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CERTIFIED FOR
PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES BOWDEN et al., Defendants and Appellants.	B151167 (Super. Ct. No. TA058325)

APPEALS from judgments of the Superior Court of Los Angeles County, John R. Johnson, Temporary Judge. (Pursuant to Cal. Constitution, art. VI, § 21.) Bowden appeal: modified and affirmed. Webster appeal: modified and affirmed. Tennant appeal: affirmed in part, reversed in part, and remanded.

Jeffrey H. Leo, under appointment by the Court of Appeal, for Defendant and Appellant James Bowden.

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* Under California Rules of Court, rules 976(b) and 976.1, only the Introduction and Tennant's Prior Juvenile Adjudication and the Disposition portions are certified for publication.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant Vacarro Webster.

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INTRODUCTION

Appellants James A Bowden, Antwon L. Tennant, and Vacarro Webster were convicted by jury trial of committing residential burglary, home invasion robbery, and false imprisonment of two of the residents by violence or menace. The jury also made firearm findings, and the court found true that Tennant suffered a prior juvenile court adjudication qualifying as a "strike" under the "Three Strikes" law and also served a prior prison term.

The parties raise numerous contentions. All three appellants contend the trial court inadequately investigated juror misconduct, the evidence is insufficient to show false imprisonment by violence or menace as to the second victim, and the trial court misinstructed the jury in four ways. Tennant raises an individual issue concerning failure to advise him that he had a right to testify. Each appellant raises a sentence issue individual to him, and the Attorney General also asserts the court failed to strike or impose sentence for Tennant's prior prison term and awarded excess credits to all three appellants. We remand for resentencing of Tennant on his prior prison term and modify the awards of credit to Bowden and Webster. Otherwise we affirm, finding no merit to the other contentions.

In the published portion of this opinion, immediately following this introduction, we uphold the trial court's finding that Tennant suffered a prior "strike" within the meaning of the "Three Strikes" law (Pen. Code, § 667, subds. (b)-(i)) based on a prior juvenile adjudication that Tennant committed robbery. We hold the prosecution was not required to prove the prior robbery was committed while armed with a dangerous or deadly weapon, because the present crimes were committed after the initiative measure known as Proposition 21 deleted that requirement in former Welfare and Institutions Code section 707, subdivision (b) and changed the cutoff date otherwise provided in Penal Code section 667, subdivision (h). (*People v. James* (2001) 91 Cal.App.4th 1147.) We also hold the fact Tennant had no right to a jury trial when he suffered the prior adjudication in juvenile court does not prevent using the prior juvenile adjudication as a strike; on this point we adhere to *People v. Fowler* (1999) 72 Cal.App.4th 581, and reject the reasoning of *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187.

TENNANT'S PRIOR JUVENILE ADJUDICATION

The court found true as alleged against Tennant under the Three Strikes law (Pen. Code, § 667, subds. (b)-(i)) that Tennant suffered a prior adjudication as a juvenile that qualified as a strike, and the court sentenced Tennant as a second strike offender. The prosecution's proof of the prior juvenile adjudication showed the juvenile court found Tennant committed robbery.

To qualify as a strike the offense previously adjudicated in juvenile court must be one listed in Welfare and Institutions Code section 707, subdivision (b). (Pen. Code, § 667, subd. (d)(3)(D); *People v. Garcia* (1999) 21 Cal.4th 1, 15.) *Formerly* Welfare and Institutions Code section 707, subdivision (b)(3) listed "robbery *while armed with a dangerous or deadly weapon.*" (Italics added.) The parties agree the proof presented by the prosecution failed to show the prior

robbery was committed while Tennant was armed with a dangerous or deadly weapon. However, Welfare and Institutions Code section 707, subdivision (b) was amended by initiative measure (Proposition 21) on March 7, 2000, to delete the armed requirement. As amended, Welfare and Institutions Code section 707, subdivision (b)(3) lists simply "robbery." The *present* offenses were committed on December 6, 2000, after the amendment.

The Three Strikes law provides in Penal Code section 667, subdivision (h): "All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993." Tennant contends that because Welfare and Institutions Code section 707, subdivision (b)(3), as it existed on June 30, 1993, required proof that robbery was committed while armed with a dangerous or deadly weapon, the evidence is insufficient to support the finding that Tennant suffered a prior strike.

However, the March 7, 2000 initiative measure also modified the cutoff date of the Three Strikes law. It added Penal Code section 667.1, which provides: "*Notwithstanding subdivision (h) of Section 667*, for all offenses committed on or after the effective date of this act [the March 7, 2000 initiative], all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667, are to *those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act*."[1] (Italics added.)

Because the March 7, 2000 initiative measure both (1) changed the cutoff date in the Three Strikes law and (2) changed Welfare and Institutions Code section 707, subdivision (b) to include simple robbery, and the present crimes were committed after the March 7, 2000 amendments, the prosecution's proof that

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1 The March 7, 2000 initiative measure made the same changes to the initiative version of the Three Strikes law by enacting Penal Code section 1170.125.

Tennant suffered a prior juvenile adjudication of simple robbery *is* sufficient to prove the strike. *People v. James, supra*, 91 Cal.App.4th 1147, controls. It holds: "sections 667.1 and 1170.125 require that, if the current offense was committed on or after March 8, 2000, a determination whether a prior conviction alleged as a serious felony is a prior strike must be based on whether the prior offense resulting in that conviction was a serious felony within the meaning of the three strikes law on March 8, 2000." (*Id.* at p. 1151.) This application of the March 7, 2000 initiative measure does not constitute an ex post facto law. (*Ibid*.)

