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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMIE ROZELLE HARRISON,

Defendant and Appellant.

E057917

(Super.Ct.No. FBA900492)

OPINION

APPEAL from the Superior Court of San Bernardino County. John B. Gibson, Judge. Affirmed in part; reversed in part with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Linh Lam, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jamie Rozelle Harrison guilty of first degree residential burglary (Pen. Code, § 459, count 1), unlawful driving or taking of a vehicle

(Veh. Code, § 10851, subd. (a), count 3), and transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a), count 5).¹ In a bifurcated hearing, the trial court found true the allegations that defendant had two prior strike convictions (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), two prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)), and that she had served one prior prison term (Pen. Code, § 667.5, subd. (b)).² The court sentenced defendant to a total term of 41 years four months to life in state prison.

On appeal, defendant contends: (1) the trial court abused its discretion by refusing to strike one or both of her prior strike convictions; (2) her sentence on count 1 violated the federal and state constitutional provisions against cruel and unusual punishment; (3) the punishment on count 3 should have been stayed pursuant to section 654; (4) the court erroneously imposed the five-year serious felony enhancement twice; (5) the prison prior enhancements (§ 667.5, subd. (b)) must be stricken; (6) the court erred in limiting her presentence custody credits to 15 percent under section 2933.1; and (7) the court should correct the abstract of judgment and use the current version of the abstract of judgment form. We affirm in part, reverse in part, and remand for resentencing.

FACTUAL BACKGROUND

On July 30, 2009, police officer Carlos Ugo responded to a call from Ronald Haywood (the victim), who reported that his house had been burglarized. He reported

¹ Count 4 was dismissed, and defendant was acquitted of count 2.

² All further statutory references will be to the Penal Code, unless otherwise noted.

that someone had gained access to his home and stole several items, including two guns, his wallet, his car keys, and his car. He also noticed that his kitchen window was broken. Officer Ugo observed broken glass on the right side of the kitchen window and a blood stain on the window curtain.

On August 18, 2009, Detective Leo Griego spotted the victim's stolen car parked in front of a residence that was being observed for narcotics activity. He decided to watch the car to see if anyone left the house and got into it the car. After about 15 minutes, some people came out of the house and drove away in the car. By that time, other officers had arrived at the scene. They followed the car a few blocks and conducted a vehicle stop. The occupants were ordered out of the car. Defendant was the driver.

The police searched the car and found a baggie containing methamphetamine, a small glass pipe, and a ring with four keys on it. Two of the keys were for the stolen car.

Detective Griego read defendant her *Miranda*³ rights and interviewed her. Detective Griego told defendant the car she was driving was stolen and asked where she got it. Defendant said she recently bought it. After that initial interview, defendant was transported to the police department. During a subsequent interview, she confessed that she was the one who broke the victim's window. She showed Detective Griego a scar on her left hand where she had cut herself. Defendant also admitted that the methamphetamine found in the car belonged to her and her boyfriend.

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Declining to Dismiss Defendant's

Prior Strike Convictions

Defendant contends that the trial court abused its discretion when it denied her motion to dismiss one or both of her prior strike convictions, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). She specifically claims that the court did not properly consider whether her case fell outside the spirit of the three strikes scheme, since it did not acknowledge the fact of her drug addiction and its role in the current offenses. She claims that because the court never considered her individualized circumstances, it did not exercise informed sentencing discretion. We find no abuse of discretion.

A. *Relevant Background*

Defendant's two prior strikes arose from a 2003 incident. She pled guilty to robbery (§ 211) and carjacking (§ 215, subd. (a)).

In the instant case, defendant filed a motion requesting the court to strike her prior strike convictions. In the motion, defendant asked the court to dismiss her strikes because they both arose from one case, she had a history of abuse, and she had a history of drug addiction and mental illness. At the hearing on the motion, defense counsel argued that defendant's criminal behavior was "driven by the use of drugs" and that she was only 19 years old when the prior strikes occurred. After reviewing the moving and opposing papers, and listening to oral argument, the court denied defendant's motion.

