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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARCO VALADEZ, Defendant and Appellant.	D030982 (Super. Ct. No. SCD129876)
In re MARCO VALADEZ on Habeas Corpus.	D036313

APPEAL from a judgment of the Superior Court of San Diego County, Federico Castro, Judge, and a petition for writ of habeas corpus. Reversed and remanded for resentencing; petition denied.

Beatrice C. Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

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1 Under California Rules of Court, rules 976(b) and 976.1, only the Introduction, Facts, Discussion part IV and the Disposition are certified for publication.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kyle Niki Shaffer and Steven T. Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Marco Valadez was found guilty of rape in concert, false imprisonment, oral copulation while acting in concert and unlawful sexual intercourse with a minor under 16 years of age. Various weapon allegations were found true. Valadez was sentenced to a prison term of 24 years to life.[2] In the published portion of this opinion we conclude Valadez was denied due process because the information did not give notice that sentencing was sought pursuant to the "one strike" law (Pen. Code,[3] § 667.61) and we remand for resentencing. During the pendency of the appeal, Valadez filed a petition for writ of habeas corpus raising claims of ineffective assistance of counsel, which has been consolidated with the appeal.

FACTS

I. *Prosecution's Case*

In June 1996, 14-year-old Amanda E. was baby-sitting at the apartment of Linda Martinez. Around 2 a.m., Martinez, appellant, appellant's friend and codefendant

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2 Appellant was sentenced to an additional consecutive three years in two unrelated cases that were combined with this case for sentencing purposes.

3 All further statutory references are to the Penal Code unless otherwise specified.

Lorenzo Soltero[4] and several other persons returned to the apartment. They appeared to be drunk and high. Before returning home for the evening, Amanda went to the bathroom located between adjoining bedrooms. On her way out, appellant, Soltero and another man, Adam Palafox, confronted Amanda in a bedroom. Appellant was pounding a pipe wrench into the palm of his hand. Soltero approached Amanda, put his hands around her waist and told her to remove her pants. Thinking he was joking, Amanda laughed. When Amanda resisted, appellant threatened her and Soltero removed her pants.

Soltero raped Amanda. Appellant forced her to touch his penis and put it in her mouth. Amanda was afraid to fight back. She knew appellant and Soltero were gang members and had heard appellant, Soltero, Martinez and other persons in the apartment describe how they had attacked people for making them angry or "looking at them wrong." When Amanda told the men she was going to throw up, they allowed her to go to the bathroom. While in the bathroom, Amanda heard Martinez from the other bedroom say "they're in there pulling a train on that bitch" and then heard laughter. When Amanda returned to the bedroom, appellant pulled her toward him. Amanda convinced the men to let her go home.

Upon returning home, Amanda did not report the assault. Her mother noticed Amanda was upset and went to Martinez's apartment to find out what had happened. Amanda's mother argued with someone in Martinez's apartment and then returned home.

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4 Soltero is not a party to this appeal.

Several minutes later, appellant and Soltero followed. Amanda's mother talked with appellant and Soltero in the kitchen. Soltero apologized to Amanda for "scaring" her. Amanda went to bed. She saw her mother get drug paraphernalia and rejoin appellant and Soltero in the kitchen. When Amanda got out of bed, appellant and Soltero were gone and there were drugs on the table.

Six months later, Amanda, who was pregnant, was called into the school counselor's office to discuss her home life. The counselor had visited Amanda's home the week prior and talked with her mother regarding Amanda's school absences. Amanda reported the rape to the counselor and agreed to file a complaint.

When contacted by the police, appellant denied knowing Amanda or ever having been in Martinez's apartment. Palafox, the man Amanda said was in the room when she was attacked, testified he was not involved in the crime but did walk through the bedroom and saw Soltero pulling Amanda onto the bed while appellant was standing nearby. Palafox claimed he feared retaliation if he were to intervene or report the assault.

