Filed 7/26/05

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN MEDINA, Defendant and Appellant.	B171348 (Los Angeles County Super. Ct. No. BA243462)

APPEAL from a judgment of the Superior Court of Los Angeles County. George C. Lomeli, Judge. Reversed in part and affirmed in part.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Medina appeals from a judgment entered upon his conviction by jury of assault on a public official (Pen. Code, § 217.1, subd. (a), count 1),[1] resisting an executive officer (§ 69, count 2), and making criminal threats (§ 422, count 3). Appellant admitted having suffered seven prior felony strikes within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). The trial court sentenced him to consecutive 25-year-to-life terms on counts 1 and 3, and a concurrent 25-year-to-life term on count 2. Appellant contends that (1) the trial court erred in sentencing him as a "three-striker," as he did not stand convicted of six of the seven prior charges when the current offenses occurred, (2) he suffered ineffective assistance of counsel in the event that it is determined that his admission of the prior convictions forfeited his challenge to whether they were strikes, (3) there was reversible prosecutorial misconduct in closing argument and trial examination of the victim, denying appellant a fair trial and due process of law, (4) the trial court erred in imposing a 25-year-to-life sentence on count 2 after striking all prior convictions with respect to that count, (5) the trial court abused its discretion in denying appellant's *Romero*[2] motion, (6) appellant's sentence constituted cruel and unusual punishment, and (7) the trial court erred in limiting appellant's presentence conduct credits to 15 percent.

We reverse appellant's sentence on count 2, modify his conduct credits and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2003, in the Long Beach courthouse of the Los Angeles Superior Court, trial began in the prosecution of appellant, in case No. NA054131 (Case No. NA054131), for five counts of attempted kidnapping during commission of a carjacking (§§ 664/209.5) and one count of attempted carjacking (§§ 664/215). Erwin Petilos, who did not know appellant before the prosecution, was the prosecuting deputy district attorney.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530 (*Romero*).

The trial resulted in jury verdicts of guilty on all counts and an admission by appellant of one prior felony conviction. The trial court sentenced appellant to a state prison term of 37 years eight months. That matter is now on appeal and is decided in a separate opinion filed concurrently herewith.

During the above trial, an incident occurred that led to the current charges. That incident was described at the trial in this matter as follows. On February 4, 2003, Petilos was waiting for the verdict of the deliberating jury in Case No. NA054131. The jury indicated that it had reached a verdict, and Petilos returned to the courtroom. The clerk read the jury's guilty verdicts as to all counts and special allegations. Before either side requested that the jury be polled, appellant threw a chair towards Deputy Sheriff Andrew Escalona, the courtroom bailiff who was standing behind him, ran towards Petilos from behind and began hitting him in the head with his fists. Petilos suffered bruises, but no permanent injuries.

At the time of the attack, a second deputy sheriff was standing next to Deputy Escalona and a third deputy was posted at the courtroom door. Deputy Escalona ran towards appellant and tackled him, pinning him against the jury box divider wall. The other two deputies came to his aid. Deputy Escalona asked appellant to relax, but it felt to him as if appellant was trying to push off the wall. Appellant did not cooperate in being handcuffed, although he did not struggle. Deputy Escalona picked up appellant, and they "went straight to the floor." After a radio call, other deputies entered the courtroom and took appellant back to a lock-up. Deputy Escalona injured his wrist tackling appellant.

After the incident, the trial judge placed the jury in the deliberation room, as it had not yet been polled. After order was restored, the jury was brought into the courtroom and polled in appellant's absence, all jurors acknowledging that the verdict was theirs. The matter was continued to March 12, 2003.

On the continued date, several motions were heard and the matter continued for sentencing. As the date was being selected, appellant acted upset, aggressive and angry, made eye contact with Petilos, "flipped [him] off" and said, "You are a dead man. I promise you that. You are fucking dead. You are going to burn in hell, bitch."

Petilos was not frightened in the courtroom when appellant made these threats because appellant was handcuffed and shackled with deputies around. But when he left the courtroom and calmed down, he became frightened because appellant was affiliated with the Compton Varrio T-flats Gang and the Surenos gang, a "southsiders sort of jailhouse gang." From Petilos's assignment to the hardcore gang unit, he was aware that most gang members in custody maintained connections outside of jail who could be called upon to arrange attacks on people outside of jail. Petilos feared such an attack, believing that appellant was particularly dangerous because he had nothing to lose in light of the lengthy sentence he faced.