B. *The Court Properly Exercised Its Discretion*

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss prior strike conviction allegations under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) In *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), the court identified a number of specific factors a trial court should consider when exercising its discretion. “[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[, subdivision] (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.” (*Id.* at p. 161.)

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “[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 p. 377.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances

where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Id.* at p. 378.)

The circumstances here were far from extraordinary, and the trial court properly applied the *Williams* factors to this case in denying defendant’s motion. The court reviewed defendant’s background and criminal history in detail. Her criminal history dates back to 2003. She has convictions for possession of controlled substances (Health & Saf. Code, § 11377, subd. (a)) and being an accessory to a felony (Pen. Code, § 32), in addition to the prior strikes. Her criminal history also includes two state prison terms, which apparently did nothing to deter her from committing further crimes. It is clear from the record that prior rehabilitative efforts have been unsuccessful. Furthermore, the court noted that, in a letter to the court, defendant said she wanted to “accept responsibility.” The court stated that defendant knew what the consequences were when she committed the current offenses—that she was looking at a life sentence. The court addressed defendant and said, “You knew exactly what the consequences were, and that’s how you take responsibility. You accept the consequences of your conduct.” The court acknowledged that defendant had a horrible childhood and marriage problems, but asserted that a lot of people have those problems, but do not go out and commit burglaries, especially knowing that they face a life in prison. The court stated that defendant was not someone that, in exercising its discretion, it felt deserved “anything other than what the law provides.” The court concluded that defendant was clearly a danger to the community, and that it had not been presented with any reason to strike any of her strikes.

In light of the court's extensive explanation of its reasons for declining to strike defendant's prior strike conviction(s), we do not find the decision to be arbitrary or irrational. The record clearly shows that the court was aware of its discretion and the applicable factors a court must consider in dismissing a prior strike, and that it appropriately applied the factors. Thus, we cannot say that the court abused its discretion when it declined to dismiss any of defendant's prior strike convictions.

II. Defendant's Sentence Did Not Constitute Cruel and Unusual Punishment

Defendant next contends that her sentence of 25 years to life on count 1 constitutes cruel and unusual punishment under the state and federal Constitutions. We disagree.

At the outset, we note that some courts have held that when the issue of cruel and unusual punishment is not raised at the trial level, it is waived on appeal. (*People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) The People assert that defendant did not raise the issue of cruel and unusual punishment at the trial level. Nevertheless, we will assume for the purpose of discussion that defendant did not waive her right to raise the argument on appeal and accordingly will consider the issue.

Under the prevailing view, the Eighth Amendment of the federal Constitution is violated when a sentence is “grossly disproportionate” to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Similarly, the California Constitution is violated when the punishment “is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” [Citation.]” (*People v. Meeks* (2004) 123 Cal.App.4th 695, 709.) Under California's three strikes

law, when the defendant has at least two prior strike convictions, the Legislature has set life sentences as the appropriate penalty for certain felonies. (§§ 667, subd. (e), 1170.12, subd. (c).) A 25-year-to-life prison sentence is imposed not only for the defendant's current felony, but also for his or her recidivism. (See *People v. Mantanez* (2002) 98 Cal.App.4th 354, 366.)

When reviewing a claim of disproportionality or cruel or unusual punishment under the state Constitution, we: (1) examine the nature of the offense and offender; (2) compare the punishment with the penalty for more serious crimes in the same jurisdiction; and (3) measure the punishment to the penalty for the same offense in different jurisdictions. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

Regarding the first prong, defendant asserts that her sentence of 25 years to life “for being involved in a burglary . . . which was clearly motivated by drug addiction” violates the Eighth and Fourteenth Amendments. She argues that “[t]he idea of someone serving a life sentence for such minimal criminal conduct does shock the conscience.” Defendant acknowledges her two prior strikes, but minimizes the significance of them by noting that they stemmed from the same incident, and that she had a history of being abused as a child and a history of drug addiction. Defendant contends that her sentence “offends the notions of human dignity because it is clear that [she] committed her crimes only because of her addiction.” Finally, she claims that her sentence “was significantly disproportionate to the risk [she] posed to society” and that she was not “the sort of criminal that must be locked away from society for the rest of her life based on a single criminal event.”