Amanda gave birth. DNA testing indicated a 99.91 percent certainty that Soltero was the father of the child.

II. *Defense*

Appellant did not testify but argued none of the events Amanda reported took place. He supported his claim by noting inconsistencies in the witnesses' testimony. Appellant also argued the rape could not have taken place as described because the position of the alleged actors was physically impossible. Appellant presented evidence that he had a marble surgically embedded in the foreskin of his penis prior to the date of

the offense and it was noticeable whenever he had an erection. By implication, he could not have been involved in the rape because Amanda never testified she saw the unusual protrusion.

Soltero testified that he and Amanda had consensual sexual intercourse the night before the claimed incident but not the night of the alleged crime.

Appellant identified Amanda's desire to get back at Soltero and to escape from her mother's home as possible motivations for lying. He argued his friendship with Soltero made him a target.

DISCUSSION

I. *Introduction of Gang Evidence*

Appellant contends the trial court abused its discretion in admitting evidence of appellant's gang affiliation. Appellant claims such evidence was irrelevant and unduly prejudicial. The People argue the trial court's ruling was proper because evidence of gang affiliation was necessary to demonstrate Amanda's and Palafox's fear of appellant and critical in assessing Amanda's and Palafox's credibility. Alternatively, the People argue if there was an abuse of discretion in admission of gang evidence, the error was harmless because the court provided a limiting instruction and there was sufficient evidence, independent of the gang evidence, upon which to convict. We conclude the evidence of gang affiliation was relevant and admissible.

The trial court retains broad discretion in determining the relevance of evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Here, the trial court allowed evidence of gang affiliation to explain Amanda's failure to resist her attackers and immediately report

the assault. Testimony a witness is fearful of retaliation relates to that witness's credibility and is admissible. (*People v. Malone* (1988) 47 Cal.3d 1, 30.) Amanda's fear of the appellant provided the motivation for her behavior. The same follows for Palafox. He also expressed a fear of the two men that motivated his failure to intervene or initially cooperate with the police investigation.

The exercise of the trial court's discretion regarding relevancy is also subject to the constraints of Evidence Code section 352, which requires the court to determine whether the prejudicial effect of the evidence substantially outweighs its probative value. The trial court's ruling will not be disturbed on appeal except on a showing that the court exercised its discretion in an "'arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

As appellant points out, in *People v. Cox* (1991) 53 Cal.3d 618, 660, our Supreme Court stated: "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (See also *People v. Anderson* (1978) 20 Cal.3d 647, 650-651.) The complaining witness's state of mind during and after an attack cannot be characterized as "tangentially relevant," but rather crucial to the credibility of the complaining witness and the People's case. It is particularly relevant here, where there were others nearby during the rape and Amanda did not cry out for help. The jury would expect an explanation of her behavior.

Gang affiliation evidence in this case was highly probative on the issue of the witness's state of mind and credibility. Any undue prejudice created by the introduction of gang evidence was addressed by the trial court's limiting instruction regarding its proper use.[5] "[J]urors are presumed to adhere to the court's instructions . . . . [Citations.] Nothing in this record indicates the jury failed to comply with the trial court's admonition." (*People v. Olguin* (1994) 31 Cal. App. 4th 1355, 1374.) We find no abuse of discretion.

II. *Use of Appellant's Nickname and Display of Appellant's Tattoos to the Jury*

Appellant contends the trial court abused its discretion by allowing the prosecution to refer to appellant by his nickname "Gangster" and by directing him to display his tattoos to the jury. Appellant claims such evidence was unduly prejudicial. The People argue the evidence was properly admitted because both the nickname and the tattoos were relevant to show the accuracy of Amanda's identification.

A. Use of Nickname

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[5] Appellant argues the trial court further erred when in the first of its two limiting instructions concerning gang evidence it deviated from language agreed upon by the parties. The court began the instruction by noting that Amanda had testified concerning statements by the defendants "regarding certain acts that they performed." The court then added this sentence that was not part of the agreed upon instruction: "And these were acts that they performed of a gang-style behavior type of acts."