Tennant contends that to give effect to the amendment in the case of a prior juvenile offense that was not listed in Welfare and Institutions Code section 707, subdivision (b) at the time it was committed would be unconstitutional, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *United States v. Tighe, supra*, (9th Cir. 2001) 266 F.3d 1187. By relying on these cases he in effect makes the broader contention that because a person previously tried as a juvenile had no right to a jury trial in juvenile court, the prior juvenile adjudication cannot constitutionally be treated as a prior conviction for the purpose of the Three Strikes law. There is no merit to this contention.

Prior to *Apprendi* and *Tighe*, this contention was rejected by *People v. Fowler, supra*, 72 Cal.App.4th 581. The Three Strikes law includes designated prior juvenile court adjudications as strikes. (*Id.* at pp. 584-585; Pen. Code, § 667, subd. (d)(3).) In *Fowler* the defendant argued, like Tennant, that a prior juvenile court adjudication cannot be used as a strike because the juvenile had no right to a jury trial when the juvenile offense was adjudicated. The *Fowler* court rejected the argument. It stated, "It is settled that while certain constitutional protections enjoyed by adults accused of crimes also apply to juveniles (e.g., notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination, double jeopardy, proof beyond a reasonable doubt), '. . . the

Constitution does not mandate elimination of all differences in the treatment of juveniles.' [Citation.] Thus, juveniles enjoy no state or federal due process or equal protection right to a jury trial in delinquency proceedings. [Citations.] [¶] . . . [¶] By enacting the three strikes law, the Legislature has . . . simply . . . said that, under specified circumstances, a prior juvenile adjudication may be used as evidence of past criminal conduct for the purpose of increasing an adult defendant's sentence. . . . Since a juvenile constitutionally--and reliably (*McKeiver v. Pennsylvania* [(1971) 403 U.S. 528, 547])--can be adjudicated a delinquent without being afforded a jury trial, there is no constitutional impediment to using that juvenile adjudication to increase a defendant's sentence following a later adult conviction." (*People v. Fowler, supra*, 72 Cal.App.4th at pp. 585-586, fn. omitted.)

In *Apprendi v. New Jersey, supra*, 530 U.S. 466, a jury convicted the defendant of possession of a firearm, a second degree offense punishable by 5-10 years' imprisonment, and the sentencing judge, by a preponderance of evidence, found as a sentencing factor that the defendant committed the offense as a racial hate crime, which increased the punishment to 10-20 years, the same as if the jury had convicted the defendant of a third degree offense. The Supreme Court held: "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490, italics added.) The court *excepted* the fact of a prior conviction from this holding, because of the long tradition allowing sentencing judges to consider the defendant's recidivism. (*Id.* at p. 488.)

In *United States v. Tighe, supra*, 266 F.3d 1187, under a federal criminal sentencing statute, a defendant's having suffered prior convictions increased the prison term beyond the statutory maximum. The prior convictions were not

required to be pleaded in a charging indictment, were not required to be proved beyond a reasonable doubt, and were not triable by a jury. One of the defendant's three prior convictions was a juvenile adjudication. Even though *Apprendi* excepted proof of prior convictions from its rule, a two-to-one majority of a Ninth Circuit panel held that when the Supreme Court said "prior conviction" in *Apprendi*, it meant only a prior adult conviction. The *Tighe* majority concluded that in order to allow a sentencing judge in the current case to increase a sentence above the statutory maximum, based on a prior conviction and without notice, proof beyond a reasonable doubt or a jury trial *of the prior* in the current case, the prior conviction must itself have involved notice, proof beyond a reasonable doubt, *and a right to jury trial*. (*Tighe, supra,* 266 F.3d at pp. 1193-1195.)

Apprendi and *Tighe* have no direct application here. In both of those cases the fact that increased the defendant's sentence above the statutory maximum was not tried or proved by the usual criminal standards *in the trial of the current case*, but was a factual finding solely by a sentencing judge ostensibly as a sentencing consideration. This is not at all like proof of a strike under California's Three Strikes law. Under the Three Strikes law a qualifying prior conviction must, *in the current case*, be pleaded and proved (Pen. Code, § 667, subd. (c)), beyond a reasonable doubt (*People v. Garrett* (2001) 92 Cal.App.4th 1417, 1433; *People v. Tenner* (1993) 6 Cal.4th 559, 566), and the defendant has a statutory right to a jury trial, at least on the issue whether the defendant suffered the prior conviction (Pen. Code, § 1025, subds. (b), (c); *People v. Epps* (2001) 25 Cal.4th 19, 26-27). Because the context is so different, *Apprendi* and *Tighe* do not apply here. This is apparent from a footnote in *Tighe* distinguishing statutes under which prior convictions are determined by a jury or tried in the manner of elements of a crime. (*Tighe, supra,* 266 F.3d at p. 1192 & fn. 3.)