Although defendant acknowledges her criminal past, she appears to be claiming that her 25-year-to-life sentence is cruel and unusual punishment because it is based on her current offense of burglary. However, defendant is not subject to a life sentence merely on the basis of her current offense, but on the basis of her recidivist behavior. Her sentence was based on those prior convictions and not solely on her current conviction. “Recidivism in the commission of multiple felonies poses a manifest danger to society[,] justifying the imposition of longer sentences for subsequent offenses. [Citations.]” (*People v. Stone* (1999) 75 Cal.App.4th 707, 715 (*Stone*)). The court considered her criminal history, which included prior felony convictions for being an accessory to a felony, robbery, and carjacking.

Defendant does not make any arguments with regard to the second and third prongs of *Lynch*.

Defendant has failed to demonstrate that her punishment shocks the conscience or offends fundamental notions of human dignity. Her sentence was not constitutionally proscribed. (See *Stone, supra*, 75 Cal.App.4th at p. 715.)

III. Section 654 Precluded Punishment on Count 3

Defendant argues that her sentence on count 3 should be stayed pursuant to section 654 because the residential burglary in count 1 and the unlawful taking of the vehicle in count 3 were committed with the same criminal intent—to take the victim’s property. The People argue that the court properly imposed consecutive sentences on counts 1 and 3 because defendant entertained multiple criminal objectives. Defendant did not object to the imposition of multiple sentences at trial. However, a section 654 claim is not waived

by failing to raise it in the trial court. (*People v. Hester* (2000) 22 Cal.4th 290, 295 (*Hester*)). We conclude relief is warranted under section 654.

Section 654 “precludes multiple punishments for a single act or indivisible course of conduct.” (*Hester, supra*, 22 Cal.4th at p. 294.) “It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) In other words, “[d]ifferent criminal acts ‘may be divisible even though “closely connected in time and a part of the same criminal venture.”’ [Citations.] The question is to be resolved upon the facts of each case. [Citation.]” (*People v. Deloach* (1989) 207 Cal.App.3d 323, 338.)

B. *The Court Should Have Stayed the Sentence on Count 3*

Defendant was found guilty of first degree residential burglary (count 1) and unlawfully taking a vehicle (count 3). In finding defendant guilty of count 1, the jury had to find that she entered a building with the intent to commit theft. In finding her guilty of count 3, the jury had to find that she took or drove someone’s vehicle without the

owner's consent; and, when she did so, she "intended to deprive the owner of possession or ownership of the vehicle for any period of time." The question is whether the unlawful taking of the victim's car in count 3 and the residential burglary in count 1 were divisible or indivisible transactions.

Defendant argues that the taking of the vehicle was incidental to the burglary and was committed with the same criminal intent and objective—taking the victim's property. She contends that the vehicle theft stemmed from the taking of the keys during the burglary; thus, both offenses were part of a continuous course of conduct. We agree. The evidence showed that defendant and her cohorts entered the victim's home, and once inside, they stole two guns, the victim's wallet, and his car keys. They then used the car keys to steal the victim's car. What other reason would she take the victim's car keys, if not to steal the victim's car? Thus, the evidence supports a finding that the taking of the car was part of a continuous and indivisible criminal transaction. Accordingly, the sentence on count 3 should have been stayed pursuant to section 654.