Appellant argues this second sentence further suggested the men acted as and were part of a gang. We are not sure what the trial court meant. In the final analysis, however, the two limiting instructions given by the court made clear the proper purpose to which the evidence of gang affiliation could be put.

As discussed above, Evidence Code section 352 requires the court to determine whether the prejudicial effect of the evidence substantially outweighs its probative value. The complaining witness's identification of the perpetrator's identity is material to the People's case. Amanda knew her attackers only by their nicknames and used them when giving a description to the police. Palafox similarly knew appellant only by his nickname, as they were very briefly acquainted.

Arguably, not allowing Amanda and other witnesses to refer to appellant by his nickname would have precluded credible corroboration of testimony with regard to identification, i.e., all the witnesses referred to appellant by the same name. In any event, any error in allowing witnesses to refer to appellant as "Gangster" was harmless. As noted the prosecution was allowed to present evidence that appellant and his cohorts were members of a gang. The trial court twice instructed the jury concerning the proper use of such testimony. The use of the nickname "Gangster" added nothing the jury did not already know about appellant's gang affiliation and did not prejudice him.

B. Display of Tattoos

Amanda's first statement to the police included a description of appellant, including the two letters tattooed on his chest. On cross-examination, Amanda testified appellant was clothed when the attack began. She was unable to pinpoint when she actually saw appellant's tattoos. After a deputy sheriff testified as to Amanda's description of her attackers, at the request of the People, appellant was directed to lift his shirt and display the tattoos on his chest to the jury. Initially, there was confusion among defense counsel as to which defendant was being asked to display his tattoos; both

defendants had the tattoos Amanda described. Appellant complied, objecting on the grounds of lack of foundation and hearsay, arguing Amanda may have been confused as to which Soltero she was describing when she made her statements to the deputy sheriff.

The trial court had to determine whether the prejudicial effect of displaying appellant's tattoos substantially outweighed its probative value. (Evid. Code, § 352.) Despite Amanda's failure to precisely articulate when she saw appellant's tattoos and the apparent confusion during trial, allowing the jury to see the tattoos as Amanda had described in her first statement served to corroborate her identification. In light of the probative value with regard to Amanda's credibility and identification of her attackers, we find the trial court did not act in an "arbitrary, capricious or patently absurd manner." (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1124.)

III. *Discharge of Juror*

Appellant contends the trial court erred when it failed to discharge a juror who believed appellant's Soltero had threatened the complaining witness during her testimony and who expressed concern for her own safety.

A. Background

At the end of the testimony of the complaining witness, the trial court told counsel for both defendants to instruct their clients not to constantly stare at the witness. When counsel asked for a clearer explanation, the court stated: "Let me define it. I happen to know a little bit about the gang culture. And they do a lot of mad-dogging, and I don't want any mad-dogging in my courtroom. [¶] So, they're not to stare at her. Okay?"

Later, an in camera hearing was held after a juror indicated she feared for her safety. She explained that two prosecution witnesses testified they moved out of state because they feared for their lives. The juror stated she did not know if the defendants were in or out of custody. The court stated it would not discuss that issue but told the juror the defendants would not harm her. When asked if she was intimidated when the defendants looked at her, the juror stated no. She then stated: "I did see, when the first witness came on the stand and started testifying, Mr. Soltero was mouthing something, like, 'I am going to get you,' you know, something."

The court told the juror that problem had been taken care of. The court asked the juror if she could continue on the case. She stated she could if the court could assure her she would not be harmed. The court replied it could not guarantee that nothing would ever happen to her but it could assure her during the duration of the trial "that nothing is going to happen to you by either one of these two." When the juror stated she was concerned about after the trial as well, the court stated it did not know what would happen after the trial. The court did explain that after trial juror information would be sealed. The juror stated she was concerned she might run into one of the defendants on the street. The court stated it understood but that was true of any juror.

