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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E036170
v.	(Super.Ct.No. FSB026013)
JAY ANGELO KELLY,	O P I N I O N
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. W. Robert Fawke, Judge. Affirmed with directions.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gary W. Brozio, Supervising Deputy Attorney General, Jonathan J. Lynn and Robert M. Foster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jay Angelo Kelly of driving/taking a vehicle (Veh. Code, § 10851, subd. (a)), evading a police officer (Veh. Code, § 2800.2, subd. (a)), and

misdemeanor hit and run (Veh. Code, § 20002, subd. (a)). In bifurcated proceedings, the trial court found that Kelly had suffered three priors for which he served prison terms (Pen. Code, § 667.5, subd. (b)) and three strike priors (Pen. Code, § 667, subds. (b)-(i)). He was sentenced to prison for two consecutive terms of 25 years to life, plus three years. He appeals, claiming the trial court erred in denying his *Wheeler-Batson*[1] motion, admitting evidence, denying his new trial motions, failing to provide him with auxiliary services while he was representing himself, and sentencing him. He also asserts that the prosecutor committed misconduct during argument to the jury. We reject all his contentions and affirm, while directing the trial court to add something to the abstract of judgment.

FACTS

Sometime between the evening of October 22, 1999, and early October 26, 1999, a Ford Expedition was taken from the driveway of its owner's home. The vehicle was spotted at the bus depot in San Bernardino the morning of October 26th. A half hour later, a plainclothes police officer in an unmarked car found the vehicle parked in a driveway three miles from the depot in the residential area of West San Bernardino. The driver had difficulty backing the car out of the driveway. The plainclothes officer called for backup and followed the car, which traveled down the residential streets. The first black and white unit to arrive on the scene got in behind the Expedition and followed it,

[1] *People* v. *Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712] (*Batson*).

and a second unit fell in behind the first. The Expedition sped up to 40 to 45 miles per hour. Both units turned on their red and blue lights and their sirens. The Expedition sped up to 50 miles per hour, went through a stop sign without stopping, and led the officers on a pursuit until it jumped the curb on 15th Street and crashed into the bedroom of a home one-fourth of a mile away from where it had first been spotted. Kelly emerged from the driver's seat and ran behind the house into which he had crashed the vehicle. He managed to evade pursuing officers and a police helicopter until being apprehended 20 minutes later. The blue jacket he had been wearing was later found by police, as were a sweaty white T-shirt and gray sweatpants.

Kelly's defense was that even though he was on parole with drug conditions, he went, with crack in hand, to the home of an acquaintance near the crash scene the night before, and, with this man, smoked it all night. The next morning, when he heard the sirens that were responding to the crash, he left the recreational vehicle in which they had been smoking the crack and, unwittingly, began running towards the crash scene. When he got close enough to see the red and blue lights of the patrol cars, he realized that he needed to avoid the police, due to his violation of several of his parole terms, and he turned and ran to get out of the area. As he did, he saw another Black man, wearing brown pants and a gray or black shirt, who was also running. Kelly removed the white T-shirt and gray sweatpants he was wearing, hoping that a parole officer, whom he knew and had passed by, would not recognize him without them. He left them where the police later found them. However, he denied that the discarded jacket also found by the police

was his. He ran when confronted by the police, but was ultimately unsuccessful in evading them.

ISSUES AND DISCUSSION

1. *Wheeler-Batson Error*

More than halfway through jury voir dire, defense counsel told the trial court, "I just want the court to admonish the [prosecutor] that there is a motion pending here that I am going to make now under *Wheeler* and *Batson* concerning her arbitrary use of p[er]emptory challenges to excuse all [African-Americans] . . . ." (Italics added.) Counsel then named the three formerly excused prospective jurors. Defense counsel added, ". . . [I]f the [prosecutor] was going to say there was a reason to kick [a named one of the three] off, it was because he was going to say that she had to prove the case against [Kelly] and that sounds like a real tough burden she has to meet here. [¶] . . . I . . . ask the court to declare a mistrial and we will have another panel come up."