After this incident, Petilos took precautions by obtaining a secure parking space, obtaining a gun and a carry permit, having Long Beach Police Department officers check on his home and having his personal information removed from California government computers. He continued to prosecute Case No. NA054131 and asked for the maximum possible sentence for appellant.

During trial in this matter, appellant admitted his seven prior convictions, within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) and section 667, subdivision (a)(1). The trial court sentenced him to consecutive 25-year-to-life terms on counts 1 and 3, pursuant to section 667 (e)(2)(A). It imposed the consecutive terms, finding in aggravation that the charges in the case involved violence and the threat of great bodily harm (Cal. Rules of Court, rule 4.421(a)(1)), that appellant exhibited a pattern of violent conduct indicating a danger to society (Cal. Rules of Court, rule 4.421(b)(1)), and appellant's prior convictions were numerous and increasing in seriousness (Cal. Rules of Court, rule 4.421(b)(2)). With respect to count 2, the trial court exercised its discretion under *Romero*, to strike the prior strikes "so as to come within the dictates of . . . section 667(c)(6)," struck the priors with regard to the section 667, subdivision (a) enhancement and imposed a concurrent 25-year-to-life term.

DISCUSSION

I. Appellant's convictions in Case No. NA054131 were prior felony strikes.

Appellant contends that his convictions of five counts of attempted kidnapping during commission of a carjacking and one count of attempted carjacking in Case No. NA054131 were not prior strikes because the conduct for which he was charged in this matter occurred prior to imposition of sentence in that case. He points to the fact that the alleged assault on the prosecutor in count 1 and resisting the bailiff in count 2 occurred immediately after reading of the verdict and before the jury was polled. The alleged criminal threat in count 3 occurred after the verdict was read and the jury polled, but before sentencing.

The issue presented for our determination is whether a defendant has been "convicted" of a prior offense, for purposes of the three strikes law, after a jury guilty verdict is read in open court but before the jury is polled or the defendant sentenced. We answer this question in the affirmative.

To resolve this issue, we must apply the customary rules of statutory construction in an effort to glean the meaning of the term "conviction" in this context. We examine the statute giving the words their ordinary meaning in context (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055), and consider the nature and purpose of the statute. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378-379.)

Section 667, subdivision (c), makes the harsher three strikes sentencing provisions applicable when (1) a defendant "has been convicted of a felony," and (2) "it has been pled and proved that the defendant has one or more *prior felony convictions* as defined in subdivision (d) . . . ." (Italics added; see also § 667, subd. (e) [making the enhanced three-strike penalty applicable "where a defendant has a prior felony conviction"].) Subdivision (b) of section 667 states that "[i]t is the intent of the Legislature in enacting subdivisions (b) to (i) [three strikes law], inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."

The term "conviction" has no fixed definition and has been interpreted by the courts of this state to have various meanings, depending upon the context in which the word is used. (*People v. Williams* (1996) 49 Cal.App.4th 1632, 1637.) "'Convicted'" sometimes refers to a verdict or guilty plea and other times it means a verdict or guilty plea and the judgment pronounced on the verdict or plea. For purposes of imposing a sentencing enhancement, "'conviction'" means only the ascertainment of guilt. (*People v. Mendoza* (2003) 106 Cal.App.4th 1030, 1033.) With respect to its applicability to the three strikes law, "[t]he Legislature certainly did not intend to benefit a repeat offender such as defendant based solely on the fortuity of the timing of sentencing." (*People v. Rhoads* (1990) 221 Cal.App.3d 56, 59.) "To the contrary, in context, Penal Code section 1170.12, subdivision (b)(1) evinces an intent to eschew technicalities in definition. The focus we discern is rather on factual guilt. . . ." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1253-1254.)