Soltero's counsel asked if any one out of court had approached the juror. She stated no. She was asked if any other juror had expressed similar concerns. She stated no. Appellant's counsel asked if the juror's generalized fear might affect her ability to analyze the case. She stated that given all the evidence, she thought she could be fair. She stated, however, she had been around gangs before and "[knew] what they're like."

The prosecutor asked the juror if her fear would make it more likely she would vote to convict to ensure the defendants would be in custody. The juror stated her fear would have no affect on her consideration of the case. She stated that once she heard the defense evidence, she would be able to determine what happened and make her decision based on the evidence. The juror agreed when the court reminded her that a defendant was considered innocent until proven guilty.

Soltero's counsel stated he believed the court should excuse the juror. The court replied that based on the juror's answers, it believed she would be able to decide the case based on the evidence.

At the request of appellant's counsel, the prosecutor stated he would stipulate that the fear mentioned by the witness was a generalized one and not based on any specific threats made by the defendants. Soltero's counsel stated he would cover that matter during his cross-examination of Palafox.

The next morning, Soltero's counsel stated he had considered further the question of whether the juror should be excused. He stated he was particularly concerned with the juror's belief that the Soltero had mouthed a threat to the complaining witness. Counsel stated there was no evidence the juror was a lip reader. Counsel stated his client categorically denied making such a threat. He stated that under the circumstances he did not believe she could be fair and asked again that she be excused. The court denied the motion.

Later, the court explained it denied the motion to excuse the juror because of her statement she could be fair and impartial. The court stated it did not see the Soltero

mouth any threat to the complaining witness. It did state, however, it could not prevent jurors from making their own observation of what occurred in the courtroom and interpret defendant behavior.

B. Discussion

Appellant contends the juror was exposed to inherently prejudicial extraneous material that was likely to engender bias and the trial court erred in not excusing her or admonishing her to disregard the perceived threat.

Pursuant to section 1089, the trial court may discharge a juror for good cause. Misconduct is good cause. To establish misconduct, the facts must establish an inability to perform the functions of a juror. The decision to retain or discharge a juror rests in the sound discretion of the trial court. If any substantial evidence exists to support the trial court's decision, it will be upheld on appeal. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351.)

Here, the trial court reminded the juror, and she agreed, that the defendants were innocent until proven guilty. The juror stated she had not discussed her fears with any other jurors. She also stated on several occasions that she could, even in light of the Soltero's behavior, be fair and base her decision on the evidence. In addition to the discussions between the court and the juror *in camera*, the court instructed the entire jury that it must not "consider or discuss facts as to which there is no evidence" and must "determine what facts have been proved from the evidence received in the trial and not from any other source." The trial court did not abuse its discretion in refusing to discharge the subject juror.

IV. *One Strike Sentencing*

Appellant contends he was denied due process because the information did not give notice that sentencing would be required under section 667.61, commonly referred to as the "one strike" law.

A. Background

Appellant was charged under section 261, subdivision (a)(2)/264.1 [forcible rape in concert], with a special allegation under section 12022.3, subdivision (b) [use of a deadly weapon]. Under the one strike law, section 667.61, subdivision (b), requires a sentence of 15 years to life if a defendant is found guilty of section 261, subdivision (a)(2), and if the section 12022.3, subdivision (b), allegation is found true. (§ 667.71, subds. (b), (e)(4).) A term of 25 years to life is required pursuant to section 667.61, subdivision (a), if the defendant is convicted of certain enumerated sex crimes and if certain described circumstances are proved. (§ 667.61, subds. (a), (c), (d), (e).)

Section 667.61, subdivision (i), states: "For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

The amended information charged appellant with a violation of section 261, subdivision (a)(2), and alleged that in the commission of that offense he was armed with a deadly weapon within the meaning of section 12022.3, subdivision (b). While a verdict of guilt on the charged offense and a true finding on the armed allegation would require

sentencing pursuant to section 667.61, subdivision (b), that section was unmentioned in the information.

