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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EFRAIN NEFTALI FRAGA,<br><br>Defendant and Appellant. | H036566<br>(San Benito County<br>Super. Ct. No. CR10000152) |

## I. STATEMENT OF THE CASE

A jury convicted defendant Efrain Neftali Fraga of assault on a police officer. The court then found that he had a prior strike conviction and had served three prior prison terms. (Pen. Code, §§ 245, subd. (c); 667, subds. (b)-(i); 1170.12, subds. (a)-(d); 667.5, subd. (b).)[1] The court imposed a 12-year sentence comprising a five-year aggravated term for the assault, doubled under the "Three Strikes" law, plus two one-year prison term enhancements.[2]

On appeal, defendant claims the court erred in giving CALCRIM No. 371 which instructs jurors on efforts by a defendant to create or obtain false testimony. Defendant

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[1] Defendant was also charged with resisting arrest (Pen. Code, § 148, subd. (a)(1)), but that charge was dismissed shortly before the trial commenced.
All unspecified statutory references are to the Penal Code.

[2] The court struck one of the prison term enhancements.

claims the Three Strikes law was inapplicable because the prosecutor failed to plead that one of his prior convictions was a strike. He claims there was insufficient evidence that he served three prior prison terms. He claims the court erred in denying a continuance to allow sentencing before the trial judge. He claims he is entitled to additional pretrial custody credit. And last, he claims the abstract of judgment must be corrected to reflect the sentence actually imposed for the assault.[3]

We conclude that the court erred in denying a continuance, reverse the judgment, and remand the case for assignment, if possible, to the trial judge for further proceedings related to sentencing.

## II. FACTS

On July 3, 2009, Parole Officer Fitzroy Stevens, Officer Leticia Ramirez of San Benito County Probation Department, Sergeant George Ramirez of the Hollister Police Department, and Agent Marcia Ferguson of the state Department Of Alcohol Beverage Control were at the Cantina Bar & Grill in Tres Pinos as part of a multi-agency team assigned to monitor bars during the Hollister Motorcycle Rally. Around 7:40 p.m., Officers Stevens and Ramirez, who were in tactical clothing identifying them as parole and probation officers, were outside behind the Cantina and saw a man and a woman exit quickly. Officer Stevens immediately recognized the man as defendant and identified him to Officer Ramirez.

Defendant headed toward a Harley Davidson motorcycle. Officer Stevens called to him by name. Defendant ignored him, mounted the motorcycle, and put on his helmet, which had no visor and simply covered his head. Officer Stevens approached him and said "I know you're Efrain Fraga on parole." Defendant denied being Fraga and being on parole and started the engine. Officer Stevens ordered him to turn it off and then put his

[3] Defendant has also filed a petition for a writ of habeas corpus (H037900) in which he claims defense counsel rendered ineffective assistance. We ordered that the appeal and petition be considered together. In a separate opinion, we deny the petition.

hand on a handlebar and straddled the motorcycle. He was about one foot away from defendant, and there was nothing obstructing his view of defendant's face. At that point, defendant stepped on the accelerator and released the clutch. The motorcycle reared up and came back down, hitting Officer Stevens's knee. He immediately drew his gun. Defendant said, "[You] ain't going to shoot me," revved the engine, and sped away, forcing Officer Stevens to move to avoid getting hit.

After this happened, a "be on the lookout" report was broadcast over the radio using defendant's name. Sergeant Ramirez and Officers Stevens and Ramirez then went to the police station, where Sergeant Ramirez assembled a six-person photographic lineup. He told the officers that the lineup might or might not include the photograph of the person they saw on the motorcycle. It did in fact include defendant's photograph. Officers Stevens and Ramirez viewed the lineup separately, and both immediately identified defendant as the person they had seen.

At trial, Officer Stevens testified that he recognized defendant at the Cantina because he knew who he was from reviewing parole office "face sheet[s]" and from seeing him on numerous occasions in the parole office talking to other parole officers. He said that he and his office partner, Officer Mace, often talked about their "problem case[s]," and defendant was one of Officer Mace's problem cases. He explained that defendant was a "parolee-at-large," which meant that he was not following the rules and avoiding parole supervision and contact with his parole officer. He said that in the past, he and Officer Mace had gone to defendant's residence to find him or gather information concerning his whereabouts. He said that defendant had a history of denying his identity to police officers, but he was surprised that defendant would do so to a parole officer who knew him.

At trial, both Officer Stevens and Officer Ramirez said they were certain that the man was defendant.

Dennis Lucia, a friend of defendant, testified as a prosecution witness. He had previously testified for the defense at the preliminary hearing. At that time, he said he was at the Cantina that evening and saw two officers approach a man on a motorcycle, who he thought was defendant. Lucia approached him to say hello but realized the man was not defendant. Lucia further testified that he saw defendant in Gilroy one day and told him that a defense investigator had called him a few weeks before to talk about a newspaper report about a high speed motorcycle chase.

At trial, Lucia acknowledged his former testimony. The prosecutor asked Lucia to explain how the defense investigator would have known to call him if, as he had testified, defendant was not the person he had seen at the Cantina and he did not talk to defendant about the case until *after* he had spoken to the investigator. Lucia became unsure about the timing of his conversations with defendant and the investigator and then said that he first spoke to defendant and later "got some phone calls." Concerning his encounter with defendant in Gilroy, he said that he told defendant he had read a newspaper article about him.

