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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. REGGIE WASHINGTON, Defendant and Appellant.	B186443 (Los Angeles County Super. Ct. No. NA056254)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed as modified with directions.

Sally P. Brajevich, 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, Mary Sanchez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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Reggie Washington appeals from the judgment entered upon his conviction by jury of carjacking, second degree robbery, and second degree burglary (Pen. Code, §§ 215, subd. (a), 211, 459), in each of which he personally used a knife and in each of which the victim was 65 years of age or older and appellant had an enumerated prior conviction (Pen. Code, §§ 12022, subd. (b)(1), 667.9, subd. (b)), and of attempted second degree robbery, in which he personally used a deadly weapon (Pen. Code, §§ 664/211, 12022, subd. (b)(1)).[1] The trial court found that appellant had sustained two prior felony convictions within the meaning of the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and section 667, subdivision (a)(1), as well as four prior felony convictions for which he served separate prison terms within the meaning of section 667.5, subdivision (b).

Appellant was sentenced to consecutive terms of 27 years to life and 25 years to life, with enhancements totalling 18 years.

Appellant contends that (1) the trial court erred in denying his *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531); (2) insufficient evidence supports his convictions; (3) the trial court erred in refusing to admit evidence of a victim's prior felony conviction and prior misdemeanor conduct, and in failing to instruct the jury in accordance with CALJIC No. 2.23; (4) the concurrent term for robbery must be stayed pursuant to section 654; (5) the matter must be remanded because the trial court was misinformed as to its sentencing discretion; (6) clerical errors in the abstract of judgment must be corrected; and (7) the imposition of upper term and consecutive sentences violated *Blakely v. Washington* (2004) 542 U.S. 296.

Respondent contends that the trial court failed to either impose or strike the section 667.9, subdivision (b) enhancement with respect to two of the three counts as to which the allegation was found true, the second degree robbery and second degree burglary counts.

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

We requested that the parties address the questions of whether the section 667.9, subdivision (b) enhancement applies to the second degree burglary count, and whether the two section 667, subdivision (a) enhancements must be imposed on each count.

FACTS

We view the evidence in accordance with the usual rules on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) On the evening of February 27, 2003, Ricardo Sailor got into the driver's seat of his son-in-law's van, which he had parked in a lot on West Artesia Boulevard in Long Beach. Appellant, who was inside the van, grabbed him around the neck, held a sharp object to his neck, threatened to kill him if he did not have any money, and rifled through his pockets. Sailor grabbed the weapon and struggled with appellant, cutting his own hand. He was finally able to push the weapon down and to get out of the van.

Appellant began looking for the keys, which Sailor had dropped, and Sailor went inside a nearby store to find a weapon. Sailor's son-in-law arrived and exchanged words with appellant. Appellant fled. Sailor chased him for a short time, but his son-in-law left the scene and Sailor gave up the chase. Sailor described his assailant to police as wearing a black jacket with a red emblem or design on it. He did not disclose his son-in-law's presence to police because the son-in-law had outstanding warrants.

Less than a week later, on the afternoon of March 5, 2003, 83-year-old Deloris Fagan was driving her red 1991 Cadillac El Dorado toward the garage entrance of her Long Beach apartment. Appellant was standing in the alley near the garage door, which was operated by a remote control. Fagan stopped to let him walk by, but he motioned for her to continue into the garage, and she drove in. After she parked her car, appellant accosted her, holding a knife. He ordered her to get out of her car. When she did, he pulled off her gold necklace and told her to go around to the rear of the vehicle. He got into the car, asked where the remote was located, and drove out of the garage. Fagan's purse was still in the car. Fagan, who was "terribly" afraid during

the incident, called the police. Although it had been dark in the garage, she described the robber as a fairly tall Black man wearing dark clothing and stated that the robber's hair was covered with a cap.

Another resident of Fagan's apartment complex, Barry Citron, was standing on his fourth-floor balcony when he saw a man standing near the entrance to the parking garage as the red Cadillac was driving in. The man was wearing a dark shirt and pants and could have been wearing a cap. Citron, who was on the board of directors and had received complaints about homeless people defecating in the doorways near the garage entrance, was concerned that appellant might have been one of those persons, and he ran downstairs.