The People assert the evidence showed that defendant was arrested after the police observed her unlawfully driving the victim's stolen vehicle on August 18, 2009. Thus, the People argue that there was a division in time of three weeks between the burglary in July and the unlawful driving of the car in August. The People further contend that defendant's intent in burglarizing the victim's home in July was to steal property from inside the house, but her intent in August was to deprive the owner of possession of his car and to use it for her own purposes. However, the evidence was uncontroverted that the car was taken at the same time as the burglary. Moreover, the information charged

defendant with committing the burglary and unlawful driving or taking of a vehicle “[o]n or about July 28, 2009.” Thus, the jury found defendant guilty of committing the unlawful driving or taking of the car on the *same day* as she committed the burglary—not three weeks later.

The People also argue that section 654 did not apply here because defendant’s offenses were “separated by periods of time during which reflection was possible.” The People assert the evidence showed that when defendant broke the window to gain access to the victim’s house, she cut her hand on the broken glass and left blood at the scene; the injury “creat[ed] a period of time during which reflection was possible, before [she] made a volitional and calculated decision to proceed with stealing the victim’s property.” The People cite *People v. Trotter* (1992) 7 Cal.App.4th 363, 368, in support of its argument. However, in *Trotter*, the defendant was convicted of three counts of assault on a peace officer with a firearm. (*Id.* at p. 365.) The court concluded that all three shots were separate acts because there was “time prior to each shot for defendant to reflect and consider his next action.” (*Id.* at p. 368.) Defendant’s case is distinguishable. There was no evidence that just because defendant cut her hand on the glass, she stopped to reflect on what she should do next. The People appear to be arguing that defendant cut her hand, stopped to reflect, and *then* decided to steal the victim’s property. However, defendant was convicted of burglary, which meant the jury found that she entered the house with the intent to commit theft.

Finally, the People contend that defendant had multiple criminal objectives. Her objective in the burglary was “to steal property from *inside* the home,” while her

objective in taking the victim's car was to "take property from *outside* of the home." (Italics added.) "In resolving section 654 issues, our California Supreme Court has recently stated that the appellate courts should not 'parse[] the objectives too finely.' [Citation.]" (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) To distinguish between taking property from inside and outside the home would, in our judgment, parse the objectives too finely.

We conclude that the residential burglary and unlawful taking and driving of the victim's car was an indivisible course of conduct. Thus, section 654 precludes multiple punishment on counts 1 and 3. The sentence on count 3 should have been stayed.

IV. The Court Made Numerous Other Sentencing Errors That Must Be Corrected

Defendant argues that the court made several sentencing errors. The People agree with some and point out a few more. Both parties agree that the matter must be remanded for resentencing.

A. *Defendant's Sentence*

The trial court sentenced defendant to 41 years four months to life. On count 1, the court sentenced defendant to 36 years to life in prison, consisting of 25 years to life, pursuant to the three strikes law, plus two consecutive five-year prior serious felony enhancements (§ 667, subd. (a)(1)), and a consecutive one-year prison prior enhancement (§ 667.5, subd. (b)). On count 3, the court sentenced her to one-third the midterm of two years (eight months), doubled because of the strikes, plus one year for the prison prior (§ 667.5, subd. (b)), for two years four months. On count 5, the court sentenced

defendant to one-third the midterm of three years (one year), doubled because of the strikes, plus one year for the prison prior (§ 667.5, subd. (b)), for three years.

B. The Trial Court Should Have Calculated the Indeterminate and Determinate Sentences Separately

The People raise the issue that the court failed to sentence defendant for crimes punishable by imposition of determinate terms separately from the crimes punishable by imposition of an indeterminate term. Defendant agrees.

Section 1170.1 “provides for sentencing for multiple convictions which will aggregate the sum of the principal term (i.e., the greatest determinate sentence) plus one-third of the middle term imposed by law for each remaining conviction.” (*People v. McGahuey* (1981) 121 Cal.App.3d 524, 531.) “[T]his scheme fully applies only when all terms of imprisonment are ‘determinate,’ i.e., of specified duration. A life sentence is ‘indeterminate,’ i.e., not for a fixed period. When a defendant is sentenced to both a determinate and an indeterminate sentence, the determinate sentence is served first. Nonetheless, neither term is ‘principal’ or ‘subordinate.’ They are to be considered and calculated independently of one another. [Citation.]” (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856 (*Reyes*).

