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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.

JOSE URENO,

Defendant and Appellant.

E060160

(Super.Ct.No. FVI1301077)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed as modified.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Collette C. Cavalier and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jose Ureno guilty of carjacking (Pen. Code, § 215, subd. (a); count 1)¹ and taking or driving a motor vehicle (Veh. Code, § 10851, subd. (a); count 2). The jury also found true that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(a) & (b)(1)(c)). Defendant admitted that he had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). In a bifurcated proceeding, the trial court found true that defendant had suffered one prior prison term (§ 667.5, subd. (b)). Defendant was sentenced to 30 years to life on count 1, plus a consecutive term of five years for the prior serious felony conviction, plus one year for the prior prison term, plus a concurrent six years on count 2. On appeal, defendant argues that (1) there was insufficient evidence to sustain his conviction on count 1 for carjacking; (2) the matter must be remanded for a new sentencing hearing because the trial court failed to properly consider its full discretion in imposing the sentence; and (3) the concurrent sentence on count 2 must be stayed pursuant to section 654. We agree with the parties that count 2 must be stayed, and reject defendant’s remaining contentions.

I

FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2013, David Byron was attempting to sell his 1992 Chevy Suburban. The vehicle was initially parked at Byron’s house in Apple Valley and had a “for sale”

¹ All future statutory references are to the Penal Code unless otherwise stated.

sign on the car's front window. The sign included the price of the vehicle and other information about the vehicle. Byron saw defendant looking at the vehicle but had no interaction with defendant at that time.

Later around noon, Byron moved the vehicle to his sister's home, which was near his residence. As he pulled into his sister's driveway, Byron noticed defendant standing to the side, about 100 feet from the car. Byron went inside his sister's home, and shortly thereafter, defendant knocked on the door and said he was interested in the car. Byron walked with defendant toward the vehicle, and defendant asked Byron to write down his name and phone number on a piece of paper and sign it. Defendant also asked Byron for his driver's license to take it with him. Byron did not give his driver's license to defendant, but wrote his phone number on a piece of paper, signed it, and gave it to defendant. To prevent defendant from asking for his driver's license again, Byron had lied and stated that he had been arrested for driving under the influence a couple weeks prior and the police had confiscated his license.

Byron explained to defendant the condition of the vehicle and also informed defendant that the vehicle required a smog check. Defendant told Byron that he would take the car to get the smog check. Byron responded, “ ‘No, no, not until you pay for [the car] It's not going anywhere.’ ” Defendant then stated that his “ ‘ride left, or it didn't show up. I need a car. Give me the keys. I'm going to take it or my me [*sic*] and my home boys are going to come back and get it.’ ” Byron was “in shock,” and defendant's statements “made [him] feel scared.” “Because [he] didn't know what was

going to happen next. [He] didn't know if [defendant] had anything on him. If [defendant] was kidding or serious.”

In an effort to calm defendant down, Byron offered defendant a cigarette. Defendant took the whole pack of cigarettes and lighter from Byron and placed them in his pocket. After Byron told defendant to give him back his pack of cigarettes, defendant took a couple of cigarettes, put them in his pocket, and smoked a cigarette. Defendant smoked half of the cigarette, and then told Byron, “ ‘Either you give me the keys, I'm going to take it or I'm going to come back with my home boys.’ ” At that time, Byron “[d]efinitely felt threatened, scared, didn't know what was going to happen. Didn't know if he had anything in his backpack, his pockets.” Byron also explained that he was concerned for the safety of his family and others because his sister ran a daycare; that there were children in his sister's home; and that he “didn't know what was going to happen.”

Defendant later screamed out a gang name and said the gang was from the L.A. area. Defendant's reference to a gang scared Byron because he had seen gang violence in his former neighborhood. Defendant was acting odd and also appeared more “aggressive, like he was about to do something.” Byron was afraid of retaliation because defendant knew where Byron lived. Byron was also concerned because he could barely lift a can of soda on that day with his left arm. Byron believed that if he were to get into a fight that day, he would not be able to defend himself and a fight would further damage his arm, making it inoperable.