Appellant was found guilty of the charged offense and the armed allegation was found true. The first mention of sentencing under the one strike law came in the prosecution's post-trial sentencing memorandum.

As to the section 261, subdivision (a)(2), conviction, appellant was sentenced to an indeterminate term of 15 years to life pursuant to section 667.61, subdivision (b).

B. Discussion

Appellant argues that sentencing him to a term of 15 years to life without notice that one strike sentencing would be sought violated the pleading requirements of section 667.61 and denied him due process.

During the pendency of this appeal, our Supreme Court decided *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), a case dealing with the pleading requirement of the one strike law. We requested the parties brief the impact of that decision on the present matter. Appellant and respondent agree that *Mancebo* requires the prosecution to give notice in the charging document when sentencing is sought under the one strike law. They agree no notice was given here. They disagree concerning the effect of that omission.

1. *Mancebo*

In *Mancebo* the defendant was charged with one strike crimes involving two victims. As to each of those crimes, the information cited section 667.61 and alleged two circumstances listed in section 667.61, subdivision (e), that if found true required the

imposition of terms of 25 years to life under the one strike law. One of those qualifying circumstances was firearm use. (§ 667.61, subd. (e)(4).) The information *did not* allege as a qualifying circumstance that the crimes were committed against multiple victims (§ 667.61, subd. (e)(5).) As to each of the crimes, the information also alleged firearm use within the meaning of section 12022.5. (*Mancebo, supra,* 27 Cal.4th at pp. 739-740.)

Mancebo was convicted of the charged crimes and the allegations were found true. Pursuant to the one strike law, the trial court sentenced him to two consecutive 25 years to life terms. To each of those terms the court imposed an additional 10 years based on the section 12022.5 firearm use findings. (*Mancebo, supra,* 27 Cal.4th at p. 740.) It was the legality of these additions that was at issue in *Mancebo*.

Section 667.61 contains two pleading and notice provisions relevant to that issue. Section 667.61, subdivision (i), requires that the existence of any fact necessary for one strike sentencing be "alleged in the accusatory pleading and either be admitted by the defendant in open court or found to be true by the trier of fact." Section 667.61, subdivision (f), states that if only the minimum number of qualifying circumstances necessary for sentencing under the one strike law have been "pled and proved," those circumstance must be used to impose sentence pursuant to that law and not to impose punishment under any other law. However, if more than the minimum number of qualifying circumstances have been "pled and proved," they "shall" be used to impose any additional terms authorized by law.

In *Mancebo* the minimum number of qualifying circumstances necessary to authorize 25 year to life sentencing under the one strike law were pled and proved.

Nominally, this would suggest that the fact of firearm use -- found true pursuant to the section 12022.5 allegation but neither pled nor proved as a qualifying circumstance for One strike purposes -- could not be used to support both one strike sentencing and the imposition of a firearm use enhancement.

The trial court, however, concluded that while the multiple victim qualifying circumstance (§ 667.61, subd. (e)(5)) was not pled, it was necessarily proved since the defendant was found guilty of committing qualifying crimes against two victims. The trial court substituted the multiple victim circumstances for the firearm use circumstances as a basis for 25 years to life sentencing under the one strike law and then used the fact of firearm use to impose a section 12022.5 enhancement.

The court in *Mancebo* found such manipulation violative of the pleading requirements of section 667.61 and of due process. The court concluded it was necessary to read section 667.61, subdivisions (i) and (f) together and that so read their meaning was that qualifying circumstances had to be specifically pled and found. The court described this requirement as "straightforward and plain." (*Mancebo, supra,* 27 Cal.4th at pp. 743-745, 749, 751, 753.)