The trial court responded, ". . . [T]he three that you have talked about, I have seen them be excused but there have been reasons that the [prosecutor] could choose to do it." Kelly here contends that the trial court's failure to declare that he had made a prima facie case of discrimination require the prosecutor to state nonracial reasons for excusing these jurors and determine that those excuses were sufficient and in good faith require reversal of his convictions. We disagree.

No doubt, the trial court "short-circuited" procedures by the manner in which it handled Kelly's motion. However, we believe the result would not have been different had the court below done exactly what it should have done. It concluded that there

existed reasons for dismissing each of these prospective jurors, which were not related to their race. Kelly challenges this conclusion, asserting, merely, ". . . [T]here was little if anything in the voir dire of [the three] to justify the prosecution's use of peremptory challenges." However, Kelly himself reports in his opening brief that one worked for the public defender's office in Los Angeles, had a brother who had been convicted of murder, and had herself been the victim of a robbery, while another had a brother who was in prison. Additional facts about these prospective jurors Kelly does not mention are that the former one had a daughter who worked for the alternate public defender's office in Los Angeles, and the latter one thought he knew Kelly from high school, had a nephew who was in prison for "strong-arm robbery," and his wife worked for an officer that "help[s] whoever has problems with the D[istrict] A[ttorney]." The last of the three had cousins who had been arrested. Thus, there existed legitimate nonracial reasons for excusing all three prospective jurors. Had the trial court followed proper procedures, a different result would not have occurred, and, therefore, Kelly was not prejudiced by what it did. We note that defense counsel below failed to object to the manner in which the trial court handled his motion.

2. *Admission of Evidence*

During direct examination by the prosecutor, the officer who was in the second black and white unit testified that after Kelly had been arrested, "I walked back to the crime scene, at which time a witness flagged me down and . . . showed me where the suspect had taken off his clothes, which was 1448 West . . . 15th. He had taken off his white shirt and he had tan khaki pants or gray sweat pants [*sic*] and a blue jacket. I found

exactly where they told me and they said he took off his white shirt, left it . . . right next to the garage. I found a white T-shirt . . . . [¶] . . . [¶] The witness, who was right across the street at 1455 said, 'Hey, the suspect . . . .'" Defense counsel made a hearsay objection which was sustained by the trial court. The officer continued, "'Jumped over the fence right here, left his white shirt right here,[']which I found . . . ." The prosecutor then asked the officer, "They said [the] suspect then went over here behind these bushes . . . ." Defense counsel interrupted the prosecutor, saying, ". . . [W]e don't want to hear what they told you, just what you did."

During cross-examination of the officer by defense counsel, the officer testified that shortly after the crash, he received a call over the radio that the "suspect [who] was just involved in a crash . . . was taking off his clothes . . . at 1448 [15th Street]." Defense counsel asked the officer who the caller was and the officer identified him as "Mr. Mendoza." During further cross-examination, the officer testified that he talked to Mendoza. Counsel asked the officer, "[Mendoza] didn't see the person get out of the vehicle that was crashed up against the house, he saw somebody later, right?" The officer responded, "He actually told me it was the suspect from the vehicle." Defense counsel said, "Okay. But . . . did [Mendoza] actually say he saw the car hit the house?" The officer replied, "He said he heard the accident. I don't know if he actually saw the accident." During more cross-examination, the officer testified that he talked to Mendoza, who said that the suspect was wearing brown khaki pants or gray sweats. He also said that his report contained a statement by a woman who said that the suspect that had been driving the vehicle was in front of her home. The officer denied talking to this

woman, but said that her statement had been dispatched on the radio. This woman had to have been the same witness who, at trial, positively identified Kelly as the driver of the Expedition and testified that five minutes after the crash, Kelly emerged from between two houses, having changed his clothes.