***The Defense***

The defense was that Officers Stevens and Ramirez had misidentified defendant, who at the time of the incident was miles away in Half Moon Bay celebrating the Fourth of July weekend with his then girlfriend, Amber Steits.

At the time of trial, Amber Steits was no longer defendant's girlfriend, but she remained his friend. She testified that on July 3, 2009, defendant picked her up at her house between 10:00 and 11:00 a.m., and they drove to Half Moon Bay and Soquel, where they went on a boat ride and watched fireworks. In Half Moon Bay, they ate dinner at a Mexican restaurant called La Bomba and afterward spent the night at a campsite on the beach.

Steits further testified that a couple of months before trial, she went to Half Moon Bay with defendant and his father to talk to a waitress at La Bomba and a cashier at a Quick Stop convenience store to see whether they had seen defendant on July 3, 2009. Both persons remembered seeing defendant. Steits admitted that she did not volunteer this information until after the defense investigator came to her house. She explained that before doing so, her relationship with defendant had ended, the matter was of no concern to her, and she had decided to move on with her life.

Concerning the events July 3, 2009, Steits conceded that her recollection was vague because she had had four or five margaritas before defendant arrived, and she continued drinking the rest of the day. For example, she testified that defendant picked her up mid-morning at her house in Gustine, and she left with only the clothes she was wearing. However, she told the defense investigator that he picked her up in San Martine, not Gustine, and she said that in Half Moon Bay, she had to change her shirt because she had spilled hot chocolate on it at a convenience store. She told the investigator that they got to the campsite first and then went to dinner later. However, she testified that they ate at La Bomba first and then went to the beach and got a campsite. She later testified that they met up with a number of her relatives who were already at the beach and had secured a number of campsites. She and defendant left for dinner and later returned to the campsite, where they continued to drink. Steits then explained that upon arriving in Half Moon Bay, they went on a boat ride. After that, they stopped at the Quick Stop on their way to dinner. There they ran into her relatives. She testified that the cashier asked her how her Fourth of July was, even though it was July 3.

Gabriella Brito, who worked at a “More for Less” store in Half Moon Bay, testified that defendant came into the store on July 3, 2009, sometime between 5:00 and 9:00 p.m. because it was not quite dark yet. She remembered recommending La Bomba

restaurant. Brito testified that it took her an hour and a half to get to the courthouse from Half Moon Bay.

Serafina Machado, who worked at La Bomba restaurant, testified that defendant came in on July 3, 2009, sometime between 6:30 and 8:30 p.m. It was still a little light outside. She said that some months later, defendant came in again and reminded her about that night. Machado testified that it took her an hour and forty minutes to drive to court, which is almost eight miles closer to Half Moon Bay than the Cantina is.

## III. CALCRIM No. 371

Defendant contends the court erred in giving CALCRIM No. 371, which permits jurors to infer a consciousness of guilt from evidence that a defendant tried to obtain false testimony or authorized someone else to try. He argues there was no evidence that he or someone else acting on his behalf tried to obtain false testimony.

As given, the instruction provided as follows. "If the defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than the defendant tried to create false evidence, provide false testimony or conceal or destroy evidence, that conduct may show the defendant was aware of his guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself."

CALCRIM No. 371 is properly given only when there is evidence in the record that, if believed by the jury, sufficiently supports an inference of consciousness of guilt. (See *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 102 [concerning similar CALJIC Nos. 2.04 and 2.06]; see also *People v. Riggs* (2008) 44 Cal.4th 248, 308, fn. 27

[instruction properly given if the defendant's efforts to fabricate evidence indicate consciousness of guilt].) The instruction makes "clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

It is undisputed that the defense investigator spoke to Lucia before the preliminary hearing, and at that hearing, Lucia testified that defendant was *not* the person approached by two officers at the Cantina on July 3, 2009. At trial, Lucia acknowledged his prior testimony that he spoke to a defense investigator *before* he ever talked to defendant about the case. As noted, Lucia could not explain how the investigator would have known to call him and then became unsure about the timing and suggested that he spoke to defendant first.

In our view, jurors could have found that Lucia, as defendant's friend, had a natural bias and motive to protect defendant. Jurors could have inferred that defendant must have spoken to Lucia before Lucia spoke to the investigator. Finally, jurors reasonably could have inferred that after talking to defendant about the case, Lucia agreed to support the defense by testifying, falsely, that he thought he saw defendant at the Cantina but was mistaken and that he did not talk to defendant until after he had spoken with the investigator. Because the jurors reasonably could have drawn this inference, we conclude that the court did not err in giving CALCRIM No. 371.

We further note that the court advised jurors that not all of the instructions might be applicable and warned them not to assume that because an instruction was given, it was applicable. (See CALCRIM No. 200.) Thus, even if we assume that the evidence

did not support the instruction, the instruction would have been superfluous, and we could and would presume the jurors would have found the instruction inapplicable and simply disregarded it. (Cf. *People v. Pride* (1992) 3 Cal.4th 195, 249 [inapplicable instruction on consciousness of guilt from effort to suppress evidence is "at worst" superfluous]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1125 [where case given to jury on different factual theories, one of which is not supported by any evidence, court presumes jurors rejected that theory and based verdict on the factually supported theory].) Indeed, the advisement given by the court ordinarily renders an inapplicable instruction harmless. (*People v. Rollo* (1977) 20 Cal.3d 109, 123; see *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472.)