Defendant repeated his demand and ordered Byron to “ ‘[g]ive [him] the keys’ ” or he was going to take the vehicle or his “ ‘homies’ ” would come. Because he was in fear for his safety and his family, Byron gave defendant the key to his vehicle. Byron explained, “It was either give him the keys or end up having to replace the window, ignition, steering column, whatever else, have his home boys come down, something else.” Byron further stated that he had “willingly in a way” given defendant the car key, but he would not have given him the key if defendant had not said “what he said.” Defendant took the car key and told Byron that he would be back in 30 to 45 minutes. Byron went back inside his sister’s home and watched defendant drive away with his car. Byron did not call the police because he feared retaliation.

About an hour later on that same day, San Bernardino County Sheriff’s Deputy Chris Dekeyrel was dispatched to a Victorville car wash in regard to an individual. When the deputy arrived, he saw defendant at the car wash near a Chevy Suburban. Defendant appeared to be under the influence of methamphetamine. Officers discovered the vehicle was registered to Byron and contacted Byron. Byron went to the car wash, about 10 miles from his home, identified the Suburban as his, and explained the vehicle had been stolen by defendant. Byron told Deputy Dekeyrel that defendant had become aggressive with him; that he was afraid he was going to get beat up by defendant; and that he felt intimidated by defendant because defendant had said he was in a gang and, if defendant could not take the vehicle, he would come back with his “homies” to take it. Byron

further informed the deputy that he had therefore handed the car key to defendant, believing he had no choice.

Deputy Dekeyrel arrested defendant, took photographs of defendant's tattoos, and collected the backpack defendant was carrying. Deputy Dekeyrel did not recover any money, checkbook, money order, or documentation for Byron's vehicle. Defendant admitted being a member of a gang and gave another deputy the piece of paper with Byron's contact information. While being booked, defendant admitted associating with and knowing members of the Carmellas street gang. Defendant had a Carmellas and a Chingones tattoo on his right and left forearms and was a known gang member. Defendant had previously admitted to gang detectives that he was affiliated with the Carmellas gang, particularly the Chingones clique out of Norwalk or a subset of the Carmellas gang, and that he had several family members in the gang. Defendant's tattoos were also consistent with gang membership.

A gang expert explained gang culture, gang activity, gang territory, gang crimes, and the history of the Carmellas street gang and its connection to the Chingones gang and its pattern of criminal activity. The parties stipulated that Carmellas is a criminal street gang and that defendant was a member of the Carmellas gang. Another gang expert explained that there was a significant amount of gang activity in the High Desert area; that it was common for gang members in the High Desert area to claim gangs that are not traditionally from the High Desert; and that even though Byron could not remember the name of the gang defendant had claimed, it was a credible threat. Based on his training,

experience, and investigation, the gang expert opined that defendant committed the crimes for the benefit of, at the direction of, or in association with the Carmellas criminal street gang, because the crimes benefitted defendant's status within the gang and the reputation of the gang in the community. The gang expert further noted that the gang benefitted by instilling fear in victims and witnesses not to report crimes, as evidenced by Byron not calling the police because he feared retaliation; and defendant had actually procured possession of the vehicle because of his gang membership.

II

DISCUSSION

A. *Sufficiency of the Evidence to Support Carjacking Conviction*

Defendant contends that there was insufficient evidence to support his conviction for carjacking. Specifically, he argues that his conviction was “based solely on the speculative fear that something might happen in the future if Byron did not give [defendant] the key” to his vehicle.

When a defendant on appeal challenges a criminal conviction based on a claim of insufficiency of the evidence, “the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; see *People v. Jones* (2013) 57 Cal.4th 899, 960.) The reviewing court

presumes in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, including reasonable inferences based on the evidence.

(People v. Tran (1996) 47 Cal.App.4th 759, 771-772.) We do not reweigh evidence or determine if other inferences more favorable to the defendant could have been drawn from it. *(People v. Stanley (1995) 10 Cal.4th 764, 793.)* “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” *(People v. Young (2005) 34 Cal.4th 1149, 1181.)*

“ ‘[C]arjacking is a particularly serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim, the perpetrator and the public at large.’ [Citations.]” *(People v. Hill (2000) 23 Cal.4th 853, 859-860 (Hill).)* “Legislative history . . . indicates that the carjacking statute was enacted to address a specific problem—the taking of a motor vehicle directly from its occupants. The Legislature sought to impose a severe penalty on those who created a specific risk by directly confronting a vehicle’s occupants. [Citations.]” *(People v. Coleman (2007) 146 Cal.App.4th 1363, 1369.)*

Subdivision (a) of section 215 defines the crime of carjacking as “the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or

temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.” (§ 215, subd. (a).) Five elements must be shown to prove this crime: “(1) taking a vehicle possessed by another; (2) from the presence of the possessor or a passenger; (3) ‘against his or her will’; (4) with intent to deprive possession; (5) and, by means of force or fear.” (*Hill, supra*, 23 Cal.4th at p. 862.)