Kelly here contends that the trial court erroneously admitted the statements Mendoza made to the officer and during his call to the police. First, the officer testified that Mendoza, and possibly others (he used the word, "they" often) told him that the suspect had taken off the latter's white T-shirt, his khaki or gray sweatpants and his blue jacket, and Mendoza pointed these items out to the officer. Defense counsel did not object to this testimony, and, therefore, may not now contest its admission. (Evid. Code, § 353.) It was during cross-examination of the officer by defense counsel that the former went on to state that Mendoza had called reporting that the person who ran from the Expedition had taken off his clothes. He added that Mendoza did not actually see the crash, but he knew the person who ran from the Expedition was wearing brown khaki pants or gray sweatpants. (Kelly admitted wearing the sweatpants that were found.) Because counsel himself elicited this testimony, he cannot now object to its admission. That small portion to which defense counsel objected, as noted above, added nothing of prejudicial impact to the evidence to which counsel either failed to object or solicited himself.

As a fall-back position, Kelly asserts that his attorney's failure to object to this evidence constituted incompetency of counsel. To prevail, however, he must show a reasonable probability that but for the failure to object, the outcome would have been

more favorable to him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 2064].) This probability must be sufficient to undermine confidence in the outcome. (*People v. Davis* (2005) 36 Cal.4th 510, 551.) Kelly cannot meet this burden. Kelly asserts that only Mendoza "connected the clothing to the driver of the [Expedition]." Not true. The officer in the first black and white unit behind the Expedition testified that the driver wore a blue jacket with three white stripes on the sleeves. Kelly was bare-chested when he was apprehended and the jacket was found near the crash scene and behind the house where the woman had seen Kelly emerge. The woman, who testified and was cross-examined, stated that the driver of the Expedition changed his clothes. She had told the police at the scene the same thing. Both of these witnesses positively identified Kelly as the driver. The woman had also identified Kelly "in the field" minutes after the crash. The helicopter overhead traced Kelly's flight through the neighborhood. Kelly ran from officers closing in on him. Even Kelly admitted this at trial. Kelly's defense was not strong. As part of his parole revocation, he did not contest that he took the vehicle and evaded police.

3. *New Trial Motion*

Kelly contends the trial court erred in denying his motion for a new trial on the basis that his trial attorney was incompetent. We examine each incident of incompetence mentioned in Kelly's opening brief.

a. *Newly Discovered Evidence/Failure to Investigate Shaved Key*

In an argument combining the bases for a new trial motion of both newly discovered evidence and incompetency of counsel for not finding this evidence before

trial, Kelly asserted below that, after trial, he sent an investigator to a local Ford dealership. There, the investigator contacted an individual at the service department. This person's position in that department is not identified in Kelly's moving papers.[2] This person said that a 1998 Ford Expedition could not be started with a shaved key unless the driver was able to bypass the security system in some fashion. The person asserted that a driver would need a key with a computer chip inside to start a 1998 Ford Expedition. Kelly asserted below that had this evidence been presented at trial, he could have made the argument that "this was an insurance scam gone wrong where the owner of the car made the key available to the thief or thieves who took the car." He added that he had "repeatedly . . . asked [his trial attorney] to investigate the fact that the stolen car did not use a shaved key."

As the People correctly pointed out in their written response to Kelly's motion, the subject was, indeed, explored at trial. The officer who first got to the vehicle after it had crashed into the house testified that he believed there was a key in the ignition and the vehicle was running. The owner testified that there was a Ford key, which obviously was not intended for the vehicle[3] and was not his, in its ignition when he regained possession of the Expedition. He also testified that there were two sets of keys to the vehicle, and that he had both of them at the time the vehicle was taken. He denied giving either set to

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[2] He could have been a receptionist, a car washer, a janitor, or the head of the department.