Moreover, here the evidence of guilt was strong. Defendant has never claimed that Officer Stevens was not assaulted at the Cantina that day. He claimed only that the officers misidentified him. However, Officer Stevens was very familiar with defendant, having seen him a number of times in the parole office. He was right in front of defendant with an unobstructed view of defendant's face during the assault. And later, without hesitation, he picked defendant's picture from a photographic lineup of six men. Officer Ramirez also independently picked defendant's picture from the lineup.

Finally, although Brito and Machado testified that they saw defendant on the evening of July 3, 2009, in Half Moon Bay, their testimony did not preclude his being at the Cantina earlier that evening. And although their testimony corroborated Steits's testimony that defendant was at the convenience store and restaurant that evening, they did not corroborate Steits's testimony that she and defendant were together for the whole day and did not go to the Cantina. Steits was defendant's friend and thus potentially biased, she admitted having trouble remembering events because of her drinking, and her testimony on certain factual issues was contradictory. Finally, Lucia's testimony about

mistakenly thinking he saw defendant at the Cantina was undermined by his potential bias as defendant's friend and his equivocation about when he spoke to defendant.

Under the circumstances, any error in giving CALCRIM No. 371 was harmless because it is not reasonably probable the jury would have returned a more favorable verdict had the instruction not been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[4]

## IV. SENTENCING UNDER THE THREE STRIKES LAW

Defendant contends that the court erred in sentencing him under the Three Strikes law because the prosecution failed to plead that one of his prior convictions was a strike.

### A. Background

In addition to charging assault, the complaint, which was later deemed the information, alleged that defendant had five prior felony convictions which resulted in his serving three prior prison terms within the meaning of section 667.5, subdivision (b), which provides a one-year enhancement for a prior prison term. One of the alleged convictions involved a violation of section 273.5 (domestic abuse) in court case number 4118 in San Benito County.

During a break in the jury trial, defendant waived his right to a jury on the prior conviction/prison term enhancement allegations. Shortly thereafter, the prosecutor advised the court and the defense that in addition to the prison term enhancement

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[4] Relying primarily on *Ulster v. Allen* (1979) 442 U.S. 140, defendant claims giving an inapplicable instruction violated his federal constitutional right to due process. We disagree. The instruction creates a permissive inference. A permissive inference violates due process only if it is not reasonable to draw the permitted inference from the required factual predicate. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-315; *Ulster v. Allen, supra,* 442 U.S. at p. 157-163.) Defendant cites no authority for the proposition that it is unreasonable to infer a consciousness of guilt from a defendant's efforts to obtain false testimony. On the contrary, it is reasonable to draw such an inference. (See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 131 [inference of consciousness of guilt from effort to suppress evidence reasonable and does not violate due process].)

allegations, he intended to prove that the San Benito County prior conviction was a strike, in that it involved the infliction of great bodily injury.[5] The court said, "You're just alerting the Court and counsel that you intend to do that?" Defense counsel acknowledged this and said that the defense "would request . . . proof of [the strike] as well."

Later, during jury deliberations, the prosecutor said he "wanted to clarify the issue that I brought up yesterday regarding the prior strike that I was going to prove in the event there is a guilty verdict. I wanted to be sure that [defendant] understood that he did waive his right to a jury *on that issue*." (Italics added.) The court asked defense counsel if he and defendant had discussed that issue, and counsel confirmed that they had. The court further inquired, "And more specifically, in connection with the priors that are alleged in the complaint and information. But the question now is the extent to which there could be a jury issue . . . on the sentencing enhancement of priors; is that correct?" The prosecutor responded, "*Sentencing enhancement of the strike prior, yes*." (Italics added.) The court asked, "That he is also waiving his jury on that issue?" The prosecutor said yes. The court asked defendant whether he understood, and defendant said he did. The court then asked whether he waived his right to a jury on that as well, and defendant said he did.

After the jury returned its verdict, the court commenced the bench trial on the prison enhancement and strike allegations. To prove the strike, the prosecutor introduced

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[5] The prosecutor stated, "Your Honor, as I mentioned, briefly, the People have done some further investigation and we intend to prove, at the time of presentation of proof with respect to the prison priors, et cetera, that, in fact, there's also a strike prior pursuant to [section] 667 [subdivisions] (b) through (i). [¶] That is, that [defendant] has a prior conviction here in San Benito involving great bodily injury, serious bodily injury such that he has a strike under the aforesaid law, and we would present that to the court at the time to prove up of [*sic*] those prior convictions, et cetera, and ask the court to find that there is an enhancement pursuant to the law."

documentary evidence showing that defendant had suffered an enhancement for inflicting great bodily injury in connection with the San Benito conviction for domestic violence which would qualify the conviction as a strike. (See §§ 273.5; 12022.7; 667, subd. (d)(1); 667.5, subd. (c)(8).) Defense counsel reviewed the documents and submitted the case on the evidence. The court found that defendant had served three prior prison terms, and that the San Benito conviction was a strike. Later, defendant filed a *Romero*[6] motion to dismiss the strike. The court denied it, and, as noted, sentenced him under the Three Strikes law.

**B. Discussion**

Three Strikes law applies when the defendant has been convicted of a felony "and it has been pled and proved" that the defendant has a strike. (§§ 667, subd. (c); 1170.12, subd. (a).)

