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(Opinion following rehearing)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JORGE COLON, Defendant and Appellant.	C084527 (Super. Ct. No. 15F05910) OPINION ON REHEARING

A jury found defendant Jorge Colon guilty of various offenses after he broke into his neighbor's apartment, ransacked it, and started a fire inside.

On appeal, defendant contends the trial court infringed his constitutional right to a trial by an independent jury and to a verdict not coerced by judicial action when the court ordered further deliberations after learning the jury was split 11 to one, instructed jurors to openly exchange ideas about their respective positions, and later dismissed the holdout

juror for medical reasons. Defendant also argues the trial court abused its discretion in imposing the upper term on the arson charge because it did not consider defendant's mental illness as a mitigating factor, and that his trial counsel was constitutionally ineffective in several respects, including that he failed to file a *Romero* (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) motion to strike his strike prior, failed to correct alleged errors and omissions in the probation report, failed to object to the aggravating factors considered by the trial court during sentencing, and failed to move for a mistrial when the court ordered deliberations to continue after learning the jury was split.

We initially concluded that the court did not abuse its discretion in ordering the jury to continue deliberating and in giving a supplemental instruction on the meaning of deliberation. We found the court did not improperly coerce the jury into a verdict, nor did it err by subsequently dismissing the lone holdout juror for medical reasons. We also concluded the trial court did not abuse its discretion in imposing the upper term, and we rejected defendant's ineffective assistance of counsel claims. We therefore affirmed the judgment.

We then granted defendant's rehearing petition, vacated our original opinion, and obtained supplemental briefing by the parties on the juror coercion issue as well as on defendant's new request that we remand the matter to the trial court for resentencing based on newly-enacted Senate Bill No. 1393, which amends Penal Code sections 667 and 1385 to remove the prohibition on striking a prior serious felony enhancement. (Further undesignated statutory references are to the Penal Code.)

We again conclude that the trial court did not improperly coerce the jury. We also find, as before, that the court properly imposed the upper term on the arson charge, and we reject defendant's ineffective assistance of counsel claims. However, we shall remand the matter for the trial court to determine whether to exercise its newly granted

discretion under Senate Bill No. 1393 to strike the five-year prior serious felony enhancement under section 667, subdivision (a).

FACTS AND PROCEEDINGS

In September 2015, R.F. lived in an upstairs apartment in a 10-unit apartment complex in Sacramento. Defendant lived with his mother in the apartment next door. Sondra Hammond and her daughter, Tashiyana Sanders, lived in a house next to the apartment complex.

R.F. had a difficult relationship with defendant. On several occasions defendant demanded that R.F. let him into his apartment because defendant believed his girlfriend was having sex with his brother inside. One time, defendant had a knife. R.F. did not know defendant's brother or his girlfriend, and neither had ever been inside his apartment. R.F. refused to let defendant inside.

Around 4:00 a.m. on September 25, 2015, defendant called R.F. and angrily asked to check his apartment for his brother and his girlfriend. R.F. told him no. When R.F. opened his front door three hours later, defendant was waiting outside. Defendant told R.F. that when he asked to check his apartment, R.F. had better let him check the apartment. Defendant threatened to go get a "nine," which R.F. understood to mean a nine-millimeter handgun. R.F. slammed the door and waited several hours before leaving to give defendant time to cool off.

Around 9:00 a.m., R.F. left and went to a nearby laundromat. He locked his apartment door. R.F. saw defendant and his mother standing near a fence. Defendant angrily approached R.F. and threatened to do something to him because he had refused to let him in his apartment.

Shortly after arriving at the laundromat, R.F. received a call from Hammond; she said defendant had just kicked in his apartment door. R.F. asked Hammond to come get him at the laundromat. When they returned to the apartment complex a few minutes

later, R.F. found his door damaged and opened. Smoke was billowing out of his apartment. R.F.'s belongings had been ransacked and thrown about the apartment; his bedroom, where the fire had been started, was burned.

According to Hammond, she heard a commotion outside her house the morning of the fire. She went outside and observed defendant and his mother; defendant was pacing back and forth smoking a cigarette. He was wearing a red, white, and blue striped shirt and shorts. Hammond saw defendant walk toward R.F.'s apartment; he threw his body against the door and kicked it several times. The door split open, and defendant went inside. Hammond heard smashing sounds, like defendant was throwing things inside the apartment.

Hammond called R.F. Before leaving to pick R.F. up at the laundromat, Hammond saw defendant emerge from R.F.'s apartment. He repeatedly asked, "[c]an you smell that?" He was no longer smoking the cigarette. At that point, however, she did not know what he meant.

Defendant saw Hammond talking to R.F. on the phone. He walked past her and said, "Mammacita it's not nice to snitch." Hammond felt threatened and called police.

After she brought R.F. back to the apartment complex, she saw smoke coming out of his apartment. She saw defendant walking down an alleyway between her house and the apartment complex. His mother was following him.

Sanders, Hammond's daughter, was inside their house when she heard loud crashing noises nearby. When she went outside, she saw defendant in a red, white, and blue T-shirt leaving R.F.'s apartment. While standing with her mother, defendant walked by and asked if they smelled anything. He told them that they better "not be no rats" or "snitching" to the police.

Sacramento Police Officer Tobias Williams went to the apartment. Hammond reported that defendant had walked down the nearby alleyway. Officer Williams eventually apprehended defendant in the parking lot of a nearby recycling center. He was

crouched down behind some dumpsters. During a subsequent infield showup, Hammond identified defendant as the man who broke into R.F.'s apartment.