But even in its own context (prior convictions determined solely by a judge as a sentencing consideration), the *Tighe* majority opinion is unpersuasive, and we decline to follow or extend its reasoning in the context of the Three Strikes law. We agree with the *Tighe* dissent that the *Tighe* majority made a "quantum leap" from certain language in a Supreme Court opinion and erroneously concluded prior juvenile adjudications are not prior convictions. (*United States v. Tighe, supra*, 266 F.3d at p. 1200 (dis. opn. of Brunetti, J.).) As noted *ante*, *Apprendi excepts* prior convictions from its rule. (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 488-490.) The *Tighe* majority (266 F.3d at pp. 1193-1194) focused on language in *Jones v. United States* (1999) 526 U.S. 227, 249, a precursor of *Apprendi*, that stated, "one basis" for distinguishing prior convictions is, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." The *Tighe* majority concluded this was intended to state a "fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions." (266 F.3d at p. 1193.) The *Tighe* majority then concluded that since juvenile adjudications do not involve a right to jury trial, they cannot be included within the *Apprendi* exception for prior convictions. (*Id.* at p. 1194.)

We agree with the *Tighe* dissent that this language in *Jones* does not support such a broad conclusion. The dissent stated, "In my view, the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not. Extending *Jones'* logic to juvenile adjudications, when a juvenile receives all the process constitutionally due at the juvenile stage, there is no *constitutional* problem (on which *Apprendi* focused) in

using that adjudication to support a later sentencing enhancement." (*Tighe*, *supra*, 266 F.3d at p. 1200 (dis. opn. of Brunetti, J.).)

A unanimous panel of the Eighth Circuit Court of Appeals also refused to follow the *Tighe* majority opinion in *United States v. Smalley* (8th Cir. 2002) 294 F.3d 1030, 1032-1033. It concluded that all the other procedural protections available in a juvenile court trial of a criminal charge are ample "to ensure the reliability that *Apprendi* requires," and the lack of a jury trial does not undermine the reliability of juvenile adjudications in any significant way. The court cited *McKeiver v. Pennsylvania, supra*, 403 U.S. 528, 547, where the Supreme Court stated, "The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function."

This is the same reasoning and authority cited by the California Court of Appeal in *People v. Fowler, supra*, 72 Cal.App.4th 581, 586, stating, "Since a juvenile constitutionally--and reliably [citing *McKeiver*]--can be adjudicated a delinquent without being afforded a jury trial, there is no constitutional impediment to using that juvenile adjudication to increase a defendant's sentence following a later adult conviction."[2]

We conclude that *Tighe* does not apply nor should its reasoning be extended to this case and in the context of the Three Strikes law. *Fowler* is still good law notwithstanding *Tighe*.

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2 The *Fowler* opinion was decided before *Apprendi* or *Tighe*, but the court was aware of *Jones v. United States, supra*, 526 U.S. 227, and the *Fowler* court did not interpret *Jones* as does the *Tighe* majority. (*Fowler, supra,* 72 Cal.App.4th at p. 586, fn. 2.)

FACTS

About 11:00 a.m. on December 6, 2000, the victims Herbert Blacksher (Herbert) and his grandmother Margilean Blacksher (Margilean) were in their home, when appellants entered the unlocked front door. Margilean was sitting in the front room; Herbert was in a back room. Margilean asked who they were, and received a mumbled response. Tennant was carrying a paper bag. Tennant and Webster went to the back room and confronted Herbert; Bowden stayed in the front room with Margilean.

Bowden pulled a bandana on his face, but Margilean saw his face before he did so. She asked why he was doing that, and he mumbled something she did not understand. Bowden sat down, and Margilean remained in her seat. At one point she got up because she saw the other two holding a gun on Herbert in the hallway; Bowden told her to sit back down and she obeyed.

Herbert was in the back when Tennant and Webster confronted him. Tennant pulled a chrome revolver from a paper bag. Tennant demanded the keys to Herbert's jeep, a flashy red Grand Cherokee Laredo with customized stereo, wheel rims and tires. Herbert said the keys were in the front room. Webster went to the front room and retrieved them. Webster then went to the garage. Meanwhile Tennant held the gun on Herbert and demanded money. Tennant took money, a ring, a Rolex gold chain and a pager from Herbert and from Herbert's bedroom.

Webster returned because he could not start the jeep. Herbert told him the sequence of buttons to push. Webster went back and started the jeep.

Tennant tied Herbert's hands with a robe belt and took Herbert to the front room. Tennant forced Herbert to lie down on the floor at Margilean's feet. Tennant waved the gun around and demanded money. Margilean was terrified and begged Tennant not to shoot Herbert. Tennant said, "I'm not going to shoot him,

Grandma." Bowden told Tennant, "Pop that Nigger, man. Pop that Nigger." But Tennant did not shoot.

Herbert's jeep was equipped with Lojack, a detection device for finding stolen cars. When Tennant asked whether it was so equipped, Herbert lied, "No," because Tennant said, "If you have Lojack I'm going to shoot you right now." When Tennant or Webster asked for the keys to the locked customized wheel rims, Herbert lied that they were in the jeep with the spare tire. Appellants took Herbert's portable phone with them and left the house, taking the jeep. Herbert called the police on a different phone.

Later that afternoon, all three appellants went to Lopez Tires and Wheels. Tennant asked Raymond Lopez (1) if he wanted to buy some wheel rims, and (2) whether he had spare wheels to fit a Jeep Grand Cherokee. Lopez replied he was not interested in buying wheel rims, and appellants left.