We agree with the analysis in *People v. Williams*, *supra,* 49 Cal.App.4th 1632. There, the defendant pled guilty to three counts of residential burglary and one count of receiving stolen property, and the trial court found him guilty of a fourth count of residential burglary. The information alleged a prior burglary strike, to which the defendant pled guilty, for a burglary that occurred before the current burglary. However, judgment on the prior burglary was pronounced after the current burglary. The defendant argued that the first burglary did not result in a conviction until pronouncement, which occurred after the current burglary and was therefore not a *prior* strike. The Court of Appeal rejected this contention, stating, "Generally, however, where the existence of a prior conviction triggers increased punishments, courts interpret 'conviction' to mean the factual ascertainment of guilt by verdict or plea." (*Id.* at p. 1637.) The court concluded: "Given the focus and purpose of section 667 (b)-(i), we conclude that 'prior felony convictions' in section 667, subdivision (c), falls within the general rule. . . . [that] when guilt is established, either by plea or verdict, the defendant stands convicted and thereafter has a prior conviction." (*Id.* at p. 1638.) This appears to reflect the weight of authority on this point in this state. (See *People v. Castello, supra,* 65 Cal.App.4th at p. 1254 ["prior felony convictions" in § 667, subd. (c), applies to Florida guilty plea even though not formally adjudicated]; *People v.*

Johnson (1989) 210 Cal.App.3d 316, 324 [defendant has been "'convicted'" within the meaning of § 667 even if he has not received pronouncement of judgment]; *People v. Hurley* (1957) 155 Cal.App.2d 350 [conviction of possession of marijuana was sufficient to support a 10-year prison sentence on a subsequent conviction of furnishing a narcotic to a minor, though sentence for both were imposed at the same time and appeal from the prior was taken the next day]; *People v. Clapp* (1944) 67 Cal.App.2d 197, 200 ["Conviction does not mean the judgment based upon the verdict, but it is the verdict itself"].)

Appellant adds a new wrinkle to this issue. He urges that with respect to the first two counts, the conduct on which they were based occurred after the reading of the verdict to the jury and its acknowledgment that that was the verdict, but before the polling of the jury. This fact does not alter our conclusion. While a defendant has a right to have the jury polled, a verdict is generally complete if it has been read and received by the clerk, acknowledged by the jury and recorded. (*People v. Hendricks* (1987) 43 Cal.3d 584, 597; *People v. Bento* (1998) 65 Cal.App.4th 179, 188.) Here, although the jury had not been polled when appellant attacked the prosecutor and resisted the bailiff, the clerk had read the verdicts in open court, and the jury affirmatively responded to the clerk's inquiry as to whether the verdict was the jury's verdict. This oral declaration was the return of the verdict. (*People v. Mestas* (1967) 253 Cal.App.2d 780, 786; §§ 1163, 1164 ["if no disagreement is expressed the verdict is complete"].) Furthermore, we find no equity in allowing the defendant to disrupt the normal court proceedings by a violent physical outburst, and then to use that interruption as a basis of avoiding the assessment of a prior strike offense. Hence, we conclude that the trial court properly considered appellant's convictions in Case No. NA054131 prior felony strikes.[3]

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[3] We fail to comprehend appellant's argument that "[a]ll three crimes of which appellant was convicted were 'wobbler' offenses which were eligible to be declared misdemeanors. (§ 217.1, subd. (a); § 69; § 422.) . . . They were not yet prior felony convictions at the time the crimes charged in this case were committed." The three offenses to which he refers were charged in this case and were not prior offenses.

II. Appellant's ineffective assistance of counsel contention is moot.

Because we have concluded in part I, *ante*, that appellant's convictions in Case No. NA054131 were prior felony strikes, we need not consider his claim that he suffered ineffective assistance of counsel by virtue of his counsel having allowed him to admit those priors.