After searching the alley for a minute, Citron saw the red Cadillac coming out of the garage. He walked in front of it and put his hands on the hood. Appellant, the driver, stopped the car, and when Citron asked to talk to him, appellant opened the passenger window. Citron put his head inside the car, looked appellant in the eye, and, from a distance of three feet, asked appellant if he had seen anyone coming in through the garage door. Appellant, looking surprised and nervous, shook his head and drove away. The police arrived shortly thereafter, and Citron brought them to Fagan's apartment, where he told her he had seen someone driving her car out of the garage.

Appellant was arrested the following night, March 6, 2003, by Long Beach Police Officer Don Mauk and his partner, Officer Aldo Decarvalho, after the officers observed him driving Fagan's Cadillac into a gas station on Long Beach Boulevard. At the time, appellant was wearing a black hooded sweatshirt and blue sweatpants. The jacket did not have any design or emblem.[2] Officer Decarvalho recovered a black Smith and Wesson knife from the driver's seat of the vehicle. Appellant had the keys

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[2] There was no mention of a T-shirt in the description of appellant's clothing on the booking sheet prepared after his arrest. Decarvalho testified that he did not see anything under appellant's sweatshirt.

to the vehicle and a tube of lipstick in his pockets, and he gave a false name to the officers.[3]

Detective John Mercado showed Fagan a photographic lineup which included appellant's photograph. She initialed her statement, "It could be either number 2 or number 6." Appellant was number 6. At trial, Fagan identified appellant as her assailant. She was shown the pants, T-shirt and sweatshirt recovered from appellant at the time of his arrest and testified that they looked like the color of the clothing appellant had been wearing at the time of the offenses. She identified the keys recovered from appellant as the keys to her Cadillac, and she testified that the tube of lipstick found in appellant's pocket was the color and brand she had used at the time of the offenses. She testified that she thought that the blade of the knife used by appellant was more silver than the one recovered from the vehicle, which she described as black, but she observed that it had been dark in the garage and she had not seen much of the weapon.

Citron identified appellant's photograph from a photographic lineup, giving the statement, "That's him; the shape of his head is the same and his eyes, he looked right at me with the same expression." At trial, he identified appellant with 100 percent certainty as the person he had seen driving the Cadillac out of the garage.

Sailor, the victim of the attempted robbery, was shown a photographic lineup by Detective Debra Clark. Sailor identified appellant as his assailant, giving the statement, "I think it was this guy." At trial, he identified appellant and stated that he was "absolutely sure" of his identification.

Additional evidence was introduced regarding a March 2, 2003, incident at a Long Beach clothing store, as a result of which appellant was charged with the second degree robberies of Felicita Aquino and Teresa Mancia, the false imprisonments of

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[3] Fagan's driver's license, which had been in the car when appellant drove off, was found months later in a different car. A search of appellant's residence did not disclose any evidence linking him to the robberies.

Aquino and of Mancia, and second degree burglary. The jury was unable to reach a verdict on these counts, and they ultimately were dismissed.[4]

An additional count charging appellant with the attempted kidnapping of Pamela Guzman was dismissed prior to trial by the prosecutor. This offense allegedly occurred at the time of appellant's March 6, 2003, arrest.

Appellant's mother testified on his behalf that he was living with her in early March 2003 and that he had the flu and stayed home all day from March 3rd until he left the house on March 6th, the date of his arrest.

Dr. Ralph Geisalman, a professor and researcher in the UCLA Psychology Department specializing in eyewitness psychology, testified that cross-ethnic identifications are 10 to 15 percent less reliable, memories deteriorate over time, the stress of experiencing a crime and seeing a weapon negatively impacts a witness's ability to make an identification, and memories can change when witnesses discuss the event. He testified that the six-pack photographic lineup that included appellant's photograph was fair, but he indicated that studies show that up to 90 percent of witnesses will select a photograph from a lineup even where the suspect's photograph is not included. The correlation between an eyewitness's confidence in his identification and the accuracy of his identification is very small. A witness is more likely to make an in-court identification, because there is only one suspect present, and in this case, since appellant represented himself at the preliminary hearing, the witnesses had the opportunity to observe appellant on a prior occasion, thus solidifying their choices.