About an hour later, appellants came back to the tire shop in two vehicles, Herbert's jeep and a white Chevrolet Caprice. Webster drove the jeep; Tennant drove the Caprice with Bowden as a passenger. They asked if the spare wheels they had mentioned earlier were ready. The jeep was lifted for the purpose of changing the wheels, but the locked wheel rims could not be removed without a key.

Alerted by Lojack to the presence of the jeep at the tire shop, police arrived. They detained everyone at the tire shop. Webster ran to the back and, finding no rear exit, hid among tires on a shelf, but was quickly found. Right below him were found Herbert's pager and Rolex chain taken in the robbery, and other property from Herbert's jeep including 27 CD's.

The customized stereo had been removed from Herbert's jeep and was found in the Caprice. Many other items of Herbert's personal property that he kept in the jeep were also found in the Caprice.

While in jail, Tennant, using a fake jail inmate name, wrote letters to the victims urging them not to prosecute. Tennant's fingerprints were on them, and a handwriting expert concluded by comparison with known exemplars of Tennant's writing that the letters were probably written by Tennant.

The defense at trial was based on identity. Herbert positively identified all three appellants at trial, at the preliminary hearing, and from photographic six-packs shown by police. He had known Bowden in childhood and recognized his voice, and he had seen Tennant in a housing project. Margilean identified Bowden at trial and Tennant in the photographic six-packs. But appellants urged there were inconsistencies in prior descriptions and prior identifications of the suspects and limited opportunity for the victims to observe the robbers. Tennant's counsel offered unauthenticated work records suggesting alibi. Webster offered testimony by relatives suggesting alibi. Bowden offered testimony by a relative that he stutters and argument that the victims did not testify that the third robber stuttered.

INQUIRY ON JUROR REMARKS

After numerous prosecution witnesses testified, juror number 2 (hereafter #2) reported to the court she was having anxiety attacks about continuing to serve as a juror. After #2 was examined, all trial counsel agreed to excuse #2, and she was replaced by an alternate. There is no issue on appeal as to the propriety of excusing #2. The only issue is whether the trial court adequately investigated whether other jurors were affected by #2's anxiety.

Factual Background

#2 explained to the court and the attorneys that, "My nerves are shot when I leave here; I'm looking over my shoulders. It's just not good for me. And it gets closer to where I was raised at in Compton and Centennial and that's where I went

to school. My mother lives over in that area. And it leaves me not being any good for my kids. I ran a light. I was pulled over by the police, and I had to explain to him I'm a juror on a case and my nerves are shot and he allowed me to go. I can't do it anymore." She said she could not remain as a juror and still evaluate the evidence in a fair and impartial manner.

Although there was no dispute about excusing #2, Webster's counsel asked whether #2 had shared her anxiety with any other jurors. #2 replied yes and mentioned three other jurors, who the court and counsel identified as numbers 12, 10, and 6. #2 said they were talking in the jury room, leaving a possibility other jurors also overheard the conversation. #2 mentioned a juror (later identified as number 10) having told #2 that she heard noises at her house at night.

The court and counsel wondered aloud whether all the jurors should be examined, but the court began with only the ones identified by #2. Juror number 12 (hereafter #12) stated she herself did not have any fears or anxieties or any reason to feel she could not be fair to both sides. #12 recalled a three-way conversation among herself, #2, and another juror who heard noises at her house. #12 did not know whether any other jurors overheard it. #12 regarded the conversation as a fleeting remark that did not affect her attitude at all.

Juror number 10 (hereafter #10) was the person who had discussed hearing noises at her house. She explained that when #2 mentioned her nervousness and running a red light, #10 replied, "well, you know[,] that happens," and that she, #10, got paranoid when she was home alone at night and heard noises but it was just her neighbors. #10 then explained to the court that she hears noises at home all the time, that she did not have any fear of retaliation as a juror, and that her impartiality was unaffected. She stated her conversation with #2 was in the jury room, and that one additional juror had piped in that if #2 had concerns she should

inform the court; but #10 believed all the other jurors in the jury room were discussing the Oscars at the time.

Juror number 6 (hereafter #6) told the court that when #2 had mentioned her concern, #6 urged #2 to tell the court she was uncomfortable. The conversation did not affect #6's attitude: "I'm fine." In #6's opinion, "everybody else seemed to be fine." #6 did not recall any juror commenting about incidents at their home.

After these examinations of #2, #12, #10, and #6, the court asked counsel, "Any motions?" Webster's counsel said, "I think you need to talk to all of them." The court said, "I don't." Tennant's counsel stated he would "make a motion for mistrial based on the prospect of this jury being tainted." Bowden's counsel requested an opportunity to confer with cocounsel before the court entertained argument on Tennant's motion. When counsel reconvened moments later, Tennant's counsel *withdrew* his motion for mistrial. Then Bowden's counsel, Miss Monroe, stated, "Your Honor, I am not making a motion for a mistrial. I am satisfied based on the inquiry that the court has made of the other jurors that this panel can continue in a very impartial manner, so I have no motion." Then Webster's counsel agreed: "I'm likewise satisfied, Your Honor, and I join in Miss Monroe's statements." The prosecutor, noting that Tennant's counsel had earlier made but later withdrawn a motion for a mistrial, requested that Tennant's counsel make "a more substantial statement on the record that he is satisfied with, that this jury is competent to go forward." In response, Tennant's counsel stated, "I join in Miss Monroe's comments."

