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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMON ERIC GRIGGS, Defendant and Appellant.	F040410 (Super. Ct. No. 83357B) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, John G. McLean and Jay A. Mark, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of PROCEDURAL HISTORY, FACTS, and parts B. and C. of DISCUSSION.

INTRODUCTION

Defendant and appellant Raymon Eric Griggs appeals from a judgment following a jury trial in which he was convicted of being a felon in possession of a firearm and ammunition in violation of Penal Code sections 12021, subdivision (a)(1), and 12316, subdivision (b)(1), and of certain drug offenses. During trial, appellant and his codefendant stipulated that they had prior felony convictions for the purpose of establishing their ex-felon status as an element of the felon-in-possession charges. At the close of the prosecution's case, the jury was informed of the stipulation. In the published portion of the opinion, we reject appellant's contention that the trial court's failure to give a limiting instruction, sua sponte, concerning the stipulation violated his due process rights. In the unpublished portions of the opinion, we reject appellant's claims that he was denied effective assistance of counsel by his counsel's failure to move to sever his trial from that of his codefendant and that the trial court abused its discretion in declining to dismiss one of his prior felony convictions. We will affirm the judgment.

PROCEDURAL HISTORY*

On January 29, 2002, appellant was charged in an amended information with: transportation and importation of marijuana (Health & Saf. Code, § 11360, subd. (a)) (count 1); possession of marijuana for sale (Health & Saf. Code, § 11359) (count 2); possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)) (count 4); assault of Jeanetta Pollard with a deadly weapon, a fan (Pen. Code, § 245, subd. (a)(1)) (count 5); assault of Jeanetta Pollard by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) (count 6); assault of Jeanetta Pollard with a deadly weapon, a firearm (Pen. Code, § 245, subd. (a)(2)) (count 7); threatening to commit a crime which would result in death or great bodily injury to another (Pen. Code, § 422) (count 8); and possession of ammunition by a convicted felon (Pen. Code, § 12316, subd.

*See footnote, *ante*, page 1.

(b)(1) (count 9). Codefendant Jessie West was charged with appellant in counts 1, 2, and 9, and charged alone in count 3 with unlawful possession of a firearm by a felon.

In connection with all counts alleged against appellant, the information alleged that appellant had previously been convicted in 1988 of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a), and shooting into an inhabited dwelling in violation of section 246, within the meaning of sections 667, subdivisions (c)-(j), and 1170.12, subdivisions (a)-(e). The information further alleged that appellant had previously served a separate term in state prison within the meaning of section 667.5, subdivision (b).

On February 6, 2002, a jury, sworn on January 31, 2002, convicted appellant on counts 1, 2, 4 and 9, and acquitted him on counts 5 through 8.[1] In a bifurcated bench trial held on February 7, 2002, the court granted the prosecution's motion to strike the prior prison term allegations under section 667.5, subdivision (b), and found the two prior convictions alleged true.

On March 7, 2002, the trial court granted appellant's motion to strike both prior convictions as to counts 1 and 2 only, but denied the motion as to counts 4 and 9. The court denied appellant's application for probation and sentenced appellant to a total term of 25 years to life plus one year, comprised of: (1) 25 years to life on counts 4 and 9, with count 9 stayed pursuant to Penal Code section 654; (2) the upper term of four years on count 1, to be served consecutively with count 4, with all but one year stayed until successful completion of count 4; and (3) the upper term of three years on count 2, stayed pursuant to section 654. A timely notice of appeal was filed on April 18, 2002.

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[1]The jury found codefendant West not guilty on count 1, but convicted him of the lesser included offense of misdemeanor transportation of marijuana (Health & Saf. Code, § 11360, subd. (b)), and found him not guilty on counts 3 and 9. The jury was unable to reach a verdict on count 2, and the court declared a mistrial as to that count. West is not a party to this appeal.

FACTS*

On the evening of November 13, 2001, Officer Terry Wainwright, along with two other officers from the Bakersfield Police Department, responded to an apartment in Bakersfield regarding a domestic violence call placed by Jeanetta Pollard, who had been dating appellant for four to five months. Pollard told Officer Wainwright that while appellant was in her apartment, she and appellant began arguing. Pollard was yelling and cussing at appellant. Appellant began punching her in the head, face and abdomen, and pulled her braided hair extensions, resulting in her being knocked to the floor. While she was on the ground, appellant swung a floor fan at her; Pollard blocked the blow with her arm. Officer Wainwright noticed some bruising and redness to Pollard's right eye.