[3] He so concluded because sometimes the key worked in the ignition and sometimes it didn't.

anyone. He also denied giving anyone permission to take or drive his vehicle. He said he did not know how it got to San Bernardino from the driveway of his Nuevo home in Riverside County.[4] He denied knowing Kelly or seeing him in his vehicle. While the prosecutor introduced evidence that car thieves use shaved keys to steal cars, and it was the prosecutor's theory that Kelly used a shaved key to drive the Expedition, the particular key that had been used had not been kept and was not available for inspection by the parties. The prosecution's expert on stolen cars said he believed that not all Expeditions were made so that they did not run if a key without a chip was inserted in the ignition, and he was unaware which models did. Even those that had a chip in their key could be driven with a shaved key for some distance.

The trial court denied the motion for a new trial on this basis, saying, ". . . [The] newly discovered evidence . . . was known to the defense at the time [of trial]. . . . [Defense counsel] was aware of it, the defendant had made him aware of it. . . . [T]here [are] an awful lot of new cars that have those chip keys . . . that are being stolen on a regular basis with a variety of methods used to start them. [¶] . . . [T]his particular stolen vehicle did have the shaved key in it and had been operating up to that point prior to the accident when it crashed into the house. So . . . in reality it does not come in as new evidence, it is something that was available and could have or would have been developed at the time of trial." The trial court went on to conclude that it was probably a

[4] Nuevo is 12 miles west of Hemet. According to Kelly's moving papers, it is 50 miles from where the vehicle was driven into the house.

tactical decision by trial counsel not to call someone like the service department employee, who would have been asked on cross-examination how cars with chips in their keys end up stolen anyway.

Here, Kelly asserts that trial counsel "fail[ed] to do even the most minimal investigation into this 'shaved key' issue." However, there is no support whatsoever in the record before us for this assertion. Moreover, we agree with the trial court -- it would have been foolish for defense counsel to try to persuade the jury that the Expedition could not have been driven with anything other than the keys the owner received when he purchased it, unless counsel was also prepared to prove that the owner had given Kelly or whoever was driving the vehicle one of those keys. There is nothing in the record before us to support such a theory; in fact, the evidence in the record is quite to the contrary. Therefore, Kelly cannot possibly carry his burden of showing that, but for his attorney's failure to present this or similar testimony (or to further investigate the matter), there is a reasonable probability he would have enjoyed a better outcome. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687 [104 S.Ct. at p. 2064].)

b. *Failure to Locate Tyrone Thomas*

The officer who spotted the Expedition on the west side of San Bernardino testified that when he came upon the vehicle, it was parked in a driveway. A Black male was in the driver's seat. A person, whose gender the officer did not notice, was standing outside the driver's door talking to the driver. After the crimes, prints belonging to Tyrone Thomas were discovered on the driver's door window and the fender on the driver's side. In his motion for a new trial, Kelly stated that he "knew Thomas," and the

latter had Jheri curls. The officer who identified Kelly as the driver testified that in describing the driver to dispatch, he *might have said* that the latter had Jheri curls, but he could not recall what he said, and, in fact, the driver's hair was in cornrows.[5] In his motion, Kelly faulted his trial attorney for not investigating the whereabouts of Thomas.

As the People correctly pointed out in their written response to Kelly's motion, had Thomas been located (a result not supported by the record before us), Kelly may have received no benefit whatsoever. If, in fact, Thomas was the driver of the car (and the fact that his prints were found on the *outside* of the car did nothing to support this), he would have "taken the Fifth Amendment" and refused to testify. The fact that Kelly knew Thomas is more damning than anything about the matter this jury was told. Thomas could easily have been the person who was talking to the driver of the car in the driveway (his prints on the outside of the car are consistent with this), and because Thomas and Kelly were acquaintances, that would incriminate Kelly, not exonerate him. The mere coincidence, alone, of the fingerprints of an acquaintance of Kelly's being on the outside of a car allegedly being driven by Kelly, would have been one more nail in Kelly's coffin. Fortunately for Kelly, the prosecutor during trial was apparently unaware of the link between the two men. Not involving Thomas in this trial was a smart move on the part of defense trial counsel. Our conclusions were echoed by the trial court.

