr. Qahhaz to know that in 1997, he was convicted of felony criminal threats?” Ms. Carter replied, “No. Because he probably lost his temper with someone and said a whole bunch of stuff he shouldn’t have said and didn’t mean. . . . [I]f it had come up, I probably would have teased him about it or messed with him about it losing his temper and talking crazy.” The jury was subsequently instructed on character evidence with CALCRIM Nos. 350 and 351.⁹

The court did not err in permitting the type of examination and cross-examination that occurred here. “When a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness’ testimony. [Citations.] In asking such questions, the prosecutor must act in good faith and with the belief that the acts or conduct specified actually took place. [Citations.] The rationale allowing the prosecution to ask such questions (in a ‘have you heard’ form) is that they test the witness’ knowledge of the defendant’s reputation.” (*People v. Wagner* (1975) 13 Cal.3d 612, 619.) However, “ [i]f allowing these questions and answers would create a substantial danger of undue prejudice to the defendant, the trial court has

⁹ CALCRIM No. 350, as given below, states: “You have heard character testimony that the defendant is a person that she believes has normal non-violent relationships with older women in the community where he lives. [¶] You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt. [¶] Evidence of the defendant’s character for having normal non-violent relationships with older women can by itself create a reasonable doubt. However, evidence of the defendant’s good character may be countered by evidence of his bad character for the same trait. You must decide the meaning and importance of the character evidence.”

CALCRIM No. 351, as given below, states: “The attorney for the People was allowed to ask defendant’s character witness if she had heard that the defendant had engaged in certain conduct. These ‘have you heard’ questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to evaluate the meaning and importance of the character witness’s testimony.”

the discretion to preclude them under Evidence Code section 352.’ ” (*People v. Clair* (1992) 2 Cal.4th 629, 683.)

Defendant argues that the trial court’s ruling permitting the challenged questions was an abuse of discretion because it was illogical for the court to rule that the prior conviction was too remote to be relevant to defendant’s credibility if he testified, but not too remote to be relevant to the character witness’s opinion; the prior conviction concerned a male victim who was “sort of related to” defendant’s former girlfriend and, generally speaking, evidence of bad character is “recognized as being highly prejudicial and inflammatory.” We are not persuaded that the trial court abused its discretion.

At the outset, we note that “a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352.” (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) Here, the record shows all of the factors argued on appeal were brought to the attention of the trial court. Furthermore, the court’s comments indicate it appreciated the difference in potential prejudicial effect between permitting prior conviction evidence for impeachment of the defendant, and permitting it for the limited purpose of testing the basis of a character witness’s good opinion of the defendant for a particular character trait. The court heard argument from both sides before it ruled and, so far as this record shows, carefully considered defendant’s objection and weighed the probative value of the questions and probable answers against their potential for prejudice. The trial court also minimized that potential by instructing the jury with CALCRIM Nos. 350 and 351. No error appears.¹⁰

The Trial Court’s Finding That Defendant’s Prior Conviction Was A Felony Is Supported By Substantial Evidence.

Defendant was sentenced to prison for 67 years to life, consisting of the middle term of six years for count one, doubled to 12 years under the Three Strikes law, plus 25

¹⁰ Since we find no error under state law, we also reject defendant’s argument that the court’s ruling had the additional legal effect of violating his due process rights. (*People v. Partida* (2005) 37 Cal.4th 428, 431.)

years to life for count two, doubled to 50 years to life under the same law, plus a five-year enhancement for the prior serious felony conviction under section 667, subdivision (a). Both the strike and the enhancement were based on a prior felony conviction from 1997 for a violation of section 422, a “wobbler,” that is, an offense that is punishable as either a felony or a misdemeanor. The prior felony conviction allegation was found true following a court trial. On appeal, defendant argues the court’s finding that he was convicted of a felony is not supported by substantial evidence because he “qualified to have this prior declared a misdemeanor, if in fact it was not done.”

Defendant does not dispute that the record before the trial court demonstrated that he pleaded no contest to a felony violation of section 422. Rather, defendant’s claim, so far as the record developed below shows, is that his conviction was a misdemeanor for all purposes because imposition of sentence was suspended and he was placed on probation with the promise that “[u]pon successful completion of probation and proper filing of motion, charge may be reduced to a misdemeanor pursuant to PC 17(b).”

His argument is based on section 17, subdivision (b)(3), which provides, in relevant part: “(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison . . . or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.” According to defendant, “even though the conviction was termed a felony at the time of the probation grant, the statute nevertheless provides that under the circumstances presented [here], that it will be treated as a misdemeanor for all purposes[] [i]nasmuch as there is no evidence that [defendant] did not successfully complete his probation”

Defendant also relies on section 667, subdivision (d)(1) which defines a prior felony and provides in relevant part: “The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed *unless*

the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

[¶] (A) The suspension of imposition of judgment or sentence.”