The court stated, "[B]ased upon the demeanor and the statements made by all the jurors, I was satisfied that none of them had any concerns about the remark made by the juror that was experiencing that experience, the anxiety attack. While it may have been appropriate for that particular juror to have been discharged, and I think it was, the other jurors were not affected. Apparently, every anxiety is in

the eye of the beholder. And so none of the other jurors were at all affected by the statement."

Discussion

Appellants contend the trial court abused its discretion by failing to interview the other eight jurors to determine whether they overheard #2's remarks and whether that affected their ability to render an impartial verdict.[3]

This contention is waived by the trial attorneys' expressed satisfaction with the trial court's inquiry and ruling. Bowden's trial counsel stated explicitly, "I am satisfied based on the inquiry that the court has made of the other jurors that this panel can continue in a very impartial manner." Tennant's trial counsel and Webster's trial counsel expressly joined in the comments by Bowden's trial counsel. Appellants may not for the first time on appeal complain that an inadequate inquiry was conducted, when their trial attorneys expressly approved of the trial court's inquiry and did not complain that further inquiry was needed. (See *People v. Wisely* (1990) 224 Cal.App.3d 939, 947 [failure to object to juror conduct].)

To avoid the force of the People's argument that this contention is waived, appellants construe the record narrowly and argue that trial counsel were forced into this concession by the trial court's refusal to conduct a more extended inquiry. They contend the trial court made clear it would not examine the remaining jurors, and they assert counsel had no further obligation to object or "badger" the court with requests to interview the remaining jurors. In effect they invoke the idea that further objection was futile and should be excused. We reject this argument. Its

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[3] This argument is made in Tennant's brief; Bowden and Webster filed documents of joinder in Tennant's argument.

only basis is that when Webster's counsel first suggested "I think you need to talk to all of them," the court replied "I don't." But *after* a conference among defense counsel all three defense attorneys stated on the record their satisfaction that the remaining jurors could be impartial and that a mistrial was neither warranted nor requested. The trial attorneys could have reiterated an objection that further inquiry was needed and explained why, but instead they acquiesced in the court's conclusions. By expressly declining to move for mistrial and by expressing satisfaction with the remaining jurors, all trial counsel effectively waived the argument that the court conducted an inadequate inquiry. (See *Chyten v. Lawrence & Howell Investments* (1994) 23 Cal.App.4th 607, 618 [acquiescence]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1047 [tactical defense decision to oppose examination of apparent holdout juror].)

ADVICE ON TENNANT'S RIGHT TO TESTIFY

When the prosecution rested its case-in-chief, Tennant's counsel mentioned it would not be necessary to determine whether Tennant could be impeached with his prior convictions, because "my client . . . does not wish to testify."

Prior to presentation of the defense case, *Webster's* counsel and *Bowden's* counsel *requested* the court to advise Webster and Bowden on the record about their right to testify, and to make the record clear it was their decision not to testify. The court did so.

Apparently the court then looked toward Tennant's counsel, who stated, "I believe we did that with Mr. Tennant yesterday. If not explicitly, but implicitly." Therefore, the court did not explicitly advise Tennant.

Tennant now contends the trial court erred in failing to advise Tennant that he had a right to testify and that the decision whether or not to testify was his.

Although a defendant has a right to testify, even against the advice of counsel, a trial court is not required to advise the defendant of the right nor to obtain an on-the-record waiver of the defendant's right to testify. Rather, when the defendant is represented by counsel who rests without calling the defendant as a witness, the trial court is entitled to presume the defendant has been advised by counsel and has elected not to testify. (*People v. Alcala* (1992) 4 Cal.4th 742, 805-806.) A trial court's duty to inquire personally of the defendant arises only when the record shows an *express conflict* between the defendant and counsel on the point. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332.)

The record in the present case did not impose a duty of inquiry on the trial court. There was no express conflict between Tennant and his counsel concerning whether Tennant desired to testify. Tennant did not contradict his counsel when counsel asserted Tennant did not wish to testify. Nor did Tennant speak up when his counsel indicated the court did not need to address Tennant. Tennant could not sit silently by and now, after trial, assert the trial court failed to protect his right to testify. (*People v. Alcala, supra*, 4 Cal.4th at pp. 805-806.)

FAILURE TO GIVE CALJIC NO. 17.00

The trial court neglected to instruct the jury under CALJIC No. 17.00 that the jury must decide separately whether each of the defendants is guilty or not guilty.[4] This is a basic instruction that should be given sua sponte. (*People v. Mask* (1986) 188 Cal.App.3d 450, 457.) The omission appears to have been a

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[4] CALJIC No. 17.00 states: "You must decide separately whether each of the defendants is guilty or not guilty. If you cannot agree upon a verdict as to [all] the defendants, but do agree upon a verdict as to any one [or more] of them, you must render a verdict as to the one [or more] as to whom you agree."

simple oversight. According to comments made by the court and arguments made by defense counsel to the jury, this principle was discussed during voir dire.[5]

The omission was harmless. The jury was given separate verdict forms for each defendant. The jury was given the principle involved in CALJIC No. 17.00 during voir dire and the argument of counsel. The jury understood the principle as indicated by its report during deliberations that it was initially deadlocked as to Bowden. There is no reason to think the jury rendered verdicts against appellants as a group instead of individually. (*People v. Mask, supra*, 188 Cal.App.3d at p. 457 [failure to give CALJIC No. 17.00 held harmless].) There is no reasonable probability any verdict would have been different had the instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellants offer no authority to suggest the simple omission to give CALJIC No. 17.00 is federal constitutional error.