Defendant does not claim that his prior conviction did not qualify as a strike. Rather, he claims the strike was not properly pleaded. The complaint/information did not allege that one of the otherwise pleaded prior convictions was a strike, and the prosecutor never requested that the pleading be amended to include a strike allegation. In support of his claim, defendant relies on *People v. Mancebo* (2002) 27 Cal.4th 735, 749, fn. 7 (*Mancebo*), *People v. Arias* (2010) 182 Cal.App.4th 1009 (*Arias*), and *People v. Sandoval* (2006) 140 Cal.App.4th 111 (*Sandoval*).

*Mancebo* involved section 667.61—the "One Strike" law—which provides increased punishment for certain sex offenses committed under specified circumstances but requires that those circumstances be alleged in the accusatory pleading and admitted or found true by the trier of fact. (§ 667.61, subds. (f) & (j).) There, the accusatory pleading alleged that the defendant had committed qualifying sex offenses against different victims. The pleading also alleged personal use of a firearm both as an

[6] *People v. Superior Court (Romero)* 13 Cal.4th 497 (*Romero*).

enhancement under section 12022.5 and as a One-Strike circumstance. The jury convicted the defendant of the charges and found the personal-use allegation true. At sentencing, the court could not use the personal-use finding to increase punishment and also to impose an enhancement. The court imposed the enhancement and then used an *uncharged* one-strike circumstance—i.e., that the crimes involved multiple victims (§ 667.61, subd. (d)(5))—to increase punishment. (*Mancebo, supra*, 27 Cal.4th at pp. 738-739.)

The Supreme Court held that it was error to use the uncharged multiple-victim circumstance to increase the sentence under the One Strike law because the accusatory pleading did not allege that circumstance or refer to the applicable statutory provision, and the pleading was never amended to do so. Thus, using it violated the statutory pleading and proof requirement. (*Mancebo, supra*, 27 Cal.4th at pp. 739, 743-744.)

The Attorney General claimed the requirement was satisfied because the pleading alleged the *facts* necessary to prove the multiple-victim circumstance. In rejecting this claim, the court explained that pleading the facts was not enough because the statute expressly required that the pleading allege the specific, statutorily described circumstance or at least refer to it by statute. (*Mancebo, supra*, 27 Cal.4th at pp. 744-745.) The court noted that the alleged facts had not informed the defendant that if he was convicted, the court could use his multiple convictions to impose a One-Strike sentence. Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure increased punishment under the One Strike law and then the personal use allegation to secure additional enhancements. (*Id*. at p. 745.)

The court further pointed out that "in addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked

to increase punishment for his crimes." (*Mancebo, supra*, 27 Cal.4th at p. 747.) Although it would have been difficult to contest the truth of a multiple-victim allegation, that observation "only begs the fair notice question in this case. The pleading and proof requirements . . . and defendant's due process rights, were violated here—not because defendant was never afforded notice that he was being charged with crimes against two victims; he obviously was, and not because defendant was never afforded notice that the One Strike law would apply to his case; again, he was. Sentencing error occurred because defendant was given notice that gun use would be used as one of the two pleaded and minimally required circumstances in support of the One Strike terms, whereafter, at sentencing, the trial court used the *unpled* circumstance of multiple victims to support the One Strike terms, and further imposed two 10–year section 12022.5(a) enhancements that could otherwise not have been imposed but for the purported substitution." (*Id*. at p. 753.)

*Arias, supra*, 182 Cal.App.4th 1009 involved section 664, subdivision (a), which provides a life term for willful, deliberate, and premeditated attempted murder if "the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found true by the trier of fact."

There, the accusatory pleading alleged two attempted murders but did not allege that they were willful, deliberate, and premeditated, and it was never amended to do so. However, the trial court instructed the jury that if it found defendant guilty of the attempted murder, it should determine whether the attempt was willful, deliberate, and premeditated. The jury convicted the defendant of first degree attempted murder but did not make any special findings. At sentencing, the court imposed a life term. (*Arias, supra*, 182 Cal.App.4th. at pp. 1011, 1017.)

On appeal, the defendant challenged the term because the prerequisite facts were never pleaded. The Attorney General claimed that any error was a pleading defect

subject to harmless error review. (*Arias, supra,* 182 Cal.App.4th. at p. 1020.) The court disagreed. It observed that no pleading provided notice or implied that the defendant might face a life term under section 664. Citing *Mancebo*, the court said that the lack of notice implicated the defendant's right to due process. (*Arias, supra,* 182 Cal.App.4th. at pp. 1019, 1020.) The court further stated, " 'It is fundamental that "[w]hen a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.]" [Citation.]' [Citation.]" (*Arias, supra,* 182 Cal.App.4th. at p. 1019, quoting People v. *Lohbauer* (1981) 29 Cal.3d 364, 368.)

The *Arias* court also distinguished *People v. Toro* (1989) 47 Cal.3d 966 (*Toro*) (disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 558, fn. 3). In *Toro*, the court upheld a conviction for an *uncharged* lesser related offense because the defendant had agreed to an instruction and verdict form on that offense. Doing so, according to the court, constituted implied consent to amending the information. The *Arias* court acknowledged that, as in *Toro*, the defendant had agreed to the instruction directing the jury to determine whether the attempt was willful, deliberate, and premeditated. However, the court noted that whereas the instruction in *Toro* was beneficial to the defense in that it permitted a conviction for a *lesser* offense, the instruction in *Arias* could only have led to *increased* punishment. The court opined that the defense could have had no tactical reason to voluntarily offer the jury a way to impose greater punishment. Under the circumstances, the court declined to extend the *Toro* doctrine of implied consent to amend the pleading based on the defendant's approval of the instruction. (*Arias, supra,* 182 Cal.App.4th at pp. 1020-1021.)