An amended information charged defendant with first degree residential burglary (§ 459; count one), arson of an inhabited structure (§ 451, subd. (b); count two), and arson of personal property (§ 451, subd. (d); count three). Count three was charged alternatively to count one and count two. The information further alleged a prior prison term (§ 667.5, subd. (b)), a prior serious felony (§ 667, subd. (a)), and a prior strike (§§ 667, subds. (b)-(i), 1170.12).

In October 2015, defense counsel expressed doubts as to defendant's competency under section 1368. In January 2016, defendant was found incompetent to stand trial and was referred to the state hospital for evaluation and restorative treatment. (§ 1370, subd. (a)(2).) At a subsequent hearing in February 2016, the court found defendant incompetent and ordered further treatment. In November 2016, defendant was found competent to stand trial and criminal proceedings were reinstated.

At trial, R.F., Hammond, and Sanders testified to the above facts. Sacramento fire investigator Misty Cole, the prosecution's expert on fire origin and cause, testified about examining R.F.'s apartment after the fire. Based on her training and experience, she opined that the fire was manmade and started in R.F.'s bedroom.

Video surveillance from a nearby apartment was shown to the jury. The footage captured a person in a striped shirt walking underneath the apartment complex balcony, and then a person wearing shorts moving their legs in a scissor-type kicking motion in front of R.F.'s apartment. A different camera angle captured the person in the striped shirt swinging something above his head near the door. Yet another camera angle captured the same person in a striped shirt pacing back and forth in the parking lot adjacent to the complex.

Defendant testified on his own behalf. He said R.F. sold drugs from his apartment, and that R.F. had gotten mad at him because he refused to mail drugs for him.

He denied breaking into R.F.'s apartment and setting fire to any property inside; he claimed he was never at the apartment complex that day. Defendant testified that he had been at a relative's house in Olivehurst the night before, and that he went directly to the recycling center upon returning to Sacramento on September 25 to recycle cans. According to him, he was not hiding behind the dumpster when he was detained; the officer lied.

On cross-examination, defendant admitted that he was wearing a red, white, and blue striped shirt and red shorts on September 25, but denied being the person seen in the surveillance video. He said someone else must have been wearing the exact same outfit. He admitted asking R.F. once to check his apartment to see if his brother and girlfriend were having sex inside, but denied ever having a knife.

Defendant admitted the allegations for a prior strike, a prior serious felony conviction, and a prior prison term. After the court excused a juror and replaced her with an alternate, the jury found defendant guilty of burglary and arson of an inhabited structure and not guilty of arson of personal property.

The court sentenced defendant to an aggregate term of 21 years in state prison. The court imposed the upper term of eight years for the arson offense, doubled to 16 years for the strike prior, plus five years for the prior serious felony conviction enhancement. Under section 654, the court imposed and stayed the upper term of six years for the burglary offense, which was doubled to 12 years for the strike, and the one-year term for the prior prison term enhancement (§ 667.5, subd. (b)). Defendant timely appealed.

DISCUSSION

I

Verdict Coercion

Defendant contends that the trial court's directive to continue deliberations after the jury appeared deadlocked coerced the jury's verdict in violation of section 1140 and his federal and state constitutional rights to due process and an independent and particular jury. The claim's factual background is as follows:

The jury retired to deliberate at 11:19 a.m. on Thursday, March 23. Approximately 35 minutes later, at 11:55 a.m., the jurors recessed for lunch and did not resume deliberating until 1:02 p.m. They deliberated for about two hours before taking a break, and then resumed deliberating for another hour before being released for the evening. During that time, the jury requested to know how to zoom in on the time stamp of video shown during the trial, and also requested a readback of Hammond's and defendant's testimony. In total, the jury deliberated for approximately three and one half hours the first day.

Deliberations resumed the next day, Friday, March 24, at 9:08 a.m., with the court reporter completing the requested readbacks at 9:24 a.m. At 10:06 a.m., the court received a third jury note stating, "We are hung between 11-1 and our discussions are done. This is on count one. What's the next step?" The jury then took a break; they had deliberated for about 45 minutes that morning.

The court responded to the jury's third question as follows: "In response to Question No. 3: Has the jury deliberated or reached a verdict as to Counts 2 and 3? If not, please do so. If you've reached a verdict as to those counts, inform the court. Please do not reveal how the vote stands on any count or issue unless I ask [you] to do so." After deliberating for about 45 minutes, the jury sent a fourth note stating, "After

deliberation we do not have a verdict on count 1, count 2, and count 3. What should we do now?"

The court met with counsel before responding, and indicated its intent to address the jurors in the courtroom to determine if there was anything it could do to help them, and to also give CALCRIM No. 3551, known as the "firecracker" instruction. When the court asked for comments from counsel, the prosecutor suggested that the court ensure all jurors were deliberating, and defense counsel cautioned that just because one person did not agree with the others it did not necessarily mean that the person was not deliberating. The court agreed.

The court reconvened the jury in the courtroom, and questioned Juror No. 4, the jury foreperson. The court cautioned the foreperson to only answer her very specific questions because it did not want to step into the "sanctity of your deliberation room." The court made clear that it could not "ask you about your deliberations or what anyone's particular opinion is."

After noting that the jury had only deliberated Thursday afternoon and Friday morning, and warning the foreperson not to reveal the vote count, the court asked whether there had been any movement or change in the vote count or changes in opinion overall during that time. The foreperson responded, "no." By that point, they had taken approximately five votes.