III. There was no prosecutorial misconduct.

Appellant contends that there were numerous instances of prosecutorial misconduct during the prosecutor's trial examination of Petilos and closing argument. To establish that prosecutorial misconduct violates the federal Constitution, appellant must show a pattern of conduct so egregious that it infects the trial with unfairness so as to make a conviction a denial of due process. It is reversible prosecutorial misconduct under state law if the prosecutor employs methods to persuade the trier of fact that are reprehensible or deceptive. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) But isolated instances of technical misstatement do not constitute a pattern of egregious behavior warranting reversal. (*People v. Frye* (1998) 18 Cal.4th 894, 979.) Reversal requires that the prosecutor engage in an egregious pattern of conduct infecting the trial with unfairness or reprehensible or deceptive conduct. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

A. Violation of court ruling

Before trial began, the trial court conducted an Evidence Code section 402 hearing to determine the admissibility of evidence that appellant had gang affiliations. The prosecutor made an offer of proof that Petilos was in the gang unit, had prosecuted 12 gang-related murders and was familiar with the manner in which gangs operated. She argued that this evidence was relevant to establish that Petilos was in sustained fear, an element of the criminal threat offense.

The trial court ruled that Petilos could only testify as to his belief that appellant was in a gang, and that even if appellant was in custody, other gang members not in custody can be employed to retaliate. The court stated: "And I think that if you characterize it as a belief on his part as his state of mind, that is fine." "[T]o go further would be undue consumption of time and would be unduly and substantially prejudicial over the probative

value of the evidence." The trial court elaborated that the prosecutor should, "[m]ake the record very clear, it is not offered for the truth, but basically [Petilos's] state of mind with respect to the sustained fear."

During her opening statement, the prosecutor commented, "Was Erwin Petilos scared? He was scared. Based on his work on that last case, he knew the defendant was a gang member." During closing argument, she argued: ". . . Erwin Petilos knows that the defendant is a gang member. He is a member of the T-flats gang. He knows he is a member of Surenos, which is a jailhouse gang." Despite the fact that these comments were arguably inconsistent with the trial court's ruling, defense counsel made no objection to them nor did he request an admonition.

During the prosecutor's examination of Petilos, she asked why he was scared, to which Petilos responded: "A couple of things. 'A', I know that this particular defendant doesn't have anything to lose. 'B', I know he is affiliated with Compton Varrio T-flats gang, and is also part of a Surenos gang, which is a southsiders sort of jailhouse gang." Defense counsel made no objection or motion to strike any of this testimony, nor did he request a limiting instruction or admonition.

Appellant contends that these comments by the prosecutor and response by Petilos to the examination constituted prosecutorial misconduct. He argues that "[d]espite the court's limiting ruling, and the numerous clarifications of it, the prosecutor offered the testimony of appellant's gang affiliation for the truth of the matter."

Respondent initially meets this contention by asserting that appellant has waived it by failing to object and request an admonition with respect to the prosecutor's comments or Petilos's response or questioning. We agree that this contention is waived.

Generally, "'"a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."' [Citation.] This general rule, however, does not apply if a defendant's objection or request for admonition would have been futile or would not have cured the harm caused by the misconduct; nor does it apply when the trial court promptly overrules an objection and the

defendant has no opportunity to request an admonition. [Citation.]" (People v. McDermott (2002) 28 Cal.4th 946, 1001.) Appellant has failed to show that an exception applies, and he may not now raise this claim.

If this claim had been preserved for appeal, we would reject it. The isolated two comments by the prosecutor do not reflect a pattern of misconduct under the federal standard, nor were they so reprehensible or deceptive as to meet the state standard. While the prosecutor's conduct may have technically violated the trial court's ruling, we find the violation insignificant. Petilos testified that he was in the hardcore gang unit and had been involved with gang prosecutions. Consequently, a jury would likely conclude that any statement of Petilos's belief of appellant's gang affiliation and his ability to retaliate against Petilos from jail would be factually based.

Finally, even if the prosecutor's actions constituted misconduct, it was not prejudicial. Prosecutorial error is prejudicial where it is "reasonably probable that a result more favorable to the appealing party would have been reached" had the prosecutor not made the improper comments. (*People v. Watson* (1956) 46 Cal.2d 818, 836*; People v. Garcia* (1984) 160 Cal.App.3d 82, 93-94, fn. 12 [prosecutorial misconduct in exposing a jury to improper factual matters usually tested under the *Watson* standard]; see also *People v. Medina* (1990) 51 Cal.3d 870, 896.) The evidence against appellant was overwhelming, with the district attorney, court bailiff and trial judge all testifying without contradiction that appellant committed the charged crimes. On the issue of whether Petilos was in sustained fear, the jury was unlikely to place significantly different weight on testimony that Petilos knew appellant was a gang member than on testimony that, based on his work in the gang unit and trial of gang cases, he believed appellant to be a gang member. In either case, he would be in sustained fear. Further, the jury was instructed that their decision must be based on the evidence (CALJIC No. 1.03) and that the comments of counsel were not evidence (CALJIC No. 1.02). We presume that the jury followed these instructions. (*People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