Having found error, the court turned to the issue of disposition. It noted that the prosecution understood the express pleading requirements of section 667.61 since it properly pleaded such a case. Rather than undertake a prejudice analysis, the court stated it would deem the prosecution's failure to plead a multiple victim qualifying circumstance a discretionary charging decision. It stated this conclusion was supported not only by the record but also by the failure of the People to suggest how any failure to plead that

circumstance was the result of mistake or other excuse. The court stated that under those circumstances the concepts of estoppel and waiver applied and there was no need to assess prejudice. (*Mancebo, supra,* 27 Cal.4th at p. 749.)

Mancebo recognized that in *People v. Knox* (1999) 74 Cal.App.4th 757 (*Knox*), the court found a similar pleading error harmless. In *Knox* the defendant was charged with sex offenses against three victims and placed on notice that the prosecution was seeking one strike sentencing. As to each victim, the information alleged one qualifying circumstance, i.e., firearm use, thus, making the defendant eligible for a sentence of 15 year to life as to each victim. The information did not allege the additional qualifying circumstance that the crimes were committed against multiple victims. Nonetheless, the trial court, noting the jury necessarily found crimes against multiple victims, imposed terms of 25 years to life based on findings of multiple circumstances rather than 15 years to life terms applicable to a finding of a single circumstance. (*Mancebo, supra,* 27 Cal.4th at pp. 749-750.)

The *Knox* court found that any failure to plead the additional multiple victim circumstance harmless. It observed that all facts necessary for that finding were pled. It noted there was no suggestion the case would have been defended differently had the additional circumstance been included in the information. It stated the defendant was aware that he was charged with qualifying sex crimes against multiple victims. Finally it noted the jury necessarily found the facts supporting the unpled circumstance, i.e., multiple victims. (*Knox, supra,* 74 Cal.App.4th at pp. 750-751.)

Mancebo rejected and disapproved the *Knox* analysis. It found "questionable" the conclusion the defendant knew based on the information that he faced a term of 25 years to life rather than 15 years to life. It also noted that *Knox*, unlike *Mancebo*, did not involve a violation of the express provisions of section 667.61, subdivision (f).

2. Analysis

The Attorney General argues the *Mancebo* decision with regard to the issue of disposition was a narrow and limited one. He interprets the opinion as applying the doctrines of waiver and estoppel only to situations where the prosecution demonstrates its understanding that it must give explicit notice that it is seeking one strike sentencing. He contends that when, as in the present case, there is no evidence the prosecution understands this duty and when it provides no notice whatsoever of its intention to seek an indeterminate life term, its omission is amenable to a claim of harmless error.

It would be odd, we think, if the prosecution's tactical position on appeal was improved because its error below was more egregious. We reject the Attorney General's interpretation and conclude based on the concepts of estoppel and waiver as applied in *Mancebo* that the failure to give notice that one strike sentencing will be sought precludes such sentencing.

The Attorney General believes this case is distinguishable from *Mancebo* because there the information demonstrated the prosecutor's understanding of the requirement that it give notice it was seeking one strike sentencing, but here the information suggests prosecutorial ignorance. This demonstration of awareness is crucial the Attorney General

argues since it is the basis for *Mancebo's* conclusion that the prosecutor made a charging decision in not pleading the multiple victim qualifying circumstance.

We do not believe *Mancebo's* observation concerning the prosecutor's general understanding of its pleading requirements in this context was meant as a limitation on the application of the concept of waiver and estoppel. The prosecution's state of mind is surely less important than the effect of its actions. Whether done intentionally or not, the failure to give notice that one strike sentencing or some nuance of one strike sentencing is sought has serious consequences.

As *Mancebo* notes the failure to give such notice can effect the manner in which the case is defended and, perhaps more importantly, can effect the defendant's position with regard to plea bargaining. (*Mancebo, supra,* 27 Cal.4th at p. 752.) As the Attorney General notes in his harmless error argument, not only does a failure to give notice have a serious potential for misleading the defendant, it thrusts upon the defendant the burden of demonstrating error and prejudice -- a burden that may be extremely difficult to meet especially when the claim of prejudice involves the effect of a lack of notice on plea bargaining. (See generally *In re Alvernaz* (1992) 2 Cal.4th 924, 937.) Of lesser but still meaningful importance is the need to expend judicial resources in what can be a time consuming process of sorting out prejudice. These effects on the defense and the judicial system are unacceptable especially in light of the ease with which they can be avoid by proper pleading.