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[5] We note, with interest, the difference between the officer's actual testimony, which we have summarized in the body of the opinion, and the following representation made by Kelly's attorney (not trial counsel) in his moving papers as to what the officer said, ". . . [The officer] testified that his radio description of the fleeing suspect was that he had Jherri [*sic*] curls." (Emphasis omitted.)

c. *Failure to Move to Suppress the In-field Identification*

Although Kelly here contends that the trial court erred in denying his new trial motion on the basis that his trial attorney failed to bring a motion to suppress the in-field identification of him by the woman mentioned above, we note that in his discussion of this issue, he makes no references to his moving papers below, the People's written response, or the trial court's ruling. That is, no doubt, because he never advanced this argument below as part of his motion for a new trial. Therefore, he waived the issue.[6] To the extent he appears to argue that, independent of the new trial motion, the cumulative effect of trial counsel's incompetence, including this particular failing, requires reversal of his convictions, we note our rejection of the incidents of alleged incompetence discussed here which were, in fact, part of his new trial motion. Moreover, we incorporate, by reference, the People's response to this particular assertion on its merits.

d. *Failure to Maintain Contact*

Kelly, again, advances an argument he did not make below, i.e., that his attorney's failure to maintain contact with him amounted to incompetency of counsel which merited the trial court's granting him a new trial.[7] As to the cumulative effect of this and the

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[6] If Kelly wished to make this argument independent of his contention that his new trial motion should have been granted (which he should have because it was not part of the motion), he should not have placed it under the heading concerning that motion and within the portion of his brief dealing with that motion.

[7] See footnote 6, *ante*.

other matters discussed above in relation to the new trial motion, our position has already been stated and we incorporate, by reference, the People's response to this particular contention.

e. *Failure to Object to Comments by the Prosecutor During Closing Argument*

Once again, Kelly claims the trial court erred in denying his new trial motion on the basis that his trial attorney was incompetent for failing to object to remarks made by the prosecutor during closing argument, but no such argument was advanced below as part of that motion.[8] We will therefore address the argument on the merits in relation to Kelly's assertion of prosecutorial misconduct and incompetency of trial counsel for failing to object to it and not in the context of the denial of his new trial motion.

4. *Prosecutorial Misconduct*

a. *Comments concerning Mr. Mendoza*

During argument to the jury, the prosecutor pointed out that both the officer, who was driving the second black and white unit behind the Expedition, and the woman mentioned above identified Kelly as the man who got out of the vehicle and ran. He added, "Not only that, when [defense counsel] asked [this officer] who else said that or who else said something in regards to that, [the officer] said [that] Mr. Mendoza [had]. Mr. Mendoza didn't have to come in and testify because the officer was able to tell you Mr. Mendoza also identified the defendant as driving the vehicle." Defense counsel objected, saying the prosecutor was "misstat[ing] . . . the argument." Presumably,

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[8] See footnote 6, *ante*.

counsel meant she was misstating the evidence. She was not. As stated before, during cross-examination by defense counsel, the officer testified twice that Mendoza reported that the person involved in the crash had changed his clothes.

b. *Comments Concerning What Kelly Told His Trial Lawyer*

During direct examination of Kelly by his attorney, Kelly testified that his trial attorney began representing him in May 2000. He also said, during direct, that during 2000, he saw his alibi witness on the jail bus and told him that he wanted him to testify in his behalf. He said that when he was arrested in this case, he was immediately sent to prison. During cross-examination, he explained that his parole was revoked because of his involvement in this case and for other reasons. The following colloquy occurred during redirect examination:

"[Defense counsel:] Did you ever tell me about [the woman whose house you testified to yesterday you tried to hide in while the police were chasing you] before [your testimony] yesterday?

"[Kelly:] I really don't recall telling you a whole lot about that episode . . . , so I know if I didn't tell you much, I didn't tell you that.

"[Defense counsel:] Do you ever remember telling me anything about this?

"[Kelly:] No.

"[Defense counsel:] Did I ever come to the jail and visit you?

"[Kelly:] No."