B. Appeal to jury's passion and prejudice

During closing, the prosecutor argued: "But what the defendant did, Ladies and Gentlemen, is when he attacked a member of the system, when he attacked the D.A., he is attacking the heart of the system. And that is why you cannot assault a district attorney when they are just doing their job. That is why you cannot assault a defense attorney when they are just doing their job. You can't assault a judge when he is just doing his job. You can't assault a juror because they find you guilty or they find you not guilty. Everyone in the system, in order to keep the system in tact [*sic*] and keep the integrity of the system in tact [*sic*] is protected. [¶] Ladies and Gentlemen, the defendant violated that system, he attacked the system when he committed these crimes, when he assaulted the D.A., when he refused to listen to the bailiff, who was just doing his job, when he came back and threatened the life of the district attorney."

When the jury left the courtroom, defense counsel objected to this argument as inflammatory and moved for a mistrial because there was no evidence in this case of a jury being attacked. His request for a mistrial was denied. He did not request an instruction or admonition.

Appellant contends that this comment constituted prosecutorial misconduct because it sought to arouse the passion and prejudice of the jurors by interjecting them into the prosecution "almost as if they themselves were victims." He argues that the comment suggests that appellant might attack the jury and "postures appellant as their direct enemy."

Respondent meets this contention by asserting that appellant has waived it by failing to request a curative instruction and admonition. We agree. While appellant did object to the statement, he did not request an admonition. The failure to do so waived the objection. (*People v. Ghent* (1987) 43 Cal.3d 739, 762 ["[A]lthough defense counsel objected to some of the prosecutor's questioning in this regard, he did not request an instruction or admonition to lessen any possible prejudicial effect on the jury. [Citation.] As *Green* teaches, the asserted objection was thereby waived"].)

If the issue had been properly preserved for appeal, we would nonetheless find it to be without merit. It is unlikely that jurors would have viewed themselves as victims by

virtue of the prosecutor's comments, as the conduct of which appellant was charged did not pertain to actions against jurors. The jury was not singled out as a possible object of any conduct by appellant, but was included among references to the attorneys, judge and bailiff, all of the court personnel for whose protection the law was apparently adopted. The comment simply attempted to point out the seriousness of the charged offense. It was isolated, did not permeate the trial, was not reprehensible and, hence, did not constitute prosecutorial misconduct.

Even if the challenged comment was prosecutorial misconduct, on the charges to which it related, resisting arrest and assaulting the prosecutor, it was harmless error for the same reasons as set forth in part IIIA, *ante*. Even without these comments, it was clear beyond a reasonable doubt that appellant was guilty of the two offenses.

C. References to other cases

During the prosecutor's closing argument, she stated: "It doesn't mean that every case is complicated, that every case has tricky or difficult issues. This case, it is what it is. It is about as straightforward as it gets. Ladies and Gentlemen, you hear about juries, you hear about courtroom scenarios where you think, oh, my God, that result was so absurd. What happened? But sometimes in a formal setting, . . . common sense gets turned down on its head. Don't let that happen here. Use your common sense. Look at the jury instructions. Look at the elements." Appellant did not object to this argument or request that the jury be admonished.

Appellant contends that this comment constituted prosecutorial misconduct because the prosecutor "appealed to the jurors' sense of pride, and subtlety implied that they would be held up to ridicule if they brought back an 'absurd' result." He also argues that, "it is a subtle form of vouching and additionally, improperly references matters outside the record of the trial." It is, appellant continues, the prosecutor injecting her personal opinion on the merits.

Respondent contends that claim was not preserved by virtue of appellant's failure to object to it or request an admonition in the trial court. We agree. (*People v. McDermott, supra*, 28 Cal.4th at p. 1001.)