In *Sandoval*, *supra*, 140 Cal.App.4th 111, the prosecutor stated in court that he was amending the information to allege a strike. The defense did not object and denied the strike allegation. (*Id*. at p. 134.) On appeal, the defendant claimed the court erred in applying the Three Strikes law because the information itself was never formally amended in writing to allege the strike. (*Id*. at pp. 115, 127.)

In rejecting this claim, the court explained, " 'An accusatory pleading['s] . . . purpose is to provide the accused with reasonable notice of the charges.' [Citation.] Defects in the form of an accusatory pleading are not a ground to reverse a criminal judgment in the absence of significant prejudice to a defendant. [Citation.] [¶] We are aware of no authority . . . that suggests that a criminal judgment may not be premised upon an information that has been orally amended. In a number of cases, courts have noted that an information was orally amended. [Citations.] [¶] The informal amendment doctrine makes it clear that California law does not attach any talismanic significance to the existence of a written information. Under this doctrine, a defendant's conduct may effect an informal amendment of an information without the People having formally filed a written amendment to the information. [Citations.]." (*Sandoval*, *supra*, 140 Cal.App.4th at pp. 132-133.)

Defendant argues that this case is like *Arias*. He further notes that unlike *Sandoval*, the prosecutor here never announced in court that he was amending the pleading to allege the San Benito conviction as a strike.

We find *Mancebo* and *Arias* distinguishable. In those cases, the defendant lacked notice that he might face increased punishment under certain statutes, the pleading did not contain allegations that triggered sentencing under those statutes, and the prosecutor did not formally or orally amend the information to include the necessary allegations. Thus, using the uncharged facts or circumstances to impose increased punishment

violated not only the applicable statutory pleading requirement but also the defendant's due process right to notice.

Here, the complaint/information alleged that defendant had suffered a prior felony conviction in San Benito County for domestic abuse in case number 4118, but it did not allege that the conviction was a strike. However, before the court trial, the prosecutor informed the court and defendant that he would seek increased punishment under the Three Strikes law by proving that the San Benito County conviction qualified as a strike because it involved the infliction of great bodily injury. Thus, before trial, defendant had notice of and an opportunity to object to the addition of a strike allegation. Indeed, when the prosecutor sought to clarify whether defendant waived his right to a jury trial on factual issues related to the added strike allegation, the court asked defendant if he understood this and whether he also waived his right to a jury trial on strike-related issues. Defendant said he understood and waived his right.

These circumstances render the case closer to *Sandoval*, and we conclude that the prosecutor's assertion that the San Benito conviction qualified as a strike and the announcement of his intent to prove that it was a strike, together with counsel's response that the defense would require proof, and defendant's additional waiver of a jury trial on factual issues, constituted an oral amendment of the complaint/information and denial of the strike allegation sufficient to satisfy the pleading requirement of the Three Strikes law.

We acknowledge, as defendant points out, that the prosecutor did not expressly state that he was amending the accusatory pleading. However, in general, courts are loath to exalt form over substance. (E.g., *People v. Weaver* (2012) 53 Cal.4th 1056, 1075 [declining to exalt the form of defendant's waiver over substance of what he said]; *Perry v. Brown* (2011) 52 Cal.4th 1116, 1126 [same re interpretation that would permit public

officials to do indirectly what they cannot do directly]; *Berardi v. Superior Court* (2008) 160 Cal.App.4th 210, 225 [same re form of court's procedure over substance].)

Thus, just as we do not attach talismanic significance to the existence of a written information, so too we do not believe that the doctrine of informal or oral amendment requires a prosecutor to recite a specific script or use particular words to achieve a valid and effective informal oral amendment. (Cf. *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 218-219 [no particular words or phrases required to waive *Miranda* rights]; *People v. Cruz* (2008) 44 Cal.4th 636, 667-668 [waiver need not be of a "predetermined form"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1070 ["No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation"]; *People v. Crittenden* (1994) 9 Cal.4th 83, 129-131 [no particular words needed to invoke *Miranda* rights]; *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190, 213 [no "magic words" required to waive sovereign immunity]; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 546 [no particular form of words or script required to advise defendant concerning constitutional rights]; *In re Marriage of Cesnalis* (2003) 106 Cal.App.4th 1267, 1272 [no particular words required to waive statutory termination of spousal support].)

In our view, it is the substance of what a prosecutor says and the surrounding context that matter most, and therefore we believe the existence of an informal oral amendment should turn on (1) whether what the prosecutor says conveys that he or she is alleging and intends to prove a new charge that could increase punishment; (2) whether what the prosecutor says provided the defendant with constitutionally sufficient notice of the new charge and the possibility of increased punishment; and (3) whether the defense

understood that defendant was facing a new charge, had an opportunity to object to it, and denied it.[7]

Here, the record unequivocally reveals that the prosecutor said he was going to prove a new allegation that one of the previously alleged convictions was a strike. The court and the defense understood that the prosecutor intended to prove the new and additional strike charge. The defense implicitly denied the allegation. Under the circumstances, we find sufficient compliance with the statutory pleading requirement. Thus, we reject defendant's claim that the court erred in imposing a Three Strikes sentence.