Long Beach Police Officer John Helms, the officer who arrived at the apartment complex and first interviewed Fagan, testified for the defense that he did not include Citron's statement in his report, explaining that he believed that the

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[4] Mancia identified someone other than appellant from the photographic lineup, and Aquino pointed to appellant's photograph and said that he looked similar to the robber. Other witnesses to these charged offenses told Detective Clark that they would not be able to identify anyone from a photographic lineup.

information given by Citron was not directly related to the incident because Citron was not an eyewitness to the carjacking. Mercado, the investigating detective, was not aware of Citron's existence until he subsequently interviewed Fagan.

A palm print lifted from the Cadillac did not belong to appellant.

SENTENCING

With respect to the crimes involving Fagan, the trial court imposed a term of 27 years to life in prison for carjacking with a one-year deadly weapon enhancement and a two-year elderly victim enhancement (count 1), a concurrent term of 25 years to life for second degree robbery with a one-year deadly weapon enhancement (count 2), and a stayed term of 25 years to life for second degree burglary (count 3). The trial court imposed a consecutive term of 25 years to life with a one-year deadly weapon enhancement for the attempted robbery of Sailor (count 9). Finally, the trial court imposed two 5-year section 667, subdivision (a) enhancements and four 1-year section 667.5, subdivision (b) enhancements.

DISCUSSION

I. The evidence that appellant was the perpetrator was sufficient to support the verdicts as to all counts of which he was found guilty.

Appellant contends that there was insufficient evidence of his identity as the perpetrator of the crimes against Fagan and as the individual who attempted to rob Sailor, and that his convictions therefore violated his right to due process. This contention is without merit.

Appellant cites conflicting witness testimony as to the descriptions of the suspects and complains of a flawed police investigation. However, "[t]he role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] [¶] . . . But it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond

a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.) We do not reweigh the evidence; even if the circumstances "might reasonably be reconciled with a contrary finding[, this] would not warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 529; accord, *People v. Ceja, supra*, at p. 1139.)

The factors about which appellant's identification expert testified, together with the testimony about appellant's clothing at the time of the offenses and at the time of his arrest one or more days later, and such anomalies as the absence of Citron's statement from the initial police report, were all considered by the jury. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) On the record presented, ample evidence supports the jury's conclusions that appellant was guilty of the offenses against Sailor and Fagan.

II. The trial court's denial of appellant's* Pitchess *motion does not require reversal.

Prior to trial, appellant, who was at that time representing himself, filed a *Pitchess* motion requesting discovery of the personnel records of Long Beach Police Detectives Deborah Clark and John Mercado and Long Beach Police Officers John Helms, Jonathan Ornelas, Peter Lackovic, Donald Mauk, Teryl Hubert, Aldo Decarvalho, and Carlos Grimaldo. Appellant requested complaints of officer misconduct amounting to moral turpitude including allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, use of excessive force, making false arrests, writing false police reports to cover up the use of excessive force, and false or misleading internal reports.

In his declaration, appellant stated that the credibility, character, habits and customs of the officers would be at issue in this trial and that evidence that they made

false arrests, engaged in illegal searches and seizures, fabricated charges and/or evidence, had a history of dishonesty and the use of improper tactics, used excessive force, or wrote false police reports would be relevant to establish those habits and customs and to impeach the officers. The Long Beach City Attorney filed a written opposition.

Officers Lackovic, Mauk, Decarvalho and Hubert

Appellant declared that he expected the trial evidence to show that Officers Lackovic, Mauk, Decarvalho and Hubert made false and misleading statements against him. In support of this claim, he stated that, as he sat in the patrol car at the time of his March 6, 2003, arrest by Officers Mauk and Decarvalho, he saw Pamela Guzman give Officer Lackovic a pocket knife whose description matched that of a knife she was known to carry.[5] This was the knife that Decarvalho claimed to have found in the carjacked vehicle. Appellant stated that Guzman was a known prostitute, crack addict, and informant for the officers involved in this case.

Appellant further declared that Officer Mauk wrote a false statement on the probable cause determination sheet and that Officer Hubert coerced witness Richard Singleton and fabricated a police report about the attempted kidnapping of Guzman. He also declared that Guzman provided Officer Hubert with a statement about him that conflicted with the statement she gave to Officer Lackovic.