VALIDITY OF CALJIC NO. 2.15

The trial court instructed the jury under CALJIC No. 2.15, in pertinent part, "If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference

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[5] In ruling that the letters written by Tennant from jail were admissible against him with a limiting instruction, the court commented that during voir dire the jury was told, "it's just like we're having three separate trials." Tennant's counsel argued to the jury, "Now, one of the things we talked about during jury selection is that in essence, we have three different trials going on here. You have to look at the evidence as it applies to each of these three young men separately. And again, it is now time for you to breathe life into that concept. It is now time for you to apply that part of the law." Bowden's counsel argued to the jury that Bowden "actually is an individual and . . . actually is entitled to your individual consideration." Bowden's counsel also argued to the jury, "everybody is supposed to get different and special individual consideration of the evidence against him. That's why all these people have different lawyers."

that the defendant is guilty of the crime of Robbery or Burglary as charged in Counts 1 and 2. *Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.*" (Italics added.)

Appellants contend the italicized portion of CALJIC No. 2.15 unconstitutionally lessens the prosecution's burden of proof beyond a reasonable doubt. They suggest a jury might be misled by the instruction to convict upon merely slight evidence.

This argument ignores the principle that individual instructions are not considered in isolation but rather in the context of the entire charge to the jury. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) In *Holt* the court rejected a similar challenge to CALJIC No. 2.15. There the defendant argued "that notwithstanding the express admonition that possession alone is insufficient to warrant a conviction of robbery or burglary, this instruction in effect tells the jury that such evidence, if corroborated, is sufficient." (*Ibid.*) The Supreme Court replied, "[I]nstructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury. [Citation.] The jury was advised that the instructions were to be considered as a whole and each in the light of all of the others. It was also instructed on all of the required elements of burglary and robbery and was expressly told that in order to prove those crimes, each of the elements must be proven. We see no possibility that giving the jury the additional admonition that it could not rely solely on evidence that defendant possessed recently stolen property would be understood by the jury as suggesting that it need not find all of the statutory elements of burglary and robbery had been proven beyond a reasonable doubt." (*Ibid.*; see *People v. Smithey* (1999) 20 Cal.4th 936, 978-979 [same]; *People v. Williams* (2000) 79 Cal.App.4th 1157,

1173 ["In our view, CALJIC No. 2.15 correctly prohibits the jury from drawing an inference of guilt solely from conscious possession of recently stolen property but properly permits the jury to draw such an inference where there is additional corroborating evidence. As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict [of guilt] beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process. Indeed, CALJIC No. 2.15 has repeatedly withstood challenges on the grounds that it lessens the burden of proof or otherwise denies a defendant due process of law."].)

VALIDITY OF CALJIC NO. 2.27

The trial court instructed the jury under CALJIC No. 2.27: "You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

Appellants contend CALJIC No. 2.27 is misleading because it does not expressly distinguish between prosecution witnesses and defense witnesses. They contend it should have been modified, as requested by Webster's trial counsel, to add: "The prosecution bears the burden of proof as to each material element of the offense charged beyond a reasonable doubt. If that proof depends on a single witness, the testimony of that witness must be believed beyond a reasonable doubt. [¶] If the testimony of a single defense witness raises a reasonable doubt as to any element of the charged offenses, then you are required to return a verdict of not guilty."

CALJIC No. 2.27 is not erroneous. The instructions must be considered as a whole. It is not necessary that the reasonable doubt concept be restated in every instruction. The jury was fully instructed on the burden of proof. Courts have rejected the argument raised by appellants. "[T]he jury received extensive instructions which made clear that the prosecution had the burden of proving every element of any criminal offense beyond a reasonable doubt. . . . '[W]e cannot imagine that the generalized reference to "proof" of "facts" in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles.'" (*People v. Montiel* (1993) 5 Cal.4th 877, 941; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1496-1497.)

FALSE IMPRISONMENT OF MARGILEAN BY VIOLENCE OR MENACE

Appellants contend the evidence is insufficient to show that Margilean was falsely imprisoned by violence or menace (felony false imprisonment). They further contend that even if the evidence is sufficient to show felony false imprisonment of Margilean, it is also sufficient to support a conclusion that only simple false imprisonment was committed, and therefore the trial court erred in failing to instruct sua sponte on misdemeanor false imprisonment as a lesser included offense.

Summarizing again the evidence relevant to this point: Bowden stayed in the front room with Margilean and sat down. Margilean remained seated. At one point, when she saw Tennant and Webster holding a gun on her grandson Herbert in the hallway, she got up, but Bowden told her to sit down and she obeyed. Later Tennant tied Herbert with a robe belt and forced Herbert to lie on the living room floor at Margilean's feet. Tennant was waving a gun and demanding money.

Margilean was terrified. Margilean begged Tennant not to shoot Herbert. Bowden urged Tennant to "pop" Herbert.

False imprisonment is the unlawful violation of the personal liberty of the victim. (Pen. Code, § 236.)[6] It is felonious when "effected by violence, menace, fraud, or deceit." (§ 237, subd. (a).) Violence means the exercise of physical force used to restrain, over and above the force reasonably necessary to effect the restraint. Menace means a threat of harm express or implied by word or act. (CALJIC No. 9.60; *People v. Matian* (1995) 35 Cal.App.4th 480, 484.) A threat to harm a person other than the person restrained can constitute menace. (See *People v. Ross* (1988) 205 Cal.App.3d 1548, 1552, 1555 [threat to harm victim's children if victim moved].)