The court asked whether there was anything that it could do to help, such as reinstructing the jury or elaborating or clarifying the law, and the foreperson responded, "I believe if we could get a further clarification on what we should be considering during our--what we're forming our opinion on this. If we can get further clarification from a judicial point of view." The court then reinstructed the jury that it must decide what the facts are based only on the evidence that had been presented and not on extraneous materials or emotion. It also instructed that members of the jury, particularly the foreperson, were responsible for ensuring everyone had a fair chance to be heard, that

everyone respected other's opinions, and that everyone was given an opportunity to deliberate. The court asked whether the foreperson believed everyone had an opportunity to deliberate, and the foreman responded that the jury "had fairly good discussions." When the court asked whether that helped, the foreperson responded, "I think so."

Before excusing the jurors, the court instructed them with CALCRIM No. 3551, the "firecracker" instruction, as follows:

"I'm going to read you one more instruction, because sometimes juries have a difficult time reaching a verdict, but are able to resume deliberations and successfully reach a verdict on one or more counts. I have some suggestions for you.

"Do not hesitate to reexamine your own views. Fair and effective jury deliberation requires a frank and forthright exchange of views. Each of you must decide the case for yourself and form your individual opinion after you've fully and completely considered all the evidence with the fellow jurors. It is your duty as jurors to deliberate with the goal of reaching a verdict, if you can do so, without surrendering individual judgment. Do not change a position just because it differs from that of other jurors or just because you or others want to reach a verdict. Both the People and the defendant are entitled to the individual judgment of each juror.

"It's up to you to decide how to conduct your deliberations. You may want to consider new approaches in order to get a fresh perspective. Sometimes asking someone to express the other side--it's kind of like a debate team--express the other view to see if that is helpful to anyone can be helpful. Change seats. Sit by somebody new. I'm not sure why that would help, but people seem to think it does. I don't know.

"So I'll ask you to go in and continue your deliberations, and we will wait to hear from you. Okay? Thank you very much." A notation in the clerk's minutes states: "The Court further instructed the jurors with the 'Firecracker Instruction' as fully stated in the record. *Thereafter, the Court asked each juror if they believed that further deliberations would be helpful. They all answered yes.*" (Italics added.) The exchange between the

court and all of the jurors described in the clerk's minutes, however, is not reflected in the reporter's transcript.

The court excused the jury to resume deliberations at 2:01 p.m. A little less than an hour later, at 2:56 p.m., the jury sent a fifth communication to the court. The fifth note stated: "We have a juror that believes that a crime was not even committed to even deliberate on count one, count two, and count three. Juror refuses to deliberate at all thus we do not have a verdict on any counts. How do we proceed from here?" The jury then took a break.

In discussing the jury's note with counsel, the court commented that it was unclear whether a juror refused to deliberate or whether a juror who had deliberated held a different opinion than the other jurors. To clarify, the court brought the jury foreperson back into the courtroom to answer some questions. Counsel did not ask any questions.

After reminding the foreperson that she was not asking about anyone's thought process, the court asked what made the foreperson feel the juror (later identified as Juror No. 11) was refusing to deliberate. The foreperson said that the jury had had an open discussion to voice whatever point of view they had, and when everyone had presented their view, Juror No. 11 refused to state hers. She had even asked them to get an alternate juror to replace her. In the foreperson's view, Juror No. 11 "[did] not want to be part of the group." She did not agree with everyone on count one, and did not want to discuss counts two or three.

The court then asked Juror No. 11 to come into the courtroom. When asked whether she had taken the position that she was not willing to deliberate with the other jurors, Juror No. 11 explained that she spoke of what she felt she saw on the videos and on the evidence and the witnesses, but the other jurors could not "accept [her] part." She said she did not feel like she should be in the jury room anymore because she felt badgered; she felt as if the other jurors were forcing her to say something she did not want to say. She felt she had fairly deliberated, that she had been willing to express her

view, had been open-minded with the other jurors, and that she had told the jury her thought process. She was unwilling to deliberate any further because she had reached her conclusion and nothing was going to change her mind. The court then excused her from the courtroom.

After further discussions with counsel, it appeared to the court that Juror No. 11 "never even deliberated on Count 2 and 3." Juror No. 11 was called back into the courtroom and stated she had given her opinion as to counts two and three and participated in a vote on those counts.

Given the difference between Juror No. 4's account and Juror No. 11's account, the court randomly selected Juror No. 12 to come into the courtroom to discuss Juror No. 11's participation. Juror No. 12 stated that Juror No. 11 had participated "[v]ery minimally" in the deliberation process. She refused to tell them her name, and said they should have her removed if they did not like her opinion. After the court gave the firecracker instruction, Juror No. 11 said, "I'm not changing my mind, so if you want to call the guy in here to get me out and bring in the other juror, I'm fine with that. I don't want to do this." Juror No. 12 explained that the other jurors did not want to "harass her or make her feel like we were harassing her, but she just wasn't really, honestly, very open to anything." She did not discuss any of the facts or the evidence that supported her opinion.

Based on the jurors' accounts, the court found that while Juror No. 11 was technically deliberating, she was not being fair to the other 11 jurors "by just sitting and not expressing any reasons for any of her opinions." The court decided to have the jury continue to deliberate and to "openly exchange their ideas about the case and their reasons for whatever conclusions they come to."