In support of these claims, appellant appended an incident report without a date that did not identify the author. The report described appellant's arrest at a gas station by the author and Decarvalho. The author stated that when appellant was apprehended near Fagan's Cadillac, appellant was standing next to Pamela Guzman, who told Officer Lackovic that appellant was trying to kidnap her. The report stated that inside the Cadillac, Officer Decarvalho found a pocket knife matching the description of the one used in the carjacking.

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[5] Guzman was the victim of the charged attempted kidnapping, which was dismissed by the prosecutor subsequent to the ruling on the *Pitchess* motion.

Appellant also appended incident reports prepared by Officer Lackovic and Officer Hubert. Officer Lackovic's report stated that he responded to the gas station in response to a call stating that a man matching appellant's description was trying to force a woman into a burgundy Cadillac. After Officers Decarvalho and Mauk detained appellant and Guzman, Guzman told Officer Lackovic that she knew appellant from the streets and had heard rumors that appellant believed she was a snitch and had threatened to kill her. Officer Hubert's incident report stated that while he was investigating an apparently unrelated attempted carjacking that same night, Richard Singleton told the officer that the suspect in that crime, whose description matched that of appellant, gave his name as "Mike."[6] Officer Hubert's report stated that Guzman, who was with Singleton, told Officer Hubert that she feared "Mike" wanted to kill her, explaining that after his recent release from jail, he seemed to "take a liking" to her and wanted her to be his girlfriend.

Appellant also appended Officer Mauk's declaration of probable cause, in which the officer stated that Guzman feared for her safety and complied with appellant's attempt to force her into the vehicle.

Officers Ornelas and Grimaldo

Appellant declared that it would be proven at trial that Officer Ornelas's police report contradicted the information in the M.D.T. printouts, establishing that his report was fabricated, and that his report conflicted with the preliminary hearing testimony of Aquino, a victim of the March 2, 2003, robberies at gunpoint at the clothing store. He also declared that Officer Grimaldo conducted an identification procedure in a manner that was deliberately suggestive in his attempt to obtain a positive identification.

In support of these claims, appellant appended Officer Ornelas's incident report relating to the March 2, 2003, offenses involving victims Aquino and Mancia. The report indicated that after Officer Ornelas and his partner, Officer Grimaldo,

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6 According to appellant's mother, appellant's true name is Michael Duane Washington.

interviewed Aquino and Mancia, they spoke with the owner of a nearby liquor store, who had a videotape from the previous day showing a suspicious-looking person who had been seen with a gun. The officers brought Aquino and Mancia to view the videotape, from which both identified the person as the individual who had robbed them. Two pages from an unidentified transcript indicate that an individual and the individual's coworker were shown a videotape at the same time.

Officer Helms

Appellant declared that Officer Helms suppressed a statement that he obtained on March 5, 2003, from Citron, an eyewitness to the carjacking of Fagan, because Citron's description of the suspect conflicted with that given by Fagan. To support this claim, he appended a page from an unidentified transcript in which the witness stated that he spoke to the officer who arrived on the scene "that day" and "talked to him a lot." Appellant also appended Officer Helms' incident report, which included no statement from Citron but indicated that the female victim described the suspect as wearing a black shirt, black pants and a black visor. A second, unidentified incident report stated that the author spoke with Citron, who described the man he had seen in the alley as wearing a blue T-shirt. The report indicated that Citron did not "realize" that the man who drove the Cadillac out of the garage was the man he had seen in the alley.

Detective Clark

Appellant declared that Detective Clark deliberately conducted unnecessarily suggestive eyewitness identification procedures and played a key role in coaching the testimony and in-court identifications by prosecution witnesses at the preliminary hearing. He further stated that Detective Clark visited him in jail and became belligerent when he exercised his rights to remain silent and to have an attorney present, that she informed him that he would have additional charges filed against him as retaliation for refusing to provide a statement, and that she refused to leave until appellant called for the guards.

Appellant appended Detective Clark's incident report detailing her interview with appellant at the Men's Jail. She reported that as she was about to give appellant the *Miranda* advisements (*Miranda v. Arizona* (1966) 384 U.S. 436), he became agitated and told her that he would not talk to her and wanted his lawyer. He began to yell at detention officers standing outside the room and demanded that they return him to his cell.