But even if not waived, we would reject this claim on the merits. A prosecutor may argue his views, beliefs, convictions as to what the evidence establishes and to urge that the evidence convinces his mind or is conclusive on the guilt of the defendant. (*People v. Head* (1952) 108 Cal.App.2d 734, 737-738.) Here, the prosecutor was simply commenting that the evidence in this case was straightforward and compelled the jury to find appellant guilty. We find no undue vouching or appealing to jurors' bias.

Even if these statements constituted prosecutorial misconduct, had they not been made there is no reasonable probability that a more favorable result for appellant would have been obtained. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Comments by prosecutors are generally treated by juries as words of an advocate in an attempt to persuade. (See *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) Further, as previously stated, the jurors received instructions that comments by attorneys are not evidence (CALJIC No. 1.02) and that they must decide all questions from evidence and no other source. (CALJIC No. 1.03). It is presumed that they followed these instructions. (*People v. Horton*, *supra*, 11 Cal.4th at p. 1121.)

IV. The 25-year-to-life sentence on count 2 must be remanded for resentencing.

During the sentencing hearing, the trial court granted appellant's *Romero* motion, striking all of appellant's prior felony convictions as to count 2 for resisting an officer. It then imposed a 25-year-to-life sentence on that count, concurrent with the 25-year-to-life sentence it imposed on count 1.

Appellant contends that the trial court erred in sentencing him to a 25-year-to-life sentence on count 2, after dismissing the prior strikes as to that count. He argues that without the priors, the proper sentencing range was 16 months two years or three years and requests that we remand this matter for the trial court to select one of those sentencing options to be imposed concurrently with the sentence on count 1.

Respondent agrees that this matter must be remanded for resentencing, but urges that the trial court should have the option, in addition to those suggested by appellant, of resentencing appellant to the concurrent 25-year-to-life term. It argues that the trial court dismissed the priors because it believed that it had to do so in order to impose a concurrent

sentence under section 667, subdivision (c)(6). That section provides that: "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)." It argues that if the court understood that it could have sentenced appellant to a 25-year-to-life sentence on count 2 concurrently, it might have done so.

We agree that this matter must be remanded for resentencing on count 2. After dismissing the prior felony counts in connection with that count, the trial court could not sentence appellant to a 25-year-to-life term, but was limited to the sentencing range specified in section 18. As respondent argues, it appears that the trial court struck the priors "so as to come within the dictates of Penal Code section 667(c)(6)." While the trial court's reasoning for its action is unclear, on remand it shall reconsider that ruling and, if it struck the priors solely to permit it to sentence concurrently, reconsider whether it was necessary to do so.

V. The trial court did not err in denying appellant's Romero motion.

Appellant filed a *Romero* motion pursuant to section 1385, requesting the trial court to dismiss "as many strike priors it can to avoid the imposition of a sentence that would be excessively cruel and unusual." The trial court denied the motion because of the nature of the underlying crime and appellant's prior criminal record.

Appellant contends that the trial court erred in denying his *Romero* motion. He argues that he must be deemed outside the spirit of the three strikes law because none of his prior convictions were violent felonies, his prior conduct lacked the "depravity and gratuitous violence" reflected in "career criminals," all of his prior convictions took place with an 18-month period, no one was harmed by his conduct, all of the prior convictions were the result of impulsive, unplanned conduct, appellant had a "difficult childhood," and appellant obtained his high school diploma and has tried to improve himself.

Section 1385 provides in part: "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) *Romero* held that trial courts have authority to

strike a prior conviction pursuant to section 1385. In deciding whether to do so, the trial court must take into account the defendant's background, the nature of his current offense and other individualized considerations. (*Romero*, *supra*, 13 Cal.4th at p. 531.) Determining what constitutes "'in furtherance of justice'" entails consideration "'"both of the constitutional rights of the defendant, and *the interests of society represented by the People* . . . . [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge."'" (*Id.* at pp. 530-531.) Thus, in deciding whether to strike a prior conviction, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the ruling on a *Romero* motion for abuse of discretion (see *People v. Carmony* (2004) 33 Cal.4th 367, 378), and "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.) Where the record indicates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the three strikes law, we will affirm the trial court's ruling, even if we might have ruled differently in the first instance. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The trial court is "presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*Ibid*.)