The court reconvened the jury in the courtroom and stated that "deliberations are not complete." The court explained that each juror should continue to deliberate, meaning to the extent they were able they should express their views and the basis of

their views and not simply a conclusory statement. The court gave the jury the option of deliberating for the remainder of the afternoon, or taking the weekend and returning on Monday. The court also advised the jurors that they could let the court know if further deliberation was simply not possible. The court excused the jurors to continue deliberating, and they were released for the weekend five minutes later. In total, the jury deliberated for approximately four hours on day two.

Jury deliberations commenced at 9:04 a.m. on Monday, the third day of deliberations. Twenty minutes later the court received a sixth note from the jury requesting readback of defense counsel's closing argument. Before the court reporter could commence the readback, Juror No. 11 approached the bailiff and complained of an anxiety attack and chest pains. She refused to return to the jury room, and sent a note to the judge asking to speak with her.

Before calling Juror No. 11 into the courtroom, the court told counsel that it would not send Juror No. 11 back into the jury room "to have a heart attack." Once in the courtroom, Juror No. 11 said she could not breathe and that she did not feel comfortable in the jury room; she was very emotional and was crying. The court excused Juror No. 11, replaced her with an alternate, and instructed the jury to start deliberations anew. An hour later, the jury found defendant guilty of burglary and arson of a structure, and not guilty of arson of personal property.

Based on the above, defendant contends the trial court erred under section 1140 in not discharging the jury and declaring a mistrial after learning the jury was deadlocked 11 to one. Ordering continued deliberations, he argues, unduly pressured the lone dissenting juror. And the court's further directive to the jurors to express, to the extent they were able, their views and the basis for their views improperly instructed the lone juror how to participate in deliberations. We disagree.

Section 1140 provides in pertinent part that a "jury cannot be discharged" without having rendered a verdict unless, "at the expiration of such time as the court may deem

proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (§ 1140.) " 'The decision whether to declare a hung jury or to order further deliberations rests in the trial court's sound discretion.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 88.) The court must exercise its power under section 1140 without coercing the jury so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency. (*Brooks,* at p. 88; *People v. Breaux* (1991) 1 Cal.4th 281, 319.) Any claim that the jury was pressured into reaching a verdict " 'depends on the particular circumstances of the case.' " (*Brooks,* at p. 88; see *Lowenfield v. Phelps* (1988) 484 U.S. 231, 237 [98 L.Ed.2d 568] [whether the trial court coerced a verdict requires consideration of the court's actions " 'in its context and under all the circumstances' "].)

We conclude the trial court did not abuse its discretion by failing to declare a mistrial. Nor did the trial court's supplemental instruction concerning the meaning of deliberation improperly coerce the jury.

The jury in this case deliberated for three and a half hours on day one and for approximately four hours on day two. When the court advised the jury that deliberations were not complete before excusing them at the end of the second day, the jury had deliberated for only about seven and a half hours, or one full day. Courts have upheld denials of mistrials even after fruitless deliberations for longer periods. (See, e.g., *People v. Bell* (2007) 40 Cal.4th 582, 617 (*Bell*) [trial court did not abuse discretion by denying mistrial after 10 hours of deliberation]; *People v. Sandoval* (1992) 4 Cal.4th 155, 194-197 [jury had deliberated for more than 14 hours over five days]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 774-775 [11th day of deliberations].)

That the trial court knew the jury was split 11 to one at the time it ordered further deliberations does not mean that its order was coercive. While our Supreme Court has recognized an "increased '*potential* for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror,' " the

court has rejected the view that denial of mistrial in that circumstance is " 'inherently coercive.' " (*Bell, supra,* 40 Cal.4th at pp. 617-618; *People v. Sheldon* (1989) 48 Cal.3d 935, 959 (*Sheldon*).) In *Bell*, for example, the court found that despite an 11-to-one split, the trial court could reasonably believe further deliberations would lead to a unanimous understanding of the case among the jurors where the jury had deliberated for less than two full days. (*Bell,* at p. 617.) A similar conclusion was reached in *Sheldon*, where the trial court did not err in reinstructing the jury after learning of an 11-to-one split over whether to impose the death penalty. (*Sheldon,* at pp. 959-960.)

The same is true here. When the court learned of the 11-to-one split from the jury foreperson's unprompted disclosure in note three, the jury had deliberated for roughly three hours on Thursday and one hour on Friday. After the split was revealed, the foreman confirmed that additional instruction from the court would be useful to help during further deliberations. Based on these representations the trial court could reasonably believe further deliberations would lead to a unanimous decision, especially since the jury had deliberated for only a short period.[1]

We do not find the court's supplemental directive at the end of the second day of deliberation "that each person, to the extent that you are able to express your--to deliberate, express your views on what it is--your views and the basis on which your view

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[1] The fact that the reporter's transcript does not confirm the notation in the clerk's transcript that all jurors answered yes when the court asked if further deliberations would be helpful is of no moment. The court reasonably relied on the foreman's representation that clarifying instructions would be helpful during further deliberations, no other jurors objected to the foreman's representation, and the jury continued to deliberate for another hour before informing the court in the fifth jury note that one of its members refused to deliberate.

exists, not just in a conclusory fashion, but actually deliberate" to be coercive.[2] The trial court's instruction simply explained that the "deliberative process" includes "participat[ing] in discussions with fellow jurors by listening to their views and by expressing his or her own views." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*) ["A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process"].) The supplemental instruction, moreover, was similar to CALCRIM No. 3550, which the jury was given prior to starting deliberations. That instruction provides in part: "It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors . . . . [¶] Keep an open mind and openly exchange your thoughts and ideas about this case."