At the hearing at which the *Pitchess* motion was to be considered, an attorney was appointed to represent appellant. At the end of the hearing, the attorney representing the Long Beach City Attorney's Office reminded the trial court, "Mr. Washington had a *Pitchess* motion." The trial court summarily denied the motion, stating, "I don't think there is a whole lot of viability in those motions. You may want to talk to [the attorney representing the Long Beach City Attorney's Office]. [¶] With respect to the *Pitchess* motion, I'm going to deny the motion on the grounds that the motion is insufficient, which it really is."

Appellant contends that that the trial court's ruling constituted an abuse of discretion, requiring reversal of his conviction. This contention must fail.

Under Evidence Code section 1043, subdivision (b)(3), a defendant seeking discovery of peace officer personnel records must include "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . ." To establish good cause and thereby obtain in camera review of potentially relevant documents, the defendant "need only demonstrate that the scenario of alleged officer misconduct could or might have occurred." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).) "A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*Ibid.*) Material information includes evidence that may be used to impeach testifying police officers. (See *Hall v. Superior Court* (2005) 133 Cal.App.4th 908, 911, fn. 1; *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 413.)

We review the trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) The erroneous denial of a *Pitchess* motion may be found to be nonprejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836, particularly where there is extensive evidence linking the defendant with the crime. (*People v. Samuels* (2005) 36 Cal.4th 96, 110.)

Requests for officer information that are irrelevant to the pending charges, such as the requested information about the officers' use of excessive force, which has no relevance to appellant's case, may readily be rejected. (*Warrick, supra*, 35 Cal.4th at p. 1021; see *People v. Hill* (2005) 131 Cal.App.4th 1089, 1096, fn. 7.) Further, we observe that, in his declaration, appellant never denied having committed any of the charged offenses. Even were we to find that the allegations of suggestive identification procedures and of fabricated police reports sufficed to establish a defense to the charges and "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents" (*Warrick, supra*, at pp. 1024-1025), we would conclude that appellant's claim as to each officer must be rejected for lack of prejudice.

As to Detective Clark, appellant failed to identify which victims were the subject of suggestive identification procedures and which additional charges were filed in retaliation. Apart from having failed to present an assertion of specific officer misconduct that is plausible in light of the documents provided (*Warrick, supra*, 35 Cal.4th at pp. 1025-1026), appellant failed to establish any prejudice resulting from the incident at the county jail.

As to Officers Lackovic, Mauk, Decarvalho and Hubert, to the extent appellant claims that Pamela Guzman gave contradictory statements to Officers Hubert and Lackovic, there is no allegation that the event was described inaccurately by the officers, or that the officers falsified the witness's statements, and therefore good cause was not established. (*People v. Hill, supra*, 131 Cal.App.4th at pp. 1099-1100.) Moreover, to the extent the claimed fabrications involve the attempted kidnapping of Pamela Guzman, any error was utterly harmless because that charge was dismissed

prior to trial. To the extent the claimed fabrications bore on the discovery of a knife in Fagan's car, near which appellant was apprehended, the evidence of appellant's guilt of the offenses involving Fagan was overwhelming. Moreover, the knife that was reported to have been found in the car did not contribute to the guilty verdict, since Fagan testified that she did not believe the knife presented in court resembled the one used by appellant.

As to Officer Helms, any error was harmless because the issue of Helms' failure to include Citron's statement regarding the person he saw at the time of the offenses involving Fagan was explored at length during trial, and the evidence of appellant's guilt of the offenses involving Fagan was overwhelming.

As to Officers Ornelas and Grimaldo, the officers investigating the unrelated offenses committed at the clothing store on March 2, 2003, any error was harmless because those counts were dismissed after the jury was unable to reach a verdict.

III. The trial court did not abuse its discretion in excluding evidence of Sailor's prior felony conviction and past misdemeanor conduct.

Appellant sought to impeach Sailor with evidence that in 1977, when Sailor was 21 years old, he had given false information to the police, conduct which resulted in a misdemeanor conviction, and that in 1982 he had suffered a felony conviction of second degree burglary. Sailor was ordered to serve five days in jail for the misdemeanor conviction, and he was placed on three years' probation and was required to serve 180 days in county jail for the felony conviction. He had had contacts with the police in 1982 and 1985 for Health and Safety Code violations, but the 1982 matter was dismissed by the prosecution and no arrest resulted from the 1985 contact.