During argument to the jury, the prosecutor said, ". . . [Kelly] is sent away to prison for violation of parole and he meets [his trial attorney], comes back here and says

that he met [his trial attorney] about a year ago. Did he tell [his trial attorney] about this alibi? No. Does he tell him . . . , [']I didn't do this, it was not my fault, I got these people [who saw me at the scene and the alibi witness who] knows where I was at the time.['] Does he tell him? No. Why not? It didn't happen. It took him a year-and-a-half to figure out an alibi."

Kelly here contends that these remarks constitute prosecutorial misconduct, but they do not. They were merely commentary on evidence *defense counsel* elicited from Kelly. Therefore, defense counsel's failure to object to them cannot be deemed incompetency of counsel.

5. *Auxiliary Services for Self-Representation*

The jury returned its verdicts in early May 2001. On August 9, 2001, before Kelly's motion for a new trial had been filed and his bifurcated trial on the priors had been conducted, he successfully moved to represent himself. The trial court noted that copies of the documents the People intended to present at the hearing on the priors had been given to Kelly and trial defense counsel acknowledged that he had discussed the evidence with Kelly. At defense counsel's request, the trial court vacated the date set for the new trial motion and continued the trial of the priors. The trial court told Kelly that he had law library privileges.

On August 20, 2001, Kelly told the trial court that he still was unable to get into the law library to do research. The trial court said that it would sign an updated order saying that Kelly was in propria persona and recall the case five days later to make sure the order was being honored. The record before us contains no transcript for that

appearance, but the minute order reflects no complaint by Kelly. An August 31, 2001, minute order states that Kelly's motion for appointment of a paralegal/legal runner was granted by the trial court, who signed the order of appointment. The motion itself is not part of the record before us. On September 28, 2001, the minute order notes that Kelly said he needed further reports from his trial attorney who was present and said he could have them to Kelly by the next hearing date. On December 10, 2001, Kelly requested counsel to be appointed, saying, "The law library . . . [is] having . . . a lock-up situation or something, I don't know, and it is shaky at best getting in there." The trial court reappointed Kelly's trial attorney, and Kelly said nothing to the court. A week later, trial counsel was relieved and a conflicts panel attorney was appointed to represent Kelly.[9] The trial of the priors did not occur until late March 2002. In July 2002, the trial court granted Kelly's *Marsden* motion and appointed him new counsel. Kelly's May 2003 *Marsden* motion against this attorney was denied. New counsel was appointed in September 2003. The hearing on Kelly's new trial motions took place on April 30, 2004.

Based on elaborations of these facts and reading things into them not supported by the record before us, Kelly here asserts that he was denied his Sixth Amendment right to represent himself by the trial court's denial of adequate ancillary services necessary to carry out that right. He does not state what those services were and the record before us provides no clue. He appeared at one point to be somewhat frustrated by his inability to

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[9] And so ended the "sadism," which Kelly currently complains occurred when his trial attorney was reappointed to represent him.

use the law library as he had wished; however, he willingly asked the trial court to appoint him counsel, which it did. This apparent frustration was resolved months before the trial of the priors and years before the hearing on the new trial motions. There is no basis whatsoever in the record before us for vacating the results of both of these proceedings, as Kelly has requested.

6. *Sentencing*

a. *Penal Code section 654*

Kelly claims that the under Penal Code section 654, he cannot be punished both for taking/driving the Expedition and evading the officers. The sentencing court concluded that the two were separate offenses, with the first being completed when the vehicle was taken and the other beginning when the first black and white unit behind the Expedition activated its lights and siren. Even if, as Kelly asserts, the evidence presented at trial did not show that he took the car, but was merely driving it, he was doing this *before* the officers attempted to stop him. Therefore, there was evidence to support the trial court's conclusion that the crimes were independent of each other. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

b. *Romero Motions*

In denying Kelly's *Romero*[10] motions, the trial court said, ". . . Kelly . . . [has] . . . pled guilty . . . [to] three residential burglaries . . . . [R]esidential burglaries are potentially one of the most dangerous of the property type crimes . . . because you are