Contrary to defendant's argument, the supplemental instruction did not order jurors to conduct their deliberations in any particular way. The court left it up to the jury to decide whether to continue deliberating for the remainder of the day or to go home and take the weekend off. The court also emphasized that the jury could let the court know if "no deliberation is possible." "[T]he court made no remarks either urging that a verdict be reached or indicating possible reprisals for failure to reach agreement." (*Sheldon, supra,* 48 Cal.3d at p. 960 [trial court did not abuse discretion in instructing the jury to continue deliberating after learning of 11-to-one split in vote for death penalty]; cf. *Lowenfield v. Phelps, supra,* 484 U.S. at p. 239 [approving supplemental instruction after deadlock that admonished jurors to consider each other's views with objective of reaching a verdict but not to surrender their own beliefs in doing so].)

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[2] Defendant erroneously refers to this supplemental directive as the "firecracker instruction." The record shows the court gave CALCRIM No. 3551, known as the firecracker instruction, before it received the jury's fifth note.

Nor did the court's supplemental instruction impliedly tell the holdout juror to change her mind as defendant argues. (*Sheldon, supra,* 48 Cal.3d at p. 960.) The court in fact emphasized that "deliberation" requires "everyone's individual opinion," and made clear that the jury could inform the court that further deliberation simply was not possible.

The cases upon which defendant relies do not help him. In *People v. Crossland* (1960) 182 Cal.App.2d 117, 118, the trial court's insistence upon further deliberation after telling the jury that the case was "probably the most simple case [the judge] had ever tried in [his] twelve years as a Superior Court judge" was deemed coercive. In *People v. Conboy* (1910) 15 Cal.App. 97, 98-99, the trial court coercively instructed the jury to convict the defendant of murder after stating, " 'I suggest to you there is no reason why twelve, honest, intelligent, reasonable men should not reach a conclusion in this case, and I am surprised that you have not done so already,' " and ordering the jury to "do [its] duty." In *People v. Kindleberger* (1893) 100 Cal. 367, 368-369, the trial court's comment that " '[i]n view of the testimony in this case, the court is utterly at a loss to know why twelve honest men cannot agree in this case' " was deemed coercive because it implicitly instructed the jury to convict.

Unlike in *Crossland*, *Conboy*, and *Kindleberger*, the trial court here did not comment on the simplicity of the case in any manner whatsoever, nor did it express surprise that the jurors had not yet reached a verdict. The supplemental instruction urging the jurors to exchange their ideas did not impliedly urge a conviction. The trial court's supplemental instruction was tailored for the case before it and did not constitute an abuse of discretion. No coercion occurred here.

The trial court, moreover, did not abuse its discretion when it dismissed Juror No. 11 on Monday when she refused, for health reasons, to reenter the jury room. (*Cleveland, supra,* 25 Cal.4th at pp. 474, 478 [the decision to discharge a juror and to order an alternate juror to serve rests in the sound discretion of the trial court].) The

record shows that replacing Juror No. 11 with an alternative juror was amply justified under section 1089.

That statute provides in relevant part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (§ 1089.) A juror's inability to perform as a juror, however, " 'must appear in the record as a demonstrable reality.' " (*Cleveland, supra,* 25 Cal.4th at p. 474.) " 'If there is any substantial evidence supporting the trial court's ruling, we will uphold it.' " (*Ibid.*)

Here, the record shows Juror No. 11 was crying and emotional when she refused to reenter the jury room to deliberate further. She told the bailiff that she was having an anxiety attack and chest pains. After being informed of Juror No. 11's physical ailments, the court commented that it would not send her back into the jury room to "have a heart attack." The court examined Juror No. 11, confirmed that her health issues prevented her from continuing as a juror, and excused her. We find no abuse of discretion in the trial court's decision. Substantial evidence shows a demonstrable reality that Juror No. 11 was unable to perform as a juror.

II

Consideration of Mental Illness

Defendant contends the trial court abused its discretion in imposing the upper term for the arson offense because it failed to consider his mental illness as a relevant mitigating factor. We disagree.

A trial court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*).) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' " (*Ibid.*)

The court may rely on any aggravating circumstances reasonably related to its sentencing decision (*Sandoval, supra,* 41 Cal.4th at p. 848; Cal. Rules of Court, rule 4.420; rule references that follow are to the California Rules of Court) and need not explain its reasons for rejecting alleged mitigating circumstances (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317 (*Holguin*)).

"In exercising his or her discretion in selecting one of the three authorized terms of imprisonment referred to in section 1170[, subdivision] (b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (Rule 4.420(b).)

Unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors. (*Holguin,* at pp. 1317-1318; rule 4.409 ["Relevant factors enumerated in these rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise"].) The court may base an upper term sentence upon any aggravating circumstances it deems significant (*Sandoval, supra,* 41 Cal.4th at p. 848), and a single factor in aggravation is sufficient to impose the upper term (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413). With these principles in mind, we turn to the sentencing proceeding below.

Prior to sentencing, defense counsel submitted a sentencing memorandum requesting the low term. Counsel specifically asked the court to consider rule 4.423(b)(2), which identifies as a circumstance in mitigation that a defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime. (Rule 4.423(b)(2).) In doing so, counsel requested that the court review the psychological evaluations from November 2015 and January 2016, which were conducted to determine defendant's mental competency for trial. Counsel noted that both reports described defendant's delusional thoughts. At the sentencing hearing, the court stated that it had received defendant's sentencing memorandum and had reviewed the psychological evaluations as requested.