Appellants point out the absence of evidence that a gun was pointed directly at Margilean or that an express threat to harm her was uttered. Nevertheless, the evidence was sufficient to show that Margilean's false imprisonment was effected by menace. Margilean started to get up when she saw Herbert being threatened with a gun in the hallway, but Bowden directed her to sit down. This was sufficient to show she was restrained by an implied threat to harm Herbert, or possibly her, if she did not remain in her place. Furthermore, later Tennant waved a gun at Herbert with Herbert lying at Margilean's feet.[7] Bowden urged Tennant to "pop" him. Margilean was terrified by this. This also was sufficient to show that Margilean's liberty was restrained by an implied threat to harm Herbert or possibly her.

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

7 Tennant "had [the gun] out hanging all around [Herbert] with it."

Appellants next contend that at least the trial court should have instructed on misdemeanor false imprisonment as a lesser included offense (see *People v. Matian, supra*, 35 Cal.App.4th 480, 487) to give the jury the option of finding that Margilean's false imprisonment was not effected by violence or menace. A trial court must instruct on all lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The trial court's duty to instruct sua sponte arises only if there is evidence from which a *reasonable* jury could conclude that the lesser offense but not the greater was committed. (*Id.* at p. 162.)

Here, all appellants relied on a defense of mistaken identification and did not dispute the elements of the charges. The jury could not reasonably conclude the offense was less than that charged. Therefore, the trial court did not err in failing to instruct sua sponte on misdemeanor false imprisonment.

But even assuming the jury could reasonably have found only simple false imprisonment occurred, any error in instruction was harmless. Error in failing to instruct on a lesser included offense is harmless if there is no reasonable probability a more favorable verdict would have been rendered had the instruction been given. (*People v. Breverman, supra*, 19 Cal.4th 142, 164-165 [overruling *People v. Sedeno* (1974) 10 Cal.3d 703, 721, which formerly required reversal unless the issue posed by the omitted instruction was "necessarily" resolved against the defendant under other properly given instructions].) Here the jury found by the verdicts on count 4 (false imprisonment of Margilean by violence or menace) that, as to all appellants a principal was armed with a firearm in the commission of that offense, and as to Tennant that he personally used a firearm in the commission of that offense. Whether or not this would have satisfied the former *Sedeno* standard, it shows there is no reasonable probability the jury would

have found misdemeanor false imprisonment had the lesser included offense been offered as an option. (*People v. Breverman, supra*.)

TENNANT'S SENTENCE

Prior Prison Term

The trial court found true the allegation that Tennant served a prior prison term. (§ 667.5, subd. (b).) The court neglected to mention this enhancement in sentencing. The People point out this omission constitutes an unauthorized sentence, because the trial court must either impose the enhancement or strike it with a statement of reasons complying with section 1385. (*People v. Bradley* (1998) 64 Cal.App.4th 386.) We shall remand the matter to the trial court to either impose the enhancement or strike it by complying with section 1385.

Calculation of Credit

As discussed *post*, the trial court slightly miscalculated the conduct credit due to each appellant. On remand the trial court can apply the correct credit to Tennant.

BOWDEN'S SENTENCE

The trial court sentenced Bowden to a midterm of six years for home invasion robbery, as the principal term.[8] Bowden contends on appeal the trial court abused its discretion by not selecting the low term of three years.

At the beginning of the sentence hearing covering all three appellants, the court began by describing the aggravated circumstances of this home invasion

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[8] The minute order and abstract of judgment erroneously refer to the six-year term as a low term. (§ 213, subd. (a)(1)(A) [term choices are three, six, or nine years].)

robbery. "It's one thing to rob a person with a threat, say give me your money and you show them a gun. It's another thing for you to tie them up, put them in a felony prone position, put a gun to their heads and then have another defendant [Bowden] say ['pop him']. Now, the chilling effect of those words in the sanctity of your home is twofold: Imagine the terror that Herbert Blacksher felt in that position. I'm sure he felt that he was about to be executed. And imagine the terror that his grandmother felt when she thought that she was about to witness the death of a loved one before her very own eyes. It must have been truly terrifying. . . . The victims were truly particularly vulnerable."

As to Bowden, defense counsel urged the court to consider a low term, while the prosecutor urged a high term. After hearing argument the trial court mentioned several factors, some in aggravation, some in mitigation. It repeated that the comment made by Bowden must have been terrifying to the victims and elevated this crime above the average home invasion robbery. It said the crime was carried out with planning, sophistication, and professionalism. It said Bowden had two prior sustained juvenile petitions for a similar offense, robbery, and his prior performance on probation was unsatisfactory. "[H]e seems like he's graduating in the school of crime." On the mitigating side were Bowden's youth (age 19) and his domination by Tennant. The court concluded that it would give Bowden "the benefit of the doubt" by treating these mitigating factors as "offsetting" the aggravating, and sentenced Bowden to the middle term.