Appellant fled the house as Pollard called the police. While still on her cordless telephone, Pollard walked outside her apartment to try to get appellant's vehicle license number. Pollard told Officer Wainwright that at that time appellant, who was already in his red Geo/Chevy Metro, rolled down the driver's side window, brandished a black and chrome handgun, and threatened to kill her. At that point, Pollard went back inside her apartment in fear for her life.

At trial, Pollard testified that she could not remember if appellant punched her that night, but she did remember that he threw her on the couch and slapped her once on her face. Pollard denied that appellant hit her with the fan, although she admitted telling the officer that appellant had tried to hit her with the fan. Pollard testified that before appellant slapped her, she tried to hit him with the fan, but he blocked the blow. At trial, Pollard testified that appellant did not point a gun at her that day or threaten to kill or hurt either her or her children, although she admitted telling Officer Wainwright on November 13 that appellant had brandished a black and chrome handgun, pointed it at her, and threatened to kill her.

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*See footnote, *ante*, page 1.

Pollard testified that on the evening of November 12, 2001, she saw a black and chrome handgun on top of her bedroom nightstand that was not hers. Appellant had spent the night with her that night. Pollard testified this was the same handgun Pollard had told Officer Wainwright appellant pointed at her the next day. Pollard also testified that on the night of November 12, 2001, she saw a large amount of marijuana in "little Ziploc bags," which were in an army-green duffel bag belonging to appellant.

On November 15, 2001, appellant returned a red Chevy Metro to Enterprise Rent-A-Car. The branch manager at the rental office, Rasmus Jensen, paged Detective Jeffrey Watts to notify him that appellant was at the rental office. Jensen saw appellant move items four or five times from the rental car into the trunk of a beige Subaru. Jensen could not see what the items were, although he saw some clothing or cloth, and could not tell what items may have already been in the Subaru. A short time later, Officer Kevin Carson stopped the Subaru. West was in the driver's seat, appellant was in the front passenger seat, and Sherene Gibson was in the back seat. Detective Watts arrived on the scene soon after the stop was made.

West gave Officer Carson consent to search his person and admitted to the officer that he smokes marijuana and had some in his right front pants pocket, which Officer Carson found. West and Gibson consented to a search of the entire vehicle after Detective Watts told them that appellant was a wanted suspect. West stated that the only property belonging to appellant was in the back seat.

In the back seat, Detective Watts found oversized men's clothing, like jackets, and shoes that appeared to be new and were still in their boxes. Detective Watts searched the trunk, which also contained many items of new clothing. Eventually, he found a wallet in a jacket. In the wallet was appellant's driver's license and social security card. Directly underneath the jacket was a fanny pack that contained a nine-millimeter, chrome and black, semiautomatic handgun loaded with a magazine holding nine bullets. On the right side of the trunk, Detective Watts discovered a plastic shopping bag in which were two large Ziploc baggies, each holding a "brick" of approximately one pound of

compressed marijuana.[2] The marijuana, gun and appellant's identification were found within two feet of each other in the trunk. Nothing with West's name on it was found in the trunk. There was nothing in the fanny pack or shopping bags to identify them or their contents as belonging to appellant.

Detective Watts searched both appellant and West. Detective Watts found $852 in currency on appellant, while he found $414 on West. The money on both appellant and West was in small denominations. Detective Watts found a cellular phone in the passenger compartment of the Subaru. Based on his expertise and experience in marijuana investigations, Detective Watts believed the marijuana, by its sheer quantity, was possessed for the purpose of sale.

By stipulation, the jury was informed that "both [West and appellant] have prior felony convictions."

WEST'S DEFENSE

West called Sherene Gibson as a witness. Gibson testified that on November 15, 2001, she followed West, who is her boyfriend, to the rental agency in her beige Subaru in order to give him a ride after he dropped off his rental car. While they were waiting to talk to someone at the rental agency, appellant turned in his car. As Gibson and West walked toward the Subaru, appellant stopped West and asked him for a ride. West agreed. Gibson did not know appellant and believed that West did not know him either.