Here, we cannot say that the trial court abused its very broad discretion. Appellant's attempt to minimize the seriousness of his prior offenses is unavailing. At the young age of 22, appellant already had an extensive prior record of seven felony convictions. That his record was not more extensive might simply reflect his youth. Although six of the

convictions resulted from Case No. NA054131, and none of his victims in that case suffered any physical injuries, had appellant succeeded in starting the van and taking the abducted family on a police chase, all of their lives would have been placed in peril, as well as the lives of pedestrians unlucky enough to cross appellant's path. Similarly, with respect to his current offenses, appellant demonstrated an utter contempt for the rule of law and a brazenness, suggesting a complete inability to control his conduct under any circumstances. He attacked an officer of the court in front of the judge, jury, bailiff and sheriffs, showing no appreciation for the propriety or consequences of his conduct, making him an extremely dangerous individual.

VI. Cruel and unusual punishment.

Appellant contends that a 50-year-to-life sentence, in addition to the 37 years eight months imposed in Case No. NA054131, constitutes cruel and unusual punishment under the United States and California Constitutions. This contention is without merit.

In California, "[t]he judiciary may not interfere with the authority of the Legislature to define crimes and prescribe punishment unless a prescribed penalty is so severe in relation to the crime that it violates the constitutional prohibition against cruel or unusual punishment. [Citations.] Nevertheless, a sentence may violate article I, section 17, of the California Constitution if it is so disproportionate to the crime for which it is imposed that it 'shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1413, overruled on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547.)

In re Lynch (1972) 8 Cal.3d 410, 425 (*Lynch*) articulated the relevant factors in analyzing whether a punishment is cruel or unusual under the California Constitution. *Lynch* requires consideration of the nature of the offender and the offense, comparison of the punishment with the penalty for more serious crimes in the same jurisdiction (*id.* at p. 426), and comparison of the punishment to the penalty for the same offense in different jurisdictions. (*Id.* at p. 427.)

Under the federal Constitution, punishment may be considered unconstitutionally excessive and in violation of the Eighth Amendment's prohibition against cruel and unusual

punishment if it is "grossly out of proportion to the severity of [his] crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) In *Harmelin v. Michigan* (1991) 501 U.S. 957, of the five separate opinions, seven justices supported a proportionality review based on the gravity of the offense when compared to the severity of the sentence. We do not find the federal standard significantly different from the California standard and, if anything, it is subsumed within the *Lynch* analysis.

With respect to the first *Lynch* factor, the nature of the offender and the offense, appellant argues that he does not have an extensive criminal history, that the three charged offenses in this matter are wobblers that could have been charged as felonies or misdemeanors, that none of appellant's victims suffered any physical injury and only one of the offenses is a "serious" felony. Appellant's argument underestimates the severity of his crimes.

Appellant's attack on Petilos created a risk of serious injury. He attacked a court officer in a courtroom filled with trial participants, peace officers and jurors.[4] The bailiff who attempted to subdue appellant suffered a wrist injury as a result. Moreover, the charged offenses reflected an utter indifference to the rule of law and a willingness to act lawlessly, even in front of an audience consisting of peace officers and a judge. While appellant and his victims were fortunate in this case that the attack did not appear to result in serious injury, the seriousness of a crime and appropriate punishment is not determined by the fortuity of whether such injury has occurred. It is also based, at least in part, on the risk and danger to society inherent in the conduct.

Appellant's history reflected significant criminal activity, bearing in mind his youth. He was convicted of robbery in 2000 and five counts of attempted kidnapping in the commission of a carjacking and one count of attempted carjacking in 2003. In committing the latter offense, he attempted to abduct a family, including three young children, by taking their van and fleeing from pursuing police. These convictions were for very serious crimes

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[4] The record does not indicate if there were spectators.

that, if completed, would have presented a grave risk of injury to the family and members of the public at large. The current charges resulted from conduct occurring while appellant was being prosecuted for those very offenses.