The court also read and considered the probation report. Although the report did not list defendant's mental condition as a mitigating factor under rule 4.423, it did note that during the presentence interview defendant reported that he had been diagnosed with bipolar disorder while at Napa State Hospital. The probation report listed five factors in aggravation: (1) the manner in which the crime was carried out indicated planning, sophistication, or professionalism, (2) defendant had engaged in violent conduct which indicated a serious danger to society, (3) defendant's prior convictions as an adult were numerous; (4) defendant had served a prior prison term; and (5) defendant was on parole when the crime was committed. Probation recommended the court impose the midterm for the arson offense and stay the sentence for the burglary conviction under section 654.

During the sentencing hearing, the prosecutor asked that defendant not be awarded conduct credits since he had received eight major write-ups resulting in 94 days of full restriction while in jail. The writeups included, among other things, violations for making or possessing weapons, falsely furnishing information, intentionally destroying property, verbal threats, and assault and battery against another inmate. Defense counsel argued that the write-ups resulted from defendant's mental illness, and that even though defendant was found competent to stand trial, there were still "issues there." While the

trial court agreed that "may very well be," it stated that "making and possessing weapons hardly sounds as a result of a mental illness."

The court expressed concern over probation's recommendation for the midterm, noting that the report did not indicate the basis for the recommendation. The court then commented: "In evaluating the mitigating and aggravating circumstances, clearly the aggravating circumstances outweigh the mitigating circumstances. There are not any mitigating circumstances shown at all. So I'm not entirely sure where that came from."

The court found the aggravating circumstances outweighed the mitigating circumstances and therefore chose the upper term rather than the midterm recommended by probation. The court noted that defendant was on parole at the time and that his crimes had increased in seriousness. Contrasting his prior conviction for assaulting his former girlfriend with his current arson conviction for starting a fire in a 10-unit apartment complex, which could have injured numerous people, the court found that defendant was "a very, very dangerous man."

Defendant contends that the court's statement that "[t]here are not any mitigating circumstances shown at all" shows it failed to consider defendant's mental illness as a mitigating factor. The comment, however, cannot be considered in isolation; it must be considered in the context of the entire hearing.

The court made the statement while discussing the contents of the probation report and its basis for the recommended midterm. The statement simply acknowledged that the probation report did not identify any circumstances in mitigation. The handwritten notations on the probation report showing "0 Mitigation" and "significant aggravat[ion]" reflect the same--that the probation report listed several aggravating factors and no mitigating factors.

The court's statement does not mean it did not consider defendant's mental illness as a mitigating factor, however. The record shows the court read and considered the psychological evaluations that discussed defendant's mental illness, including his

paranoid and delusional thoughts, and the court acknowledged that defendant "may very well" have had mental issues, although it was skeptical that those issues resulted in making and possessing weapons in jail. Defense counsel's sentencing memorandum argued the applicability of rule 4.423(b)(2), and specifically requested that the court consider "this mitigating factor" in determining defendant's sentence.

When selecting the upper term, the court stated, "[a]s far as the mid-term versus upper term, it appears that--because the aggravating circumstances outweigh the mitigating circumstances," the upper term was appropriate. The court's comment arguably implies that it found the existence of *some* mitigating circumstance but that it was insufficient to outweigh the numerous circumstances in aggravation. The trial court need not state reasons for minimizing or disregarding mitigating circumstances, including defendant's mental condition as argued by his counsel. (*People v. Avalos, supra,* 47 Cal.App.4th at p. 1583; *Holguin, supra,* 213 Cal.App.3d at p. 1317.)

Furthermore, the circumstances of the crime did not necessarily establish that defendant's actions were the result of mental illness, rather than a desire to intimidate R.F. and to seek revenge for refusing to let defendant into his apartment. Defendant twice told R.F., "[w]hen I ask you to do something you do it[,]" and threatened that he was going to do something to R.F. for failing to comply with his demands. Thus, the trial court may have reasonably concluded that defendant's mental illness did not necessarily reduce his culpability for the crimes, which apparently stemmed from a desire for revenge.

Nor does the court's comment that it did not understand the probation report's recommended midterm sentence since the report listed several aggravating but no mitigating factors mean the court was misinformed about its sentencing discretion. Defendant's argument that a midterm sentence does not have to be "based" on anything is incorrect. Under section 1170, a trial court must state the reasons for its sentence choice on the record at the time of sentencing, including if it exercises its discretion to impose

the middle term. (§ 1170, subds. (b), (c).) Additionally, rule 4.420(e) requires that "[t]he reasons for selecting one of the three authorized terms of imprisonment referred to in section 1170(b) must be stated orally on the record."

On this record, we cannot say that the court's comment that there were no mitigating factors "shown at all," made in the context of discussing the contents of the probation report, affirmatively indicates that the court failed to consider all relevant criteria, including defendant's mental illness. Given defendant's criminal history and the increasing seriousness of his offenses, the court did not abuse its discretion in imposing the upper term even if defendant suffered from a mental condition. (*People v. Quintanilla, supra,* 170 Cal.App.4th at p. 413 [" 'California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term for an enhancement' "].) The court took into account the nature of the offense as well as the offender, particularly with regard to the degree of danger both presented to society. (*Sandoval, supra,* 41 Cal.4th at p. 847.)

III

Ineffective Assistance of Counsel

Defendant contends his counsel was constitutionally ineffective for failing to (1) file a *Romero* motion to strike his strike prior, (2) contest the court's stated aggravating factors, and (3) request a mistrial based on the jury's alleged impasse. Defendant has not met his burden to establish ineffectiveness of trial counsel.