Here, defendant was convicted of first degree residential burglary in count 1, and the court sentenced her to an indeterminate term of 25 years to life under the three strikes law. She was also convicted of unlawful driving or taking of a vehicle (count 3) and transportation of a controlled substance (count 5). The court sentenced her to one-third of the middle terms, consecutive, on both of these counts. When it imposed a

consecutive one-third of the middle term sentence on counts 3 and 5, the court in effect was designating the first degree burglary as the principal term under section 1170.1. (See *People v. Neely* (2009) 176 Cal.App.4th 787, 797 (*Neely*).) However, the determinate terms on counts 3 and 5 were supposed to be calculated independently of the indeterminate term on count 1. (*Reyes, supra*, 212 Cal.App.3d at p. 856.) The court erroneously applied the principal term/subordinate term methodology set forth in section 1170.1 to these offenses. (See *Neely, supra*, 176 Cal.App.4th at p. 797.)

Therefore, the case must be remanded for the trial court to correct its sentencing of the determinate terms (counts 3 and 5).

C. The Court Never Expressly Found the Prison Prior Enhancement Allegation to be True

Defendant asserts that the court imposed the prison prior enhancement on counts 1, 3, and 5, without ever making a finding on the record that the prison prior allegation was true. She notes that the only prior conviction allegations the court found true were the prior strike convictions for robbery and carjacking. The People argue that the court's true finding on the prison prior is implied from the record. In her reply brief, defendant responds that the record does not clearly demonstrate the truth of the prison prior enhancement and requests that this court require the trial court to make a clear record. Since this matter must be remanded to correct other sentencing errors, and in the interest of clarity, we will direct the trial court to make an express finding on the prison prior enhancement. (See § 1170.1, subd. (e).)

D. *The Court Improperly Imposed Enhancements Under Both Sections 667, Subdivision (a)(1), and 667.5, Subdivision (b), on Count 1*

In the event that the trial court finds the prior prison enhancement allegation to be true, defendant argues that the one-year prison prior enhancement (§ 667.5, subd. (b)) on count 1 must be stricken because the same conviction may not be used for both the serious felony prior and prison prior enhancements. The People concede, and we agree.

“[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply.” (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 (*Jones*)). The proper remedy is to strike the lesser enhancement. (*Id.* at p. 1153; see also, *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) Here, the same robbery conviction was used to enhance the sentence on count 1 under both sections 667 and 667.5. Thus, the court should strike the lesser enhancement on count 1, which is the prison prior enhancement. (§ 667.5, subd. (b).)

Furthermore, the parties agree that the trial court erroneously applied the prison prior enhancement on both counts 3 and 5, since only one enhancement can be imposed for each prior prison term, not one enhancement on each new conviction. (*People v. Carter* (1983) 144 Cal.App.3d 534, 544, overruled on other grounds as stated *People v. Coronado* (1995) 12 Cal.4th 145, 158-159.) However, the People claim that, even though the serious felony prior and the prison prior enhancements share the same underlying conviction, the court could still apply the serious felony prior to the indeterminate sentence in count 1 and the prior prison enhancement once to the

determinate sentence on *either* count 3 or count 5. In support of its claim, the People rely on *Neely, supra*, 176 Cal.App.4th 787 and *People v. Misa* (2006) 140 Cal.App.4th 837 (*Misa*). However, neither case holds that a court can impose a prior serious felony enhancement (§ 667, subd. (a)) to an indeterminate sentence, and a prior prison enhancement (§ 667.5, subd. (b)) to a determinate sentence, based on the same underlying conviction. In *Neely*, the trial court “erroneously applied the principal term/subordinate term methodology set forth in section 1170.1 to all of the offenses.” (*Neely, supra*, 176 Cal.App.4th at p. 797.) The appellate court explained that a court must sentence a defendant for crimes punishable by imposition of determinate terms separately from the crimes punishable by imposition of an indeterminate term. (*Id.* at pp. 797-798; see also, *ante*, § IV.B.) *Misa* addressed the issue of whether the trial court could impose a prior serious felony enhancement under section 667, subdivision (a)(1), twice—once on a determinate count and once on an indeterminate count. (*Misa, supra*, 140 Cal.App.4th at pp. 846-847.)