Furthermore, much of appellant's sentence is attributable not to punishment for the current charges, but to punishment for his recidivism. There is nothing inherently impermissible in a statute punishing not only for a current offense but for an offender's recidivism. "Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824.) *People v. Cooper* stated that "[t]he imposition of a 25-year-to-life term for a recidivist offender . . . convicted of a nonviolent, nonserious felony but with at least 2 prior convictions for violent or serious felonies is not grossly disproportionate to the crime." (*Id*. at p. 825.) This is because the defendant is being punished not merely for his current offense but for his recidivism. Thus, the punishment is as much a function of the offender's inability to steer clear of criminal activity as it is a function of the seriousness of his last crime.

The next step in the *Lynch* analysis is to compare appellant's punishment with punishments in California for more serious crimes. Appellant contends that his punishment is tantamount to a life sentence without possibility of parole and is therefore disproportionate to punishment for other more serious crimes such as treason (§ 37, subd. (a)), special circumstance murder, and perjury resulting in execution (§ 128). But this assertion ignores the substantial recidivist component of appellant's sentence, not directly attributable to the offenses of which he was convicted.

"'[I]n our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments . . . .' [Citation.] 'The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible.' [Citation.] 'Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in

determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.' [Citations.] 'Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations].' [Citation.]" (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1213-1214 [rejecting cruel and unusual punishment challenge to section 12022.53, subd. (d)].)

Finally, *Lynch* requires that we compare the punishment imposed with punishments in other states. Appellant argues that even among the 40 states with three strike type laws, California's is the most severe and is one of only two in which the third strike can be any felony. Appellant ignores that one of the felonies of which appellant was convicted here is not just any felony, but a serious felony. Further, just because California's law is the most severe does not mean that it is grossly disproportionate to the penalties of other states. We do not find California's law to be so out of line with other jurisdictions as to call into question its constitutionality.

In summary, we do not find appellant's punishment to be "out of all proportion with the offense" nor do we find the sentence imposed so disproportionate as to "'shock[] the conscience and offend[] fundamental notions of human dignity.' [Citation.]" (*People v. Ingram*, *supra*, 40 Cal.App.4th at p. 1412 [finding no cruel or unusual punishment of sentence of 61 years to life on two counts of residential burglary where the defendant had drug and alcohol problems and a lengthy record], overruled on other grounds in *People v. Dotson*, *supra*, 16 Cal.4th 547.)

VII. Credits.

The trial court granted appellant presentence credit of 435 days, plus 65 days local conduct credit. The abstract of judgment has neither the "4019" nor the "2933.1" boxes checked. The trial court limited appellant to 15 percent conduct credits apparently pursuant to section 2933.1 which provides that a person convicted of a violent felony, as defined in section 667.5, shall accrue no more than that amount. (§ 2933.1, subd. (c).) None of appellant's convictions here were for crimes included as violent felonies in section 667.5. (See § 667.5, subd. (c).)

Appellant accordingly contends that application of the 15 percent conduct credit pursuant to section 2933.1, subdivision (c) was erroneously applied to him because it expressly provides that it applies to violent felonies, of which appellant was not convicted here. Respondent agrees with appellant, as do we.

None of appellant's convictions were for "violent felonies" within the meaning of section 667.5 or 2933.1 and subject to the 15 percent restriction on conduct credits. Hence, conduct credits are to be calculated by the "two-for-four" method set forth in *People v. Browning* (1991) 233 Cal.App.3d 1410, 1413. Accordingly, the judgment must be modified to reflect that appellant is entitled to 216 days of presentence conduct credit.

DISPOSITION

The judgment is modified to award appellant 216 days of conduct credit and to reflect a total of 651 days of presentence credit. The sentence on count 2 is reversed and the matter remanded for resentencing on that count consistent with the opinions expressed herein. The judgment is otherwise affirmed.

_____, J.*

NOTT

We concur:

_____, P.J.

BOREN

_____, J.

ASHMANN-GERST

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 8/25/05

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN MEDINA, Defendant and Appellant.	B171348 (Los Angeles County Super. Ct. No. BA243462) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:[*]

The opinion in the above entitled matter filed on July 26, 2005, was not certified for publication in the Official Reports.

For good cause it now appears that the opinion should be published in full in the Official Reports except for parts II through VII, inclusive, and it is so ordered.

[*] BOREN, P.J., ASHMANN-GERST, J., NOTT, J.†

† Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.