## V. DENIAL OF A CONTINUANCE

Defendant contends that the court erred in denying his request for a continuance so that the trial judge (Judge O'Farrell) could be the one to rule on his *Romero* motion and impose sentence.

### A. Background

Retired Monterey County Superior Court Judge Robert O'Farrell presided over the jury trial and the subsequent court trial on the prior conviction allegations. At a post-trial hearing, he referred the case to the probation department and scheduled sentencing.[8] Thereafter, defendant changed counsel, and sentencing was continued to permit him to

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[7] Obviously, the most direct and unequivocal way to effect an oral amendment is for the prosecutor to assert that he or she is amending the information, as the prosecutor did in *Sandoval*. However, we believe the best practice is to seek a formal written amendment of the pleading.

[8] The record reveals that at this time, Judge O'Farrell permitted defendant to withdraw a previous *Arbuckle* waiver of the right to be sentenced by him. (See *People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757 (*Arbuckle*) [implied term of plea bargain is right to be sentenced by the judge who accepted the plea].) However, Judge O'Farrell noted that defendant had no *Arbuckle* right to waive in the first place because the case did not involve a plea bargain.

file a motion for new trial. When Judge O'Farrell denied that motion counsel announced his intent to file a *Romero* motion. Judge O'Farrell rescheduled the trial.

On the trial date, the parties appeared before Judge Steven Sanders. Defense counsel sought a continuance so that Judge O'Farrell could rule on the *Romero* motion and impose sentence. To show good cause, counsel asserted that because there was a factual dispute concerning the nature of the assault, Judge O'Farrell, who had heard the evidence, should be the one to rule on the *Romero* motion and exercise sentencing discretion. In this regard, counsel pointed out that after he denied the new trial motion, Judge O'Farrell, seeking to settle sentencing issues, opined that the offense was not that "severe" and suggested a five-year term. The prosecutor objected, and no settlement was reached.

The prosecutor disagreed with counsel's suggestion concerning Judge O'Farrell's view of the offense. He agreed that Judge O'Farrell had tried to settle sentencing and had asked him to "think about five years." However, when he rejected that term, Judge O'Farrell said, "You're right; we have to just have the hearing. Let's do it." According to the prosecutor, Judge O'Farrell further said that although the matter would come before Judge Sanders, he could hear it himself. The prosecutor noted, however, that Judge O'Farrell "never followed through" and "never did anything about it." Defense counsel agreed with the prosecutor's recollection but reiterated his request for a continuance.

Judge Sanders opined that both counsel and the prosecutor were merely conjecturing about what Judge O'Farrell's views about sentencing were. He then denied the continuance, saying that he was in as good a position to rule on certain issues as Judge O'Farrell.

## B. Applicable Principles

We review the court's order on a motion for continuance for an abuse of discretion. (*Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027.) " 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.' (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 364, p. 420; see *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) 'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action . . . ." Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion. [Citation.] . . . [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred.' (*City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1297-1298.) To determine if a court abused its discretion, we must thus consider 'the legal principles and policies that should have guided the court's actions.' (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) Accordingly, we determine whether we have sufficient confidence in what the trial court did to defer our consideration to its decision.

A trial court may grant a continuance only upon a showing of good cause. (§ 1050, subd. (e); *People v. Leavel* (2012) 203 Cal.App.4th 823, 830.) A court is vested with broad discretion in determining whether to grant a continuance, and on appeal, the moving party bears the burden of demonstrating that a denial constituted an abuse of discretion. (*People v. Sakarias* (2000) 22 Cal.4th 596, 646-647.) Moreover, absent a

showing of abuse and prejudice, reversal is not required. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.)

**C. Discussion**

Our analysis is guided by *People v. Strunk* (1995) 31 Cal.App.4th 265 (*Strunk*) and *People v. Jacobs* (2007) 156 Cal.App.4th 728 (*Jacobs*).

In *Strunk, supra,* 31 Cal.App.4th 265, the court had an administrative procedure under which all sentencing was handled by the same judge to facilitate settlement. (*Id*. at p. 275, fn. 12.) On appeal, the court disapproved the practice because it conflicted with the "implied natural course of proceedings that are expected by the defendant" which contemplates sentencing by the trial judge. (*Id*. at p. 275, fn. 13.) The court opined that "[s]uch a blanket procedure, without an explicit agreement by the defendant or some showing of good cause, denies the defendant his or her right to an independent full and fair sentencing hearing as contemplated under the Determinate Sentencing Act . . . and the California Rules of Court." (*Id*. at p. 275, fn. omitted.) Although the defendant in that case did not have an *Arbuckle* right to be sentenced by the trial judge, the court opined that the procedural principle should apply. "Absent some agreement by the defendant or the unavailability of the trial judge for other than internal administrative problems or convenience of the court, or some other good cause shown, a defendant should be able to have the trial judge who was familiar with the evidence at the trial impose sentence." (*Id*. at p. 276, fn. 13.)