In deciding the significance of a prosecutor's demonstrated knowledge of pleading requirements to the application of the concepts of waiver and estoppel, we note that the

two cases cited by *Mancebo* in support of its application of those concepts do not suggest such a requirement. The court cites this quotation from *People v. Hernandez* (1988) 46 Cal.3d 194, 208-209: "'It is unnecessary to . . . engage in a harmless-error analysis when defendant's due process right to notice is completely violated.'" (*Mancebo, supra*, 27 Cal.4th at p. 749.)

The court cites this quotation from *People v. Najera* (1972) 8 Cal.3d 504, 512, a case in which the prosecutor failed both to include in the information a section 12022.5 enhancing allegation and to have the jury instructed concerning it: "'We conclude that the People waived application of section [667.61, subdivision (e)(5)] by failing to have the matter resolved at trial.'" (*Mancebo, supra*, 27 Cal.4th at p. 749.)

We conclude that *Mancebo's* reference to the prosecution's apparent knowledge of the notice requirement was case specific. It was not meant to express a requirement that the prosecution have demonstrated an understanding of the "straightforward and plain" pleading requirement of the one strike law before the concepts of waiver and estoppel would apply.

In this case the amended information, on which this case was tried, the prosecution not only failed to allege the applicability of section 667.61, subdivision (b), it affirmatively alleged the case was a determinate sentencing case. The prosecutor, perhaps gratuitously, set forth in the information the potential penal sanctions arising from each charge and allegation in the amended information. Specifically, he set forth the range of determinate sentences appropriate to each count. For example, under the heading "Sentence Range," the prosecutor listed for count 1 (§ 261, subd. (a)(2)) the

numbers "5 -7-9," which represent the range of potential years in prison as a determinate sentence for that charge. Each of the remaining counts followed the same pattern. Hence, the inescapable conclusion from the pleadings was that the defendant was not subject to a potential indeterminate sentence.

The trial court and the attorneys for the parties apparently shared this conclusion. During *in limine* discussions the trial court discussed the number of potential peremptory challenges to the jury. The court said: "And this is not a strike case, so you each get ten challenges." Defense counsel immediately agreed and the prosecutor did not challenge the accuracy of the statement. The jury was then selected on the basis that the defendant was not facing a potential life term.

Indeed, it was not until after the verdict that the prosecutor apparently discovered section 667.61, subdivision (b), was applicable. Prior to sentencing, the prosecutor's first hint he was requesting a life sentence was when he filed Points and Authorities in Support of Imposing the Mandatory Punishment of 15 to Life for Each Defendant Pursuant to P.C. 667.61. The record is entirely clear that the case proceeded completely through trial with no mention of a life term, with specific pleadings alleging otherwise and with acceptance of a judicial declaration that it was a determinate sentencing case. Both adherence to *Mancebo, supra,* 27 Cal.4th 735, and basic fairness require that we hold the prosecution to its tactical pleading choices. We reverse and remand for resentencing.

V. *Ineffective Assistance of Counsel*

Appellant argues both on appeal and in an accompanying petition for writ of habeas corpus that he received ineffective assistance of counsel when his attorney failed to advise him that if he was convicted he was subject to an indeterminate life term pursuant the one strike law. (§ 667.61.) He contends such failure to advise prejudiced him and that had he been aware of the one strike law, he would have accepted the prosecution plea offer that did not include such sentencing. Because we find appellant was improperly sentenced under the one strike law, the claim of ineffective assistance is moot and the petition for habeas corpus is denied.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for resentencing. The petition for writ of habeas corpus is denied.

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BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.