Defendant bears the burden of proving ineffective assistance of counsel. (*People v. Haskett* (1990) 52 Cal.3d 210, 248.) "To establish constitutionally inadequate representation, the defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defense to prejudice, i.e., there is a reasonable probability that but for counsel's failings the result would have been more

favorable." (*Ibid.*; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218; *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [80 L.Ed.2d 674, 693-699].) "When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' " we must reject the contention. (*Haskett,* at p. 248.)

1. *Failure to File Romero Motion*

Defendant faults defense counsel for not filing a *Romero* motion requesting that the court strike his strike prior. As a corollary to this argument, defendant contends his counsel should have corrected alleged errors and omissions in the probation report, namely--the absence of mental illness as a mitigating factor under rule 4.423, since the decision to grant or deny a *Romero* motion depends on an overall assessment of moral culpability in light of all the circumstances of the crime and the characteristics of the offender.

A trial court has discretion to strike a prior serious felony conviction only if the defendant falls outside the spirit of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) "[T]he 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." (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In deciding whether to strike a prior conviction, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be

deemed outside the 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." (*Williams*, at p. 161.)

Even if we assume, without deciding, that counsel's failure constituted incompetence, defendant falls short of showing that he suffered prejudice. (*Strickland v. Washington, supra,* 466 U.S. at p. 697 [if it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice that course should be followed].) Defendant fails to establish there is any possibility that the trial court would have granted a *Romero* motion to strike his strike prior given his criminal history, the nature of his current offenses, and the trial court's sentencing rationale.

Defendant's strike conviction for assault with the personal use of a deadly weapon (§ 245, subd. (a)(1)) occurred only four years before the instant offenses. The strike, then, was not remote in time, and it is unlikely the court would have stricken it as such. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 ["a prior conviction may be stricken if it is remote in time," but trial court should consider whether a defendant has led a " 'legally blameless life' " since the prior].)

We note that, although defendant argues that his prior felony conviction was for assault by means likely to produce great bodily injury, defendant admitted that he had been convicted of assault with personal use of a deadly weapon under section 245, subdivision (a)(1).

The trial court was also well aware of the circumstances underlying the strike conviction. The prior strike was violent and could have potentially been deadly. Defendant viciously attacked his former girlfriend while her four children were present. He repeatedly punched her with a closed fist, pulled her hair, and hit her with a baseball bat. Defendant also poked the victim with a pair of scissors, causing her to bleed.

While defendant's strike arguably had a single victim (defendant also apparently hit his mother when she tried to intervene), defendant's current offense, the court noted,

had the potential to seriously injure or kill many people. Defendant broke into R.F.'s apartment and set a fire on his bed. The apartment complex had 10 units, and numerous people, including children, lived there in addition to R.F.

In sentencing defendant to the upper term, the court emphasized the increasing seriousness of defendant's offenses by contrasting the facts underlying the strike with the current offense. While defendant takes issue with this factor, he concedes that both offenses involved dangerous conduct with the potential for serious harm. After considering the nature and extent of his prior and current crimes, the court found defendant to be "a very, very dangerous man." Given the court's dangerousness finding and the seriousness of his offenses, it is not reasonably probable that the court would have stricken defendant's strike had counsel filed a *Romero* motion.

Finally, although defense counsel did not object that the probation report failed to list defendant's mental condition as a mitigating factor under rule 4.423(b)(2), counsel's sentencing memorandum specifically referenced rule 4.423(b)(2) and asked the court to "take into consideration this mitigating factor in deciding what sentence to impose in this case." Counsel, moreover, asked the court to review, and the court did review, the psychological evaluations discussing defendant's mental health prior to sentencing. Counsel raised defendant's mental health again at the sentencing hearing. Defendant's impaired mental condition, and the effect, if any, on his culpability for the crimes was thus squarely before the court even though the probation report did not list defendant's mental condition as a mitigating factor. Given the above, it is not reasonably probable that objecting to the absence of the mitigating factor in the probation report would have resulted in a lesser sentence or striking defendant's strike.

Defendant has failed to show prejudice from counsel's failure to file a *Romero* motion or to object to alleged omissions in the probation report. Defendant does not fall outside the spirit of the three strikes law, and it is not reasonably probable that the court would have granted a *Romero* motion had counsel filed one.

2. *Failure to Object to Aggravating Factors or to Argue Against the Upper Term*

Defendant contends competent counsel would have "taken issue" with the aggravating factors listed in the probation report or cited by the trial court to support the upper term. No prejudice from counsel's failure to object appears on this record.

First, there was a sufficient basis for the aggravating factor that the "[t]he manner in which the crime was carried out indicates planning, sophistication, or professionalism." (Rule 4.421(a)(8).) Defendant clearly planned the crime, waiting until R.F. left before kicking in his door and starting the fire. There was also evidence that defendant did not light the first thing he saw in the apartment on fire, but rather gathered objects to build a camp-like fire on R.F.'s bed. The fact that a professional arsonist would have entered unseen and would have set a more destructive fire does not mean defendant did not plan the crime. In any event, the trial court did not cite the planning, sophistication, and professionalism factor as a basis for selecting the upper term.

Second, a sufficient basis exists for the court's finding that defendant's crimes have increased in seriousness. Defendant himself concedes that his conduct presented a serious danger to society. (Rule 4.421(b)(1).) As the trial court noted, defendant's conduct escalated from assaulting a single victim (his prior assault with a deadly weapon strike) to seriously endangering the lives of numerous individuals who lived in the 10-unit apartment complex. While no one may have been personally injured from defendant's conduct, his claim that he did not cause great property damage is not persuasive. R.F. was forced to move out of his apartment from the damage caused by the fire; he testified everything in his bedroom was ruined. Defendant's conduct was violent and seriously dangerous.