In *Jacobs, supra*, 156 Cal.App.4th 728, the trial judge scheduled sentencing and arranged to have the case assigned back to him for that purpose. However, on the day for sentencing, the trial judge was apparently unavailable, and the parties appeared before a different judge. Defense counsel sought a continuance because the trial judge would be available in just a few days. However, the new judge asked if there was legal authority prohibiting him imposing sentence. Neither party could provide any. However, *the*

*prosecutor* argued that the interests served by proceeding immediately were outweighed by the strong preference for having the trial judge impose sentence and the short continuance needed for that to happen. However, the new judge decided that it was necessary to proceed immediately because of "jail overcrowding." (*Jacobs, supra*, 156 Cal.App.4th at pp. 732-733.)

On appeal, the court observed that even in the absence of an *Arbuckle* right, sentencing by the trial judge is the "preferred procedure." (*Jacobs, supra*, 156 Cal.App.4th at p. 738.) The court agreed with *Strunk* that a defendant should be able to have the trial judge impose sentence unless the defendant agreed to another judge, the trial judge was unavailable, or there was good cause to have another judge impose sentence. (*Id.* at p. 739.)

With this in mind, the court found the denial of a continuance an abuse of discretion. The court noted that the trial judge expected to impose sentence, only a short continuance was needed, and "jail overcrowding" did not outweigh the sentencing preference any more than " 'administrative problems' " or " 'convenience of the court' " would. (*Jacobs, supra*, 156 Cal.App.4th at p. 740.)

The court further found that the error was prejudicial. The court acknowledged an element of speculation in the defendant's claim that the trial judge could have imposed the lower term instead of the middle term and might have dismissed the strike because of various mitigating circumstances. Nevertheless, the court found it possible that the trial judge might have imposed a more lenient sentence. Accordingly, the court's inability to say what the trial judge might have done was sufficient to establish prejudice. Stated differently, the court held that the decision to proceed with sentence under the particular circumstances "was not 'in conform[ance] with the spirit of the law' " and "could be said 'to defeat the ends of substantial justice.' " (*Id*. at pp. 740-741.) Accordingly, it remanded the matter for sentencing before the trial judge.

In seeking a continuance, defendant had the burden to establish good cause. (§ 1050, subd. (e); *People v. Leavel, supra,* 203 Cal.Ap.4th at p. 830.) An important factor in determining good cause is whether a continuance would be useful. (*People v. Beeler, supra,* 9 Cal.4th 953, 1003.) Clearly, a continuance to permit sentencing by the trial judge would be useful. As explained in *Strunk*, the trial judge is familiar with the defendant, the evidence, the testimony, and the demeanor of the witnesses, and therefore, sentencing by the trial judge is the preferred procedural course in a criminal case. In *Jacobs*, the court implicitly concluded that the defendant's request to be sentenced by the trial judge constituted good cause for a continuance. We too conclude that defendant's desire to have Judge O'Farrell, rather than Judge Sanders, rule on his *Romero* motion and impose sentence established good cause. Thus, the question becomes whether the denial of a continuance was an abuse of discretion.

Cases have articulated the standard for finding an abuse of discretion in a number of different ways. In *In re Marriage of Connolly* (1979) 23 Cal.3d 590, the court asserted that "the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (*Id*. at p. 598.) Other cases suggest that a court abuses its discretion only when it ruling is "arbitrary, whimsical, or capricious." (*People v. Zack* (1986) 184 Cal.App.3d 409, 413; *People v. Branch* (2001) 91 Cal.App.4th 274, 282; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614.)

In *Jacobs*, the court opined that it would be difficult to characterize the denial of a two-day continuance as arbitrary, whimsical, capricious, or irrational. (*Jacobs, supra*, 156 Cal.App.4th at p. 736.) However, the court noted that " '[t]his pejorative boilerplate is misleading since it implies that in every case in which a trial court is reversed for an abuse of discretion its action was utterly irrational. Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion.' " (*Id*. at

p. 737, quoting *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 (*Drew*); accord, *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1218 (*Miyamoto*).)

The *Jacobs* court further noted that " ' " 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]' " [Citations.]' [Citation.]" (*Jacobs, supra*, 156 Cal.App.4th at p. 737, quoting *Drew, supra*, 207 Cal.App.4th at p. 1297.) The court explained that " 'Abuse of discretion has at least two components: a factual component . . . and a legal component. [Citation.] This legal component of discretion was best explained long ago in *Bailey v. Taaffe* (1866) 29 Cal. 422, 424: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' " (*Jacobs, supra*, 156 Cal.App.4th at pp. 737-738, quoting *Concord Communities v. City of Concord* (2001) 91 Cal.App.4th 1407, 1417; accord, *Miyamoto, supra*, 176 Cal.App.4th at p. 1218.)

These concepts, which guided the analysis in *Jacobs*, also guide our analysis here.

The record does not establish that when the parties appeared before Judge Sanders, Judge O'Farrell was unavailable, and nothing Judge Sanders said suggests that Judge O'Farrell was and would continue to be unavailable. Moreover, we decline to presume so because the prosecutor and defense counsel agreed that Judge O'Farrell had said he could hear the *Romero* motion and impose sentence. Finally, Judge Sanders did not give any reason for denying a continuance. His view that he was in as good a position to rule on certain issues as Judge O'Farrell, while perhaps true, could be used to deny a

continuance in every case and does not, in our view, constitute good cause to ignore the preference for sentencing by the trial judge.

In short, there was good cause for a continuance, there is no evidence that Judge O'Farrell was unavailable, and Judge Sanders's denial unjustifiably thwarted the preferred sentencing procedure. As such, we find that it was an abuse of discretion.