The elements and language of the carjacking statute are similar in key respects to the elements of the robbery statute, section 211. (*People v. Alvarado* (1999) 76 Cal.App.4th 156, 160, disapproved on another ground as stated in *People v. Lopez* (2003) 31 Cal.4th 1051, 1063, fn. 2; *People v. O’Neil* (1997) 56 Cal.App.4th 1126, 1131.) Therefore, principles applicable to robbery also are relevant to carjacking. (*People v. O’Neil, supra*, at pp. 1131-1132; *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1142 [Fourth Dist., Div. Two].) The elements of robbery are the felonious taking of personal property in the possession of another, from his person or immediate presence, by force or fear, with the intent to permanently deprive the person of possession. (§ 211; *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221.)

“[T]he Legislature intended to treat carjackings *just like robbery* with two exceptions” (*In re Travis W.* (2003) 107 Cal.App.4th 368, 376.) Carjacking requires an intent to temporarily or permanently deprive the owner of property, while robbery always requires an intent to permanently deprive a person of property. Carjackings only involve vehicles, while robbery involves any type of property. (*Ibid.*)

Whether the crime was accomplished by the use of force or fear is a factual question for the jury. (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707 [Fourth Dist., Div. Two].) The terms “force or fear” have no technical meaning and are presumed to be within the understanding of the jurors. (*Id.* at p. 1708.)

To establish the element of fear, the victim need not testify that he or she was afraid. (See *People v. Mungia, supra*, 234 Cal.App.3d at p. 1709, fn. 2.) There need only be evidence from which it can be inferred that the victim felt fear and that the fear allowed the crime to be accomplished. (*Ibid.*; *People v. Anderson* (2007) 152 Cal.App.4th 919, 946 [“the fear necessary for robbery is subjective in nature, requiring proof ‘that the victim was in fact afraid, and that such fear allowed the crime to be accomplished’ ”]; *People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775 [implicit threat of harm in bank robber’s demands for money gave rise to victim’s actual and reasonable fear].) Fear may be generated by words, actions, or the surrounding circumstances, and it may arise after the taking. (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771-772 [victim’s fear arose after the defendant grabbed bag from her shoulder].) The fear element is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his or her property. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1595.) The element of fear need not arise from an express threat; intimidation of the victim is enough. (*People v. Morehead, supra*, at p. 775 [“requisite fear need not be the result of an express threat or the use of a weapon,” and “[i]ntimidation of the victim equates with fear”];

People v. Brew (1991) 2 Cal.App.4th 99, 104 [evidence that the defendant was considerably larger than the victim supported conviction for robbery based on fear or intimidation].)

In addition, the victim's fear need not be extreme. (*People v. Morehead*, supra, 191 Cal.App.4th at p. 775.) "So long as the perpetrator uses the victim's fear to accomplish the retention of the property, it makes no difference whether the fear is generated by the perpetrator's specific words or actions designed to frighten, or by the circumstances surrounding the taking itself." (*People v. Flynn*, supra, 77 Cal.App.4th at p. 772.) For example, in *Flynn*, even though the defendant did nothing to instill fear prior to the taking, evidence that the defendant was taller and bigger than the female victim, and that he and his fellow gang members outnumbered the victim six to one was sufficient to support a conviction for robbery. (*Ibid.*)

Defendant argues that "Byron made a calculated decision to give" the car keys to defendant and that the evidence is "clear that Byron was not afraid that [defendant] was going to do anything in the moment but rather he had fear that something might happen in the future." Defendant therefore claims that Byron "did not relinquish control of the vehicle out of present fear but based on future speculation of what [defendant] might do if he returned with his home boys." Defendant's arguments are unmeritorious.

There is more than substantial evidence in the record here that defendant used fear to deprive Byron of his vehicle. Substantial evidence supports the jury's finding that Byron complied with defendant's demands because he was afraid of defendant's threats

at that present moment. Byron testified that defendant had repeatedly threatened him to either give him his car keys or that he would take it or he would come back with his “home boys.” Byron further stated that defendant had also screamed out a gang name and stated the gang was from the L.A. area. Byron testified that defendant’s statements caused him to be in fear because he feared being beaten up by defendant or defendant’s “home boys.” Byron explained that he could not defend himself due to an arm injury. Byron further stated that defendant’s reference to a gang scared him because he had seen gang violence in his former neighborhood.