The trial court ruled that the felony conviction and the misdemeanor conduct were too remote, in view of the fact that the offenses occurred 22 and 27 years earlier, when Sailor was a young man, and he had had no significant contacts with law enforcement since then. Concluding that the prejudicial effect outweighed the

probative value of the evidence, the trial court excluded the evidence pursuant to Evidence Code section 352.

Appellant contends that the trial court abused its discretion in excluding this evidence and in failing to instruct the jury that a prior felony conviction could be used to determine a witness's credibility in accordance with CALJIC No. 2.23. He asserts that the felony conviction and the misdemeanor conduct involved moral turpitude and were not remote in time, and that the trial court's abuse of discretion in excluding the impeachment evidence resulted in a denial of his rights to a fair trial and due process. This claim lacks merit.

Evidence of a felony conviction involving moral turpitude and of past misdemeanor conduct involving moral turpitude may be admissible for impeachment, subject to the discretion of the trial court under Evidence Code section 352.[7] (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; *People v. Castro* (1985) 38 Cal.3d 301, 306.) A trial court has broad discretion under Evidence Code section 352 in excluding impeachment evidence (*People v. Ayala* (2000) 23 Cal.4th 225, 301), and that exercise of discretion "'will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice.'" (*People v. Green* (1995) 34 Cal.App.4th 165, 182.)

One of the factors the trial court may consider in making its determination is the remoteness of the prior conviction and whether the witness subsequently led a blameless life. (See *People v. Green*, *supra*, 34 Cal.App.4th at pp. 182-183.) There was no abuse of discretion in the trial court's ruling that Sailor's prior felony and prior misdemeanor conduct were too remote, in light of the many years that had elapsed without any new criminal prosecutions, or in its determination that the proffered evidence was therefore more prejudicial than probative. Since the trial court properly

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[7] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

excluded this evidence, it was not required to instruct the jury in accordance with CALJIC No. 2.23.[8]

IV. The sentence for the robbery of Fagan must be stayed pursuant to section 654.

At sentencing, appellant's counsel argued that, in essence, the jury had found appellant guilty of having robbed Fagan of her necklace and her car, and he asked the trial court to apply section 654 "to the two robberies and to the burglary." The prosecutor argued that the carjacking, count 1, and the robbery involving the necklace, count 2, did not necessarily come within section 654, and he asked that the trial court to impose a consecutive term for the robbery. After imposing the term for carjacking, the trial court stated, with respect to the robbery count, "[B]ecause of the close proximity of those two cases and those two events, I'm going to run that concurrent."

Appellant contends that because the carjacking and robbery of Fagan resulted from the taking of multiple items during a single robbery, the concurrent sentence for robbery must be stayed pursuant to section 654. This contention is well taken.

Section 654 provides, in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The trial court's statements at sentencing indicate that it was considering whether to sentence concurrently or consecutively for the robbery and carjacking under the three strikes law. Its use of the term "proximity," which was responsive to the prosecutor's sentencing memorandum, invokes the test set forth in *People v. Lawrence* (2000) 24 Cal.4th 219, 224, and *People v. Deloza* (1998) 18 Cal.4th 585, 594, to determine whether sentences on multiple counts must be consecutive or may be concurrent under section 1170.12, subdivisions (a)(6) and (a)(7) of the three strikes

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8 In the absence of any error, we find no due process violation. (*People v. Panah* (2005) 35 Cal.4th 395, 435.)

law. The trial court did not expressly address the section 654 issue, which is a separate question. (*People v. Deloza*, *supra*, at p. 594.)

Even under the three strikes law, "[s]ection 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza*, *supra*, 18 Cal.4th at p. 591.) Under section 654, "[i]f all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

Here, the robbery and carjacking of Fagan were incidental to one objective, to deprive the victim of her property. Section 654 therefore precludes multiple punishment, including concurrent terms. (*People v. Deloza*, *supra*, 18 Cal.4th at p. 592; see *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419-420.)