The record shows the court considered a variety of factors. In light of the wide discretion vested in the trial court and the presumption in favor of a middle term, it cannot be said the trial court abused its discretion by refusing to find that the mitigating circumstances outweighed the aggravating. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401-402; *People v. Rivera* (1993) 14 Cal.App.4th 1743, 1747; rule 4.420(a), (b), Cal. Rules of Court.)

WEBSTER'S SENTENCE

Due to conviction of burglary of an inhabited dwelling house, Webster was ineligible for probation "[e]xcept in unusual cases where the interests of justice would best be served" by granting probation. (§ 462, subd. (a).) Webster contends that the trial court abused its discretion by refusing to declare this an unusual case so as to consider probation.

The trial court heard argument by Webster's trial counsel requesting a declaration this is an unusual case, but the court declined. It commented, "This is definitely not a probation case . . . . [B]ecause of the gravity of the offense, the court is not going to allow probation." This harkens back to the court's comments at the beginning of the combined sentence hearing, that this crime was even more aggravated and terrifying than a typical home invasion robbery.

Rule 4.413 of the California Rules of Court[9] governs the determination whether to declare an unusual case despite the statutory presumption of defendant's ineligibility for probation. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831; *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1225.)[10] Rule 4.413 provides that the court shall apply the criteria in subdivision (c) to evaluate "whether the statutory limitation on probation is overcome," and only if it is overcome does the court then apply the criteria in rule 4.414 to decide whether to grant probation. (Rule 4.413(b).) The relevant provision of subdivision (c)(1) allows the court to consider that "[t]he fact or circumstance giving rise to the limitation on probation [here, burglary of an

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9 All further rule references are to the California Rules of Court.

10 Rules 413 and 414, mentioned in the cited cases, are now numbered rules 4.413 and 4.414.

inhabited dwelling house] is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation." (Rule 4.413(c)(1)(i).) This was decidedly *not* true here, as the trial court pointed out. (*People v. Superior Court (Dorsey), supra*, 50 Cal.App.4th at p. 1226.) Subdivision (c)(2) of rule 4.413 lists facts concerning the defendant's culpability to consider in determining whether the legislative presumption of ineligibility is overcome. The first two do not apply here. (Rule 4.413(c)(2)(i), (ii) [participation under circumstances of "great provocation, coercion, or duress not amounting to a defense"; crime was committed because of a "mental condition not amounting to a defense" that would respond to mental health care treatment as a condition of probation].) The third criterion arguably applies. (Rule 4.413(c)(2)(iii) [the defendant is youthful and has no significant record of prior criminal offenses].) Webster was 19 at the time of the crimes and had only one prior conviction, of misdemeanor theft.

The court's finding that this was an aggravated home invasion robbery amply justified refusing to declare this an unusual case. Rule 4.413(c)(1)(i) implements the policy of the Legislature that as a rule probation should not be granted in circumstances giving rise to the statutory limitation, in this case the commission of burglary of an inhabited dwelling house. The fact that Webster could arguably satisfy the youth-with-no-significant-record criterion of rule 4.413(c)(2)(iii) does not show the court abused its discretion, since Webster so clearly failed to satisfy any other criterion for overcoming the statutory ineligibility for probation. Webster fails to show the court acted arbitrarily. (*People v. Superior Court (Du), supra*, 5 Cal.App.4th at p. 831.) In arguing various mitigating factors, Webster's appellate counsel confuses the general criteria for probation (rule 4.414) with the preliminary step of determining whether the statutory presumption against probation is overcome. (Rule 4.413; *People v.*

Superior Court (Dorsey), supra, 50 Cal.App.4th at p. 1229 [mere suitability for probation does not overcome the presumptive statutory bar; rather, rule 4.413 contemplates a two-step process].)

CREDIT

Appellants were convicted of robbery, and their conduct credit pursuant to section 4019 for time in presentence custody was therefore limited to 15 percent. (§§ 667.5, subd. (c)(9), 2933.1, subds. (a), (c).) The trial court found as to each appellant that he was in actual custody for 178 days. The court calculated conduct credit for each as 28 days, awarding total credit of 206 days.

The People correctly contend this was a miscalculation exceeding the permissible limit, constituting an unauthorized sentence that should be modified by this court. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270.) Section 2933.1 states the credit "shall not exceed 15 percent of the actual period of confinement." (§ 2933.1, subd. (c).) This means credit is limited to the greatest number of whole days that does not exceed 15 percent. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 816.) Fifteen percent of 178 is 26.7. Therefore, only 26 days of conduct credit could be awarded.

We shall modify the awards of credit to Bowden and Webster, whose judgments we otherwise affirm. Because the judgment as to Tennant is reversed solely for resentencing, the trial court can award the appropriate credit at that time.

DISPOSITION

As to appellant Bowden, the judgment is modified to provide total credit of 204 days for time served, consisting of 178 days actual time and 26 days of conduct credit. As so modified, the judgment is affirmed.

As to appellant Webster, the judgment is modified to provide total credit of 204 days for time served, consisting of 178 days actual time and 26 days of conduct credit. As so modified, the judgment is affirmed.

As to appellant Tennant, the judgment is affirmed, except as to sentence as to which it is reversed, and the cause remanded with direction to either impose the enhancement under section 667.5, subdivision (b) or to strike it in compliance with section 1385, and to correct the award of conduct credit consistent with the views in this opinion.

CERTIFIED FOR PARTIAL PUBLICATION

VOGEL (C.S.), P.J.

We concur:

EPSTEIN, J.

CURRY, J.