Even if we assume section 667, subdivision (d) was designed to exempt wobblers sentenced as misdemeanors from being treated as strikes, that statute does not assist defendant. In his case, the initial sentence did *not* automatically convert the felony to a misdemeanor. On the other hand, at the initial sentencing, the court suspended imposition of sentence, a disposition which, under section 667, subdivision (d) did *not* affect the determination that the prior conviction was a felony.

Finally, defendant cites *People v. Feyrer* (2010) 48 Cal.4th 426 (*Feyrer*) as supportive of his position. However, *Feyrer* supports the view that, except in the situation where a wobbler offense is sentenced as a misdemeanor at the initial sentencing, the reduction of a felony to a misdemeanor upon successful completion of probation does not affect the status of a felony under the Three Strikes law. Discussing section 667, subdivision (d) quoted above, the *Feyrer* court observed: “In requiring that a ‘serious felony’ or a ‘violent felony’ be the basis for a ‘prior felony conviction’ qualifying as a strike, the Three Strikes statutes also specify that ‘[t]he determination of whether a prior conviction is a prior felony conviction for purposes of [the statute’s relevant provisions] shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor.’ (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1), italics added.) Nor is that determination affected by dispositions such as the suspension of imposition of a sentence or suspension of execution of a sentence. [¶] In the present case, the prosecutor, by obtaining defendant’s plea of no contest to the offense of assault by means of force likely to produce great bodily injury, *and* his admission of the allegation of inflicting great bodily injury, ensured that defendant’s current conviction would thus qualify as a ‘prior felony conviction’ within the meaning of the Three Strikes law, in the event defendant were to commit and suffer conviction of any felony in the future,

regardless of the eventual disposition of the conviction in the present case. . . .” (*Feyrer, supra*, 48 Cal.4th at pp. 442–443, fn. 8.) Adverting to this comment later in its opinion, the court again observed that “section 17, subdivision (b)(3) authorizes a trial court to reduce a wobbler offense from a felony to a misdemeanor and thus enable a defendant to avoid many—but not all—of the consequences of his or her conviction, notwithstanding vacation of the plea and dismissal of the charges pursuant to section 1203.4. It is evident that the court’s reduction of such an offense will not alter the status of the offense as a prior felony conviction for purposes of the Three Strikes law (see, *ante*, fn. 8) in the event the defendant were to commit a felony offense in the future.” (*Id.* at p. 444, italics added.) We, therefore, conclude that even if defendant’s prior felony conviction had been later reduced to a misdemeanor pursuant to section 17, subdivision (b)(3), that disposition would not have changed the status of the conviction from a felony to a misdemeanor for the purposes of the Three Strikes law. Therefore, the prosecution was not required to prove that defendant’s conviction had not undergone reduction, and the evidence was sufficient to prove that defendant suffered a felony conviction that qualified as a strike and a serious felony pursuant to sections 667/1170.12.¹¹

The Trial Court Did Not Abuse Its Discretion By Denying Defendant’s Motion To Strike The Prior Felony Conviction.

Defendant argues that the trial court abused its discretion in denying his motion to dismiss his prior serious felony conviction for the purposes of the Three Strikes law. (*Romero, supra*, 13 Cal.4th 497.)¹² He contends the court (1) “relied on the wrong standard in exercising its discretion” by “engaging in a weighing of factors regarding the current crime”; (2) “overlooked the fact that [defendant] had not had any prior criminal conduct since the prior conviction”; and (3) “completely overlooked the records relating to the prior conviction that suggested that it was in fact actually a misdemeanor,” thereby

¹¹ In fact, as will be discussed in connection with defendant’s next argument, the appellate record establishes that defendant’s prior was never reduced to a misdemeanor.

¹² Defendant through counsel made two *Romero* motions, one at the outset of trial and one at the time of sentencing. From the overall tenor of defendant’s argument, we understand his challenge on appeal to be limited to the second, posttrial motion.

acting “under an erroneous view of the scope of its power to dismiss pursuant to section 1385.”

“[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)). “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ ” [Citations.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376–377.)

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question 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 scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) “Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Carmony, supra*, 33 Cal.4th at p. 378.) We now apply these principles to the case at hand.