Thus, on remand, the trial court should strike the prior prison enhancements on counts 3 and 5. In the event the trial court finds the section 667.5, subdivision (b) prison prior allegation true, the court should then sentence defendant in accordance with the applicable sentencing law. (See *Jones, supra*, 5 Cal.4th at p. 1150 [“[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply”].)

E. The Court Improperly Imposed Two Prior Serious Felony Enhancements

Both parties agree that the trial court erred by imposing two serious prior felony enhancements pursuant to section 667, subdivision (a)(1), since the prior convictions were not brought and tried separately. A five-year enhancement may be added to a sentence if a person convicted of a serious felony has previously been convicted of a serious felony. (§ 667, subd. (a)(1).) However, each of the prior convictions must have been on “charges brought and tried separately.” (§ 667, subd. (a)(1).)

Here, the court added 10 years consecutively to count 1 for two serious felony prior enhancements. The conviction in count 1 for first degree burglary was a serious felony. (§ 1192.7, subd. (c)(18).) Thus, the serious felony prior enhancement applies. However, the record shows that the serious felony priors here were adjudicated in the same criminal proceeding. Thus, they were not “brought and tried separately” within the meaning of section 667, subdivision (a). (*People v. Deay* (1987) 194 Cal.App.3d 280, 286, 290.) As such, the court erred in imposing a separate enhancement for each conviction. (*Id.* at p. 290.) Therefore, defendant’s sentence must be modified to provide for only one section 667 enhancement on count 1. (*Ibid.*)

V. The Court Erroneously Limited Defendant’s Presentence Conduct Credits Under Section 2933.1

At the time of sentencing, the court awarded defendant 1,208 days of presentence custody credit, plus 181 days of work time credit under section 2933.1. Defendant contends that because none of her current offenses were violent offenses within the meaning of section 667.5, subdivision (c), the amount of presentence conduct credit to

which she was entitled should have been calculated pursuant to section 4019, rather than section 2933.1. The People concede, and we agree.

Sections 2933.1 and 667.5, subdivision (c), limit a defendant's presentence conduct credits to a maximum of 15 percent when the defendant's current conviction is violent within the meaning of section 667.5. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 276; *People v. Henson* (1997) 57 Cal.App.4th 1380, 1389-1390.) Section 667.5, subdivision (c)(21) states: "Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary."

Section 460, subdivision (a) provides: "(a) Every burglary of an inhabited dwelling house . . . is burglary of the first degree."

The parties agree that defendant was not convicted of a violent felony, within the meaning of section 2933.1, since there was no allegation or jury finding that another person was present in the residence during the burglary. Thus, when the court resentences defendant, it must also recalculate her presentence custody credits pursuant to section 4019.

VI. The Current Form of the Abstract of Judgment Should Be Used

Defendant contends, and the People agree, that when the matter is remanded for the sentencing errors, the trial court should correct the abstract of judgment using the current version of the abstract of judgment form.

DISPOSITION

The matter is remanded to the superior court for resentencing. On remand, the court is directed to stay the sentence on count 3 pursuant to section 654, and calculate the indeterminate and determinate sentences separately. The court should also strike the prior prison enhancements on count 1, 3, and 5, make an express finding on the prior prison enhancement allegation, and determine whether it can apply the prior prison enhancement to either counts 3 or 5, in accordance with the applicable law. The court should further strike one of the serious prior felony conviction enhancements (§ 667, subd. (a)(1)) on count 1, and recalculate defendant’s presentence custody credits pursuant to section 4019. The court should use the current version of the abstract of judgment.

In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.