Byron testified that he was afraid of retaliation by defendant or his gang members because defendant knew where Byron lived. Byron feared that defendant or his gang members would attack his family and was concerned about the safety of his family and others. This was because his sister ran a daycare in her home and there were children inside. Moreover, as Byron’s encounter with defendant continued, defendant appeared more aggressive, “like he was about to do something.” Byron explained that he gave defendant the keys to his car because he was in fear for his safety and for the safety of his family and felt as if he had no choice based on defendant’s statements. Indeed, Byron did not call the police after defendant drove off with his vehicle because he feared retaliation by defendant or defendant’s “home boys.”

Byron unequivocally testified he was in fear of defendant and/or defendant’s home boys, and the jury believed his testimony. There is no indication in the record to support defendant’s claim that Byron was not afraid of defendant at that moment or that Byron

feared something might happen in the future. Rather, the record plainly shows that defendant's threats to Byron were made to instill fear in Byron and to intimidate Byron at that moment. In fact, Byron's fear caused him to comply with defendant's unlawful demands for his car keys. (*People v. Davison, supra*, 32 Cal.App.4th at p. 212; *People v. Morehead, supra*, 191 Cal.App.4th at p. 778; *People v. Mungia, supra*, 234 Cal.App.3d at p. 1708.) In other words, "the fear [was] actually experienced by the victim, causing [him] to 'suspend the free exercise of will.'" [Citation.]" (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 699.) Therefore, the jury could have reasonably found that defendant took advantage of Byron's fear to retain his vehicle.

B. Exercise of Sentencing Discretion

Defendant argues that the matter must be remanded for resentencing because the trial court did not understand it had discretion to dismiss his prior conviction allegation. In the alternative, defendant claims his trial counsel was ineffective in failing to object and preserve the issue. In support, defendant refers specifically to the trial court's statement at the sentencing hearing that "With sentencing, the way the strike allegations are, the minimum is 30-years-to-life based upon the jury's finding. And in California, a lot of times our hands as judges are tied based upon findings of jurors and when strikes are found true."

The People respond defendant forfeited the issue for failing to raise it below. In the alternative, the People assert, based on the record, even if defendant had brought a motion to dismiss his prior conviction allegation or his trial counsel raised the issue at the

sentencing hearing, there is no reasonable probability the sentencing court would have struck defendant's prior conviction and therefore his claim of ineffective assistance of counsel fails.

Defendant's trial was presided over by Judge Michael Dest. However, before the initial scheduled sentencing hearing, Judge Dest became ill and sentencing was continued twice in an effort to allow Judge Dest to preside over the sentencing hearing. Defendant did not file a motion to dismiss his prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The People, however, filed a sentencing brief, pointing out the circumstances in aggravation, no circumstances in mitigation, circumstances affecting consecutive or concurrent sentences, and computation of the maximum sentence.

Without objection, on October 25, 2013, Judge Rodney A. Cortez presided over the sentencing hearing because Judge Dest remained hospitalized on that date. Judge Cortez stated that he had read the probation report, the People's sentencing brief, defendant's letters to the court, and letters from family and friends in defendant's support. Defense counsel made no oral motion to strike defendant's prior convictions pursuant to *Romero* or arguments for a mitigated sentence. Judge Cortez, after listing the criteria detailed in the probation report, sentenced defendant to a determinate term of six years (five years for the prior serious felony allegation plus one year for the prior prison term) plus an indeterminate term of 30 years to life (15 years to life for the carjacking conviction and gang enhancement doubled based on the strike allegation).

Defendant thereafter made a plea for reconsideration of his sentence, arguing the victim was not hurt, the incident was a misunderstanding, and asking for leniency. Defendant also stated that he planned to appeal.

Judge Cortez responded: “No. I understand. And that is your best avenue, [defendant], is to go the appeal route. With sentencing, the way that the strike allegations are, the minimum is 30-years-to-life based upon the jury’s finding. And in California, a lot of times our hands as judges are tied based upon findings of jurors and when strikes are found true. [¶] And so when I say that appeal is your avenue, you know, take what I’ve told you seriously if you want to appeal the judgment. No judge ever feels [slighted] by that. But in terms of appropriate sentence, given the facts and circumstances, which were provided to me—as I said, I was not the trial judge, but that is the appropriate sentence given the guidelines of the sentencing structure provided in the Penal Code.”