V. Remand is required because the trial court failed to exercise its sentencing discretion in calculating the sentence for carjacking.

In his sentencing memorandum, the prosecutor stated that, under the three strikes law, the trial court "must" sentence appellant to 27 years to life on the carjacking count, explaining, "The term of twenty seven years is derived from Section 1170.12(c)(2)(A)(i): 'three times the term otherwise provided as punishment . . .' The high term for a violation of Penal code section 215(a) is nine years. Three times nine is twenty seven." At the sentencing hearing, the prosecutor reiterated, "Again it's 27 and not 25 because the high term for carjacking is nine and pursuant to [section] 1170.12, you choose the higher of 25 years, the sentence for the crime or three times the sentence for the crime. [¶] So it is 27 years to life."

The trial court imposed the term of 27 years to life for carjacking as calculated under section 1170.12, subdivision (c)(2)(A)(i), stating, "As to Count 1 of the

information, wherein the defendant was convicted of a crime of carjacking, pursuant to section 1170.12, you are ordered committed to the Department of Corrections for a period of 27 years to life, that is the high term of nine years times three for a total of 27 to life."

Appellant contends that remand is required because the trial court was misinformed that it was required to select the upper term as the term to be tripled under section 1170.12, subdivision (c)(2)(A)(i). He argues that the trial court could have selected the middle term of five years or the lower term of three years to be tripled, either of which would have resulted in a third-strike sentence of 25 years to life under section 1170.12, subdivision (c)(2)(A)(ii), rather than the term of 27 years to life. This contention, too, is well taken.

Section 1170.12, subdivision (c)(2)(A) provides, in pertinent part, as follows: "If a defendant has two or more [qualifying] prior felony convictions . . . , the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or [¶] (ii) twenty-five years . . . ." (See also § 667, subd. (e)(2)(A).)

As appellant points out, a trial court is not required to select the upper term to triple under section 1170.12, subdivision (c)(2)(A)(i) when it calculates the minimum term of the indeterminate sentence for a third-strike defendant. It may choose either the lower, middle or upper term. (*People v. Keelen* (1998) 62 Cal.App.4th 813, 819-820.) As in *Keelen*, the record convinces us that the trial court believed it was required to impose three times the upper term as the minimum term of the life sentence. (*Id*. at p. 818.) Since the trial court was unaware of, and thus failed to exercise, its discretion, the matter must be remanded for resentencing. (*Id*. at p. 820.)

VI. Appellant's sentencing did not violate Blakely.

Relying on *Blakely v. Washington*, *supra*, 542 U.S. 296 (*Blakely*), appellant contends that because the jury did not determine the factors used to support imposition

of the upper term in count 1 and the consecutive term in count 9, his sentence violated his federal rights to due process and a jury trial.

As appellant acknowledges, this contention was rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238. In *Black*, the Supreme Court concluded that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*. at p. 1244.) We are bound by this decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[9]

VII. The finding on the section 667.9, subdivision (b) allegation as to the burglary count must be stricken.

The jury found appellant guilty of second degree burglary in count 3. The information alleged, and the jury found true, that Fagan, the victim of the second degree burglary, was 65 years of age or older within the meaning of section 667.9, subdivision (b). The parties agree that since second degree burglary is not an offense enumerated in section 667.9, subdivision (c), an enhancement under section 667.9 cannot be imposed on count 3. The finding that appellant violated that provision in the commission of count 3, second degree burglary, must be stricken.[10]

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9 Appellant raises the issue to preserve his right to federal review. The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___ U.S. ___ [126 S.Ct. 1329], on the issue of whether *Blakely* applies to California's determinate sentencing law.

10 Accordingly, respondent withdraws the contention that the trial court erred in failing to impose or strike the section 667.9, subdivision (b) enhancement as to count 3.

VIII. The matter must be remanded to permit the trial court to exercise its discretion with respect to the section 667.9, subdivision (b) enhancement on count 2.

The information also alleged, and the jury found true, that Fagan was 65 years of age or older within the meaning of section 667.9, subdivision (b) as to the robbery count, count 2. Respondent contends that the trial court erred in failing to either impose or strike the section 667.9, subdivision (b) enhancement as to that count. This claim is well taken.