At the sentencing hearing held on October 21, 2010, the trial court indicated it had reviewed the probation report, the *Romero* motion filed by prior counsel, the prosecutor's opposition to the *Romero* motion, and was familiar with the facts of the case, having been the trial judge. The court ruled: “[N]umber one, I don’t think the interest of justice would be served by granting the motion. [¶] The current offense is obviously—just the charge itself, but the underlying facts of the case, in my view, are pretty much aggravated. Basically, the defendant was invited into the home of the soon-to-be victim and, you know, she was a pretty nice person and was not close with the defendant, but was acquainted with him, and he’d been in her home before. That’s my memory. And he took advantage of a position of trust and sexually assaulted her on two separate occasions. [¶] I think that Mr. Qahhaz clearly falls within the spirit of the three strikes laws. I don’t think there’s significant mitigating evidence regarding the defendant’s background that would support a lesser sentence, and so I’m going to deny the *Romero* motion.”

The probation report supports the trial court’s conclusion that there was no significant evidence regarding the defendant’s background to support a mitigation of the sentence. According to the report, in an in custody interview with the probation officer, defendant denied any wrong doing, indicating that the victim had tried to seduce him and he had spurned her advances. He believed she lied about what occurred because he rejected her. He denied there was any forensic evidence against him and believed he was convicted because both of his attorneys were biased against him.

In 1990, by his own admission, defendant was convicted of theft for stealing alcohol to self-medicate for pain. Between 1993 and 1996, defendant incurred misdemeanor convictions for contempt of court, stalking, violation of a protective order, and a felony conviction for making criminal threats in 1996. He blamed the contempt, stalking, and protective order violation on his ex-girlfriend, and denied threatening her boyfriend.

An Israeli and possibly Jordanian citizen, defendant was originally in the U.S. legally, but had been ordered deported and was being held under an immigration hold.

He had no wife, children or parents living in the U.S. Some of his six younger siblings lived in the U.S. He had been employed as a car mechanic, but since the accident in 1998 that resulted in the amputation of his leg, he had subsisted on SSI disability benefits. His competency to stand trial had been evaluated by three doctors. Two found no mental health condition, and one gave him a tentative diagnosis of “paranoid personality disorder with delusions.” The probation report concluded there were no mitigation factors.

Additional facts noted in prior counsel’s declaration in support of the motion to dismiss the prior strike conviction did not enhance the mitigation picture. According to prior counsel, “[t]he mitigating circumstances of this incident are that Mr. Qahhaz, in broad daylight . . . from a distance of 25 feet while sitting in his car, threatened to kill a 35 year old male grocery store owner [who was] standing in front of his store. At the time of this threat, [the store owner] had a restraining order against Mr. Qahhaz. Mr. Qahhaz did not, while making this threat, personally use or display a weapon[] and he did not have any actual physical contact with [the store owner].” Defense counsel also averred that defendant had “successfully completed probation on this prior conviction and it expired without any violations occurring, *but prior to a reduction to a misdemeanor pursuant to either Penal Code § 17 or 1203.2.* This information was verified by the undersigned during a . . . telephone conversation with [the] Court Supervisor, Criminal Division, San Francisco Superior Court.” (Italics added.)

According to counsel, defendant had dual Israeli and U.S. citizenship, based on a short-lived marriage. He was 46 years old and lived with a 71-year-old female roommate at the senior apartment complex solely for the “mutual economic benefit” of sharing living expenses.

The prosecutor’s opposition to the motion argued the seriousness of the current offenses and asserted “there is no substantive mitigating evidence as to the defendant’s background weighing in support of a lesser sentence Defendant Qahhaz falls well within the spirit of the Three Strikes Law.”

Based on the record before the trial court, which included the attorneys’ written memoranda, the probation report, and the transcript of the preliminary hearing and plea in

the prior conviction case, defendant has not demonstrated that the court acted irrationally or arbitrarily in denying the motion. We presume the court considered all that it had before it in reaching its decision. Having done so, the court concluded that defendant's background, character, prospects, present offenses and past serious felony conviction, did not take him outside the ambit of the Three Strikes law.

Our review of the record shows the trial court did not rely on the wrong standard in exercising its discretion or overlook the fact that defendant had not had any prior criminal conduct since the prior conviction. Both parties argued the correct standard to the court and prior counsel's declaration, as well as the probation report, mentioned that defendant had suffered no convictions since the 1997 conviction for making criminal threats. Finally, defense counsel's declaration averred she had verified that defendant's conviction had *not* been reduced to a misdemeanor; thus, there was nothing for the court to "completely overlook" in that regard. "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.) Reviewed deferentially, the trial court did not abuse its discretion by denying defendant's *Romero* motion.

CONCLUSION

The trial court committed harmless *Marsden* error. Defendant's right to testify was not abridged. Instructions on lesser included offenses were not required. The court correctly instructed on the burglary enhancement. The prosecutor was entitled to ask defendant's character witness if she had heard about defendant's prior felony conviction. The evidence was sufficient to prove that defendant's prior conviction was for a felony and not a misdemeanor. The trial court did not abuse its discretion in denying defendant's *Romero* motion.

DISPOSITION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Banke, J.