Defendant contends the trial court did not understand it had discretion to dismiss his prior conviction allegation and therefore the case must be remanded. However, “any failure on the part of a defendant to invite the court to dismiss under section 1385 following *Romero* waives or forfeits his or her right to raise the issue on appeal.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376 (*Carmony*), citing *People v. Scott* (1994) 9 Cal.4th 331, 352-353.) Here, defendant failed to invite the court to dismiss his prior felony conviction allegation.

Although a trial court is permitted to act on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law (*Romero, supra*,

13 Cal.4th at pp. 529-530), it has no sua sponte duty to consider striking a prior conviction, and a defendant has no right to make a motion to strike a prior conviction. (*Carmony, supra*, 33 Cal.4th at p. 375.) Whereas the court in *Romero* acted on its own motion to strike the defendant's prior convictions on the condition that he plead guilty as charged on all counts, the trial court here neither acted on its own motion, as it had no sua sponte duty to do so, nor was it invited to "dismiss under section 1385 following *Romero*" (*Carmony, supra*, 33 Cal.4th at p. 376.) Although a "defendant should have the concomitant power to appeal a court's decision not to dismiss a prior under section 1385 . . . ," the trial court here never made a decision to dismiss or not to dismiss, as the issue was never presented to the court. (*Id.* at p. 376.) The only action defendant took at the sentencing hearing was to request leniency in sentencing. Therefore, defendant has forfeited his right to raise a *Romero* issue on appeal.

Anticipating he may have forfeited the issue, defendant asserts his counsel was ineffective in failing to preserve the *Romero* issue. In claiming ineffective assistance of counsel, defendant has the burden of showing: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Williams* (1988) 44 Cal.3d 883, 937 (*Williams*).

Therefore, even though defendant has a legitimate complaint about counsel's failure to make a *Romero* motion on his behalf, prejudice still must be shown. A showing of prejudice requires defendant to demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.) In establishing prejudice, the defendant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*Williams, supra*, 44 Cal.3d at p. 937.)

In order to grant a *Romero* motion and depart from the legislative determination of the appropriate punishment for repeat felons, the trial 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." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) This is a very "stringent" standard because the statutory scheme "carefully circumscribes the trial court's power to depart from [the Three Strikes law sentencing] norm[.]" (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

Defendant's claim for ineffective assistance of counsel fails because defendant has failed to show any likelihood he would have received a reduction in his sentence if his counsel had filed or orally argued a *Romero* motion. He does not direct our attention to anything about "the particulars of his background, character, and prospects" that are favorable such that he should be deemed outside the spirit of the Three Strikes law and treated as though he had not previously been convicted of his prior serious and violent felony. (*People v. Williams, supra*, 17 Cal.4th at p. 161.) Although defendant had been convicted of only one prior strike for robbery in August 2002, he had a probation violation and numerous parole violations as well as convictions for possession of a controlled substance and possession of drug paraphernalia in January 2008. Following his drug convictions, defendant was sentenced to prison for 16 months and violated parole numerous times and was returned to custody in January 2009, April 2010, September 2010, February 2011, and October 2012.

Moreover, as the sentencing court considered, the aggravating factors were numerous. Specifically, the trial court noted, citing California Rules of Court, rule 4.421(a) and (b), that the victim was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)); the crime involved an actual taking of property of great monetary value (Cal. Rules of Court, rule 4.421(a)(9)); defendant's prior convictions as an adult were increasing in seriousness (Cal. Rules of Court, rule 4.421(b)(2)); defendant had served two prior prison terms (Cal. Rules of Court, rule 4.421(b)(3)); and defendant's performance on parole was unsatisfactory (Cal. Rules of Court, rule 4.421(b)(5)). By

contrast, the court found no factors in mitigation. Additionally, as the probation officer's report noted, and which the court considered, "defendant has not shown remorse for committing the crime and is in denial despite the facts of the case." Furthermore, as the People's sentencing brief pointed out, and which the court considered in sentencing defendant, the victim has been in fear for the safety of his family since the date of the offense as the threat made by defendant included defendant's "homeboys." The court also considered defendant's letters and letters on behalf of defendant. These letters noted defendant's background and character. Based on this record and the trial court's discussion of defendant's present crimes and his background, there is no reasonable probability the court would have struck the prior conviction had defense counsel raised the issue.