[10] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

going into an individual's house. . . . Kelly has indicated that he was always sure before he entered a house that nobody was there and I am not quite sure how you could possibly make that decision . . . . You might . . . think there is [no]body in there, but . . . especially with the reasons given for breaking and entering [in that] Kelly was on drugs or ha[d] a drug habit, the sophistication, research and work to try to come to that conclusion . . . [gives me] a great deal of concern with the validity of that statement, even though [Kelly] may actually believe it. [¶] But the whole thing that has led up to this is [Kelly's] choice in the past of doing the first degree residential burglary and going into the potential situation where that confrontation could arise. That is what society has dictated is the strike. Every one of [Kelly's] prior crimes has been that first degree residential burglary, a very potentially dangerous situation for life not only to either [the perpetrator] or the people in the house, but depending on the circumstances potentially innocent bystanders depending on how far the attempt to stop the burglary or to apprehend [the perpetrator] as [the latter is] trying to get away[,] potentially injuring other people, neighbors, friends, relatives, passers-by on the street . . . . [¶] . . . [Kelly] said . . . [he] had learned [his] lesson and cleaned up [his] act [when [he] got out of prison for the third burglary], saw the error of [his] ways . . . as a two striker . . . . The problem is that it wasn't long after that that . . . [his] good faith efforts and intentions put [him] back . . . in front of me . . . . [His] ignoring the attempts . . . by law enforcement to stop [the Expedition] . . . makes this an extremely dangerous and life threatening event . . . ; the reckless driving . . . ;

potential running of stop signs;[11] potential of injuring a child . . . [or a] . . . pedestrian . . . crossing the street; . . . in this case the actual[ity of] eventual[ly] . . . losing control of the car and crashing into a house which could have injured somebody in the front yard . . . or . . . somebody in the house . . . is extremely dangerous. [¶] . . . [¶] The purpose of the three strikes law was to try to keep repeat people off of the streets that have committed violent felonies. [¶] . . . [¶] . . . I cannot find any rationale that . . . would authorize me with [Kelly's] background and circumstances to be able to [dismiss] the strikes because . . . with the history that I am looking at, [he] would probably be out in a couple more years and then somebody else the next time a situation arises is liable to lose their life because of [his] need to fulfill that drug habit. [¶] . . . [¶] . . . I . . . cannot find anything in the background and circumstances of even this crime . . . that would permit me to [dismiss] any of the strikes."

While Kelly here acknowledges that the trial court's denial of his motions is subject to review for abuse of discretion, he contends that discretion was abused because, he asserts, the trial court was unaware that it had discretion under Penal Code section 17, subdivision (b), to treat one or both of his felony convictions as misdemeanors. However, nothing in the record before us supports Kelly's assertion that the trial court was unaware that it had this discretion. Moreover, based on the remarks quoted above, we conclude that the trial court would not have exercised that discretion to reduce either

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11 As already stated, the officer in the first black and white unit following the Expedition testified that Kelly, indeed, ran a stop sign.

of Kelly's felony convictions to misdemeanors, even if Kelly had made the appropriate motion.[12]

Kelly also contends that the sentencing court abused its discretion by relying on the nature of the priors and his continuing criminality. He asserts that all third strikers are recidivists. While this, of course, is true, he ignores the real focus of the court's reasons for denying his motion, i.e., the potential for serious harm of both his past and current offenses. Added to this is the fact that Kelly ignored the conditions of his recently granted parole in several respects. If this is not a case for which the three strikes law was intended, we would be hard pressed to find one that is.

DISPOSITION

The trial court is directed to amend the abstract of judgment to note that Kelly was sentenced pursuant to Penal Code section 667, subdivisions (b) through (i). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ramirez
P.J.

We concur:

/s/ Hollenhorst
J.

/s/ King
J.

[12] Therefore, we cannot agree with Kelly that any of his attorneys below were incompetent for failing to make such a motion.