Concerning prejudice, we shall follow the *Jacob* court's example. Although defendant does not challenge Judge Sanders's denial of his *Romero* motion or the imposition of the aggravated term for assault, and although there is an element of speculation concerning whether Judge O'Farrell might have imposed a more lenient sentence, we are nevertheless unable to say what Judge O'Farrell might have done. Moreover, given the comments Judge O'Farrell made to defense counsel and the prosecutor in his effort to settle sentencing and his suggestion that the prosecutor consider five years, it is certainly within the range of reasonable probability that Judge O'Farrell would have imposed a more lenient sentence. Under the circumstances, we conclude that the decision to proceed with sentencing "was not in 'conform[ance] with the spirit of the law' " and "could be said to 'defeat the ends of substantial justice.' " (*Jacobs, supra*, 156 Cal.App.4th at pp. 740-741.)

Given our conclusion, the matter must be remanded so that, if possible, Judge O'Farrell can rule on defendant's *Romero* motion and impose sentence.

All of Judge Sanders's other sentencing decisions cannot, however, be reinstated. As noted, defendant claims there was insufficient evidence to support Judge O'Farrell's finding of three prison term enhancements. Although Judge Sanders later struck one of those enhancements, defendant argues that his reason for doing so is unclear. Was he compelled to do so because there was sufficient evidence for only two enhancements; or did he simply exercise his discretion under section 1385 to dismiss in furtherance of justice? Given the latter possibility, defendant asserts that Judge Sanders might have

thought there were three viable enhancements. However because he claims there were only two viable enhancements, Judge Sanders, if the case returns to him, should be given the chance to exercise his discretion over whether to strike one of the two enhancements and thereby reduce his sentence by one year.

We consider it necessary to address defendant's evidentiary claim for guidance on remand regardless of whether the case returns to Judge O'Farrell or Judge Sanders.

## VI. SUFFICIENCY OF THE EVIDENCE

### A. Background

The complaint/information alleged that defendant had five prior felony convictions that resulted in three prison terms: a Santa Clara County conviction on January 8, 1993, for theft; a San Benito County conviction on April 27, 1993, for domestic violence; and three Santa Clara County convictions in July 2002 for various other offenses. Pertinent here are the two 1993 convictions.

The probation report reveals that defendant received a 16-month sentence for the 1993 Santa Clara theft conviction and later a five-year term for the 1993 San Benito County domestic violence conviction. The record further shows that defendant was in custody serving the sentence for theft when he was sentenced on the domestic violence conviction. Thus, the two convictions resulted in two sentences that he served over a single, continuous period of time.

### B. Discussion

Section 667.5, subdivision (b) provides for the imposition of a one-year enhancement for "each prior separate prison term" served by the defendant for any felony. Section 667.5, subdivision (g) defines "separate prison term" to mean "a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes . . . ." Because the definition contemplates that a defendant may serve a single, continuous

period of incarceration for one or a number of felonies that are sentenced concurrently or consecutively in the same or different proceedings, the definition of "separate prison term" has been interpreted to mean that when a defendant serves "one continuous block of time" for multiple convictions, that period of incarceration constitutes only one prison term for purposes of section 667.5, subdivision (b) and, therefore, only one enhancement properly may be imposed. (*People v. Jones* (1998) 63 Cal.App.4th 744, 747-748.)

As noted, defendant served "one continuous block of time" for the two separate 1993 convictions.[9] Accordingly, the single continuous period of incarceration for the two 1993 convictions represents only one prison term. It follows that defendant's five prior convictions resulted in only two prison terms for purposes of enchancement, not three as found by Judge O'Farrell.

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[9] We note that in his opposition to the *Romero* motion, the prosecutor asserted that defendant had served only two prior prison terms. At sentencing, counsel pointed out that he and the prosecutor agreed that defendant had served only two prison terms. And Judge Sanders remarked, "Yeah. We looked at [the 1993 theft conviction] and given the credits at the time of the conviction date, and looking at [the 1993 domestic violence case], given its conviction date and the date of the offense, it appears that it would be difficult to see how the defendant was not in custody on the [theft case] at the time of the San Benito case coming up."

## VII. DISPOSITION[10]

The judgment is reversed. The matter is remanded for assignment to Judge O'Farrell for a ruling on defendant's *Romero* motion and sentencing in light of the fact that only two prison term enhancements may be imposed.

RUSHING, P.J.

WE CONCUR:

ELIA, J.

GROVER, J.

[10] In his opening brief, defendant claimed that the trial court miscalculated the amount of presentence conduct credit he was entitled to, giving him only 57 instead of 144 days. Thereafter, however, the trial court recalculated defendant's conduct credit and gave him 144 days. Defendant then filed a supplemental opening brief in which he claims that under the equal protection clause, he is entitled to the benefit of the October 1, 2011, amendments to sections 2933 and 4019, which would then entitle him to an additional 144 days of credit. Our reversal makes it unnecessary to address the equal protection claim at this time. We note, however, that two appellate courts, including this court, have addressed and rejected the identical equal protection claim. (*People v. Kennedy* (2012) 209 Cal.App.4th 385 [Sixth App. Dist]; *People v. Ellis* (2012) 207 Cal.App.4th 1546 [Fifth App. Dist.].)

Given our disposition, we also need not address defendant's claim that the abstract of judgment must be corrected.