For these same reasons, we also emphasize that there is nothing in this record to indicate that the court abused its discretion in sentencing defendant to the maximum sentence or that the court was not aware of its full sentencing discretion. Given the crimes defendant committed, their seriousness, the manifest difference in character of the crimes, and all the other factors applicable to a *Romero* analysis, defendant cannot show he would have received a more favorable result or the court would have determined defendant fell outside the spirit of the Three Strikes law.

Consequently, we reject defendant's claim that he would have received a more favorable outcome had his trial counsel invited the court to dismiss his prior strike due to the nature of the current convictions, his prior violent offense, his repeated parole violations, and other individualized factors. Because defendant has failed to show there is a reasonable probability that the court would have reached a different result on his *Romero* motion if defense counsel had advocated for defendant more effectively, we reject his claim of ineffective assistance of counsel.

C. *Section 654*

Defendant also argues that the concurrent sentence on count 2 for vehicle theft and its attendant gang enhancement should be stayed because the offense is based on the same intent and objective as the carjacking offense. The People correctly concede the sentence on count 2 should be stayed pursuant to section 654. We also agree.

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.] If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) The purpose of section 654 is to ensure that punishment is commensurate with a defendant's culpability. (*People v. Meeks* (2004) 123 Cal.App.4th 695, 705.)

In *Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground as stated in *People v. Correa* (2012) 54 Cal.4th 331, 334, 338, 341-342, the court

explained where a course of conduct violates more than one statute but is part of an indivisible transaction with a single intent or objective, section 654 applies, and the trial court may impose only one sentence. But where a defendant entertains multiple criminal objectives that are “independent and not incidental to each other,” the court may impose separate punishment even where the violations were otherwise part of an indivisible course of conduct. (*People v. Sok* (2010) 181 Cal.App.4th 88, 99.) “It is the defendant’s intent and objective that determines whether the course of conduct is indivisible.

[Citation.] Thus, ‘ “[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once.” ’ ” (*People v. Le* (2006) 136 Cal.App.4th 925, 931; see *People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.)

If section 654 applies, the proper procedure is to impose a concurrent term and then stay it. (See *People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1238-1239.)

Where a court imposes a concurrent term but does not stay the term, we infer the court found defendant had multiple intents or objectives in committing the offenses and rejected the applicability of section 654. (*People v. Alford, supra*, 180 Cal.App.4th at p. 1466.) Where a court erroneously fails to stay a concurrent term in violation of section 654, it acts in excess of its jurisdiction and the sentence is unauthorized. (*People v. Cuevas* (2008) 44 Cal.4th 374, 380, fn. 3.) The trial court has broad latitude to determine whether section 654 applies in a particular case, and we review a determination

under section 654 for substantial evidence. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.)

While recognizing the deference that must be afforded the trial court's sentencing decision, we cannot uphold the imposition of concurrent sentences for vehicle theft and carjacking under the circumstances presented here. As defendant argues, both the vehicle theft and the carjacking charges were based on the same, single course of conduct and intent: his taking of Byron's vehicle and driving off with it. There was no evidence of any other act, not part of this course of conduct, that could support either charge. Under section 654, subdivision (a), the trial court was required to impose a sentence for the charge carrying the longer potential term and impose but stay the other sentence. (*People v. Deloza, supra*, 18 Cal.4th at p. 592.) Accordingly, the trial court erred in imposing a concurrent term of six years on count 2, plus a concurrent term of four years on the gang enhancement allegation attached to count 2.

III

DISPOSITION

Execution of the concurrent 10-year term on count 2 (vehicle theft and its attendant gang enhancement) is stayed pursuant to section 654. The judgment as thus modified is affirmed. The superior court clerk is directed to prepare a new sentencing minute order and a new abstract of judgment reflecting these changes and to forward a

certified copy of the new abstract to the Department of Corrections and Rehabilitation.²

(§§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.

² The People mistakenly assert that the minute order of the October 25, 2013 sentencing hearing and the abstract of judgment do not require correction because they correctly state the sentence on count 2 was stayed pursuant to section 654. While both of these documents indicate count 2 was stayed pursuant to section 654, they *also* incorrectly note count 2 was imposed concurrently. Moreover, the abstract of judgment also incorrectly notes count 1 (carjacking) was stayed under section 654 and the determinate term was 36 years rather than six years.