Section 667.9, subdivision (b) provides, in pertinent part, that the defendant "shall receive a two-year enhancement for each violation." The trial court, however, has the discretion under section 1385 to strike a section 667.9 enhancement. (*People v. Luckett* (1996) 48 Cal.App.4th 1214, 1221.) When a trial court has discretion to strike an enhancement, and fails to either impose or strike it, the matter must be remanded to permit the trial court to exercise its discretion. (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 390, 400; *People v. Irvin* (1991) 230 Cal.App.3d 180, 191-192.)[11]

IX. Two section 667, subdivision (a) enhancements must be imposed for the serious felony convictions in each of counts 1, 2, and 9.

As indicated, the trial court imposed two 5-year section 667, subdivision (a) enhancements, one for each prior serious felony conviction found true in this three strikes case. We asked the parties to address the issue of whether the two enhancements must be applied to each count. Appellant acknowledges that *People v. Williams* (2004) 34 Cal.4th 397, 405 (*Williams*), held that "under the Three Strikes law, section 667[, subdivision] (a) enhancements are to be applied individually to each count of a third strike sentence." He argues, however, that because his 2003 crimes predated the *Williams* decision, application of the *Williams* rule would violate the prohibition against ex post facto laws. This claim is without merit.

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11 We have held that sentence on count 2 must be stayed pursuant to section 654, and the enhancement, if not stricken, will be stayed as well.

The prohibition against ex post facto laws does not apply to judicial decisions; it applies only to legislative enactments. (*People v. Morante* (1999) 20 Cal.4th 403, 430-431.) Sections 1170.12 and 667, subdivisions (b) through (i) went into effect in 1994, long before appellant's offenses. Moreover, apart from the inapplicability of the ex post facto doctrine here, giving retroactive effect to *Williams* is not improper. "'"If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. [Citation.]"' [Citation.]" (*Morante*, *supra*, at p. 431.) Such is not the case here. Although the *Williams* court mentioned that Courts of Appeal in earlier cases had *referred* to sentences in which section 667, subdivision (a) enhancements were not imposed on each count of a third-strike sentence, it pointed out that no case had addressed the issue, "and cases are not authority for propositions not considered. [Citation.]" (*Williams*, *supra*, 34 Cal.4th at p. 405.)

The *Williams* court held that the section 667, subdivision (a) prior serious felony enhancements must be "[added] to the sentence for each new serious felony conviction." (*Williams*, *supra*, 34 Cal.4th at p. 404.) In accordance with *Williams*, the judgment must be modified to provide for two 5-year section 667, subdivision (a) enhancements on the carjacking, robbery and attempted robbery counts.[12]

X. The abstract of judgment must be corrected.

The parties agree that the abstract of judgment must be corrected to reflect that the enhancement in count 1 is pursuant to section 12022, subdivision (b)(1), rather than section 12022, subdivision "(B)(A)," that the two 5-year enhancements were imposed pursuant to section 667, subdivision (a)(1), rather than section "667.5(A)(1)," and that a one-year enhancement was imposed pursuant to section 12022, subdivision

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12 Second degree burglary, count 3, is not a serious felony. (See § 1192.7, subd. (c)(18) [burglary of the first degree is enumerated as a serious felony].) We have held that the sentence on count 2, robbery, must be stayed pursuant to section 654. The section 667, subdivision (a) enhancements on that count will be stayed as well.

(b)(1) on the concurrent term in count 2, second degree robbery.[13] We will direct the trial court to so correct the abstract of judgment.

DISPOSITION

The judgment is modified to stay pursuant to section 654 the concurrent sentence for the second degree robbery of Fagan in count 2, including applicable enhancements, and to provide for two section 667, subdivision (a) enhancements on each of counts 1, 2, and 9. The matter is remanded with directions to the trial court to impose or strike the section 667.9, subdivision (b) enhancement as to count 2, to exercise its discretion with respect to the sentence for carjacking in count 1, and to prepare a corrected abstract of judgment, reflecting these modifications as well as those set forth in Part X of this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ

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[13] Although the parties erroneously refer to this enhancement as a section 12021, subdivision (b)(1) enhancement, it is clear that they are referring to the knife use enhancement alleged in the information and found true by the jury under section 12022, subdivision (b)(1).