Third, the three "recidivist factors" listed in the probation report--that defendant's prior convictions as an adult were numerous, that he had served a prior prison term, and

that he was on parole when he committed the crime--did not amount to "redundant semantics" to "heap-up" aggravating factors. (Rule 4.421(b)(2)-(4).) Defendant's parole status was separate from his prior convictions or his prior prison term.

Finally, defendant's counsel did argue that the psychological reports documenting his mental condition qualified as a "mitigating factor" under rule 4.423(b)(2), and he specifically requested the low term. While defendant in hindsight may have phrased the argument differently, the fact remains that his trial counsel made the argument defendant complains was omitted below. The trial court simply rejected it.

3. *Failure to Move for a Mistrial*

Defendant contends, somewhat confusingly, that while his trial counsel was not specifically required to request a mistrial based on jury deadlock, his failure to do so constitutes ineffective assistance of counsel. Because defendant has failed to show prejudice, we need not decide whether counsel's decision to forego filing a mistrial motion upon learning the jury was deadlocked 11 to one fell below a reasonable standard of competency.

As we previously concluded, the trial court properly exercised its discretion in ordering further deliberations after learning the jury was split 11 to one. The jury had only been deliberating a short time, about half a day, when it informed the court it was deadlocked 11 to one on count one. After inquiring whether there was anything the court could do to assist the jury, the foreperson asked for further direction, and the foreperson and jury confirmed that the court's further instruction was helpful. After later questioning the foreperson, Juror No. 11, and Juror No. 12, it was not unreasonable for the court to conclude that a verdict might still be reached if all members of the jury openly exchanged their respective positions, to the extent they were able. Given the circumstances, and the court's determination that further deliberations were appropriate,

it is not reasonably probable that the court would have declared a mistrial had defense counsel filed such a motion.

IV

Prior Serious Felony Enhancement

Defendant contends recent legislative amendments require remand for the court to consider whether to exercise newly-granted discretion to strike the prior serious felony enhancement imposed under section 667, subdivision (a)(1). The People concede the legislation applies retroactively to defendant, but argue that remand would be futile because the record shows the trial court would not have exercised its discretion to strike the prior serious felony enhancement to lessen defendant's sentence.

As previously noted, defendant's sentence in this case includes a five-year term under section 667, subdivision (a) for a prior serious felony conviction. When he was sentenced, the trial court had no power to strike the prior serious felony enhancement. (See *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045; see also, former § 667, subd. (a)(1) [prior serious felony enhancements shall be imposed "[i]n compliance with [former] subdivision (b) of Section 1385"] and former § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) Recent amendments to section 667, subdivision (a) and section 1385, subdivision (b) which became effective January 1, 2019, now give trial courts the power to strike the five-year enhancement for a prior serious felony. (Stats. 2018, ch. 1013, §§ 1, 2; Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

We agree the statutory amendments apply retroactively to defendant. Under *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), "when a statute mitigating punishment becomes effective after the commission of the prohibited act but before final judgment the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the Legislature." (*People v. Francis* (1969)

71 Cal.2d 66, 75-76.) As the Supreme Court stated in *Estrada*, "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada,* at p. 745.)

The People rely on *People v. McVey* (2018) 24 Cal.App.5th 405 (*McVey*) and *People v. McDaniels* (2018) 22 Cal.App.5th 420 (*McDaniels*) to argue that no purpose would be served by a remand in this case. We are not persuaded.

In *McVey*, the court found it unnecessary to remand to allow the court to exercise newly-granted discretion under Senate Bill No. 620 to strike a firearm enhancement given the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record about the defendant's attitude being "pretty haunting" after shooting an unarmed homeless man without remorse, and the court's deliberate choice of the highest possible term for the firearm enhancement. (*McVey, supra,* 22 Cal.App.5th at pp. 418-419.) The trial court expressly found that " '[t]his [was] as aggravated as personal use of a firearm gets,' " and that " 'the high term of 10 years on the enhancement is the only appropriate sentence on the enhancement.' " (*Id.* at p. 419.) Given the above, the *McVey* court found that "there appear[ed] no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*Id.* at p. 419.)

In *McDaniels*, the court held that even though the trial court imposed a substantial sentence on the defendant, there was no clear indication from the sentencing court that it would not strike several firearm enhancements upon remand. (*McDaniels, supra,* 22 Cal.App.5th at pp. 427-428.) In ordering remand, the court noted that "the egregious nature of the defendant's crimes, the defendant's recidivism, and the fact that consecutive

sentences were imposed -- may be germane to assessing whether a trial court is likely to exercise its sentencing discretion in the defendant's favor, but they cannot alone establish what the court's discretionary decision would have been." (*Id.*at p. 427.)

While the trial court here imposed the upper term and noted defendant was a very dangerous man, we cannot say that the court's comments during sentencing are akin to those of the trial court in *McVey*. Nor can we say that acknowledging the dangerous and violent nature of defendant's past and present crimes necessarily rules out the possibility that the court would exercise its discretion to strike the prior serious felony enhancement. We shall therefore remand for the trial court to exercise its discretion in the first instance.

DISPOSITION

Defendant's convictions are affirmed, but the case is remanded for the trial court to consider whether to strike the prior serious felony enhancement under Penal Code section 667, subdivision. (a).

HULL, J.

We concur:

RAYE, P. J.

MURRAY, J.