Gibson testified that prior to going to the rental office, the trunk of her Subaru was empty, except for some antifreeze. Gibson saw West move items into the back seat of the Subaru and appellant place items into the trunk.[3] After being stopped by police, Gibson told police they could search the car. Gibson testified she had not seen West in

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[2]Based on his training and experience, and the look, smell and packaging of the substance, Detective Watts concluded the material was marijuana.

[3]When called as a witness for appellant, Detective Watts stated that Gibson reported to him that both appellant and West placed items from appellant's rental car into the Subaru's trunk.

possession of a cell phone on November 15, and that the cell phone found in the vehicle was not hers. Gibson also testified that the marijuana and gun found in the trunk were not hers.

APPELLANT'S DEFENSE

Appellant testified on his own behalf. Appellant admitted that he had been convicted of two felonies involving moral turpitude. Appellant testified he had known Jeanette Pollard since August 2001. Appellant, who did not own his own car, explained that he rented the Geo Metro so he could look for an apartment, since his apartment had been damaged by a fire. Because of the fire damage to his apartment, he stayed at Pollard's apartment on November 11 and 12. On November 13, after taking a shower, appellant asked Pollard to bring in his duffel bag from the trunk of the rental car. Appellant testified that the duffel bag contained only clothes; there was no weapon or marijuana in the bag.

Pollard became upset with appellant after seeing the new clothes in the car trunk. She yelled at him and asked him to leave. Appellant dressed, grabbed his bag, and left. When appellant returned to the apartment to retrieve his car keys, Pollard yelled at him, picked up the fan, and hit him with it. Appellant grabbed Pollard by the hair and "slung her to the ground." Appellant again left the apartment and drove away. As he drove away, appellant saw Pollard standing outside with the phone. Appellant denied threatening Pollard and also denied having a firearm with him in the car.

On November 15, appellant arrived at the car rental office to return the car. While there, he saw West, whom he had seen previously in his neighborhood. Appellant asked West for a ride. West agreed, and they moved appellant's items, which consisted of boxes of shoes, a bag and two jackets, from the Metro into a Subaru. Most of appellant's belongings were placed in the back seat, and a few were put in the trunk. Appellant, West and Gibson all placed items in the trunk.

Appellant testified that the firearm and the marijuana police later found in the vehicle did not belong to him and denied placing them in the trunk. The money he was

carrying was from gambling winnings and a loan his brother made to him to help him get a new apartment. Appellant confirmed that he had a jacket in the trunk, which held a wallet with his identification. In an interview with Detective Watts, appellant stated he felt there had been a conspiracy against him, which included the burning of his apartment, and that "someone knew [he] was a three strike candidate and was trying to strike [him] out."

DISCUSSION

A. Failure to Give a Limiting Instruction

Appellant contends the trial court's failure to give, sua sponte, a proper limiting instruction concerning the stipulation that both he and his codefendant had prior felony convictions violated his due process rights under the federal and state Constitutions. Appellant argues that the court should have given a limiting instruction to ensure that the jury did not consider his prior felony convictions as showing that he had a propensity to commit crimes.[4]

Appellant acknowledges that he requested no such instruction, and that "in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct." (*People v. Collie* (1981) 30 Cal.3d 43, 64; see also *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 ["where the fact of a prior conviction is admitted solely to establish ex-felon status as an element of violation of section 12021, the trial court, *at defendant's request*, should give an instruction limiting the jury's consideration of the prior to that single purpose" (italics added)]; Evid. Code,

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[4]CALJIC No. 12.48.5 contains such a limiting instruction: "[There has been a stipulation by the parties] [Evidence has been offered to prove] that [the defendant] [_____] was previously convicted of a felony. A prior conviction of a felony is an essential element of the crime charged, which the prosecution is [otherwise] required to prove beyond a reasonable doubt. [Do not speculate as to the nature of the prior conviction. That is a matter which is irrelevant and should not enter into your deliberations.] You must not be prejudiced against a defendant because of a prior conviction. You must not consider that evidence for any purpose other than for establishing a necessary element of the crime charged [unless you are otherwise instructed]."

§ 355.[5]) Although there can be an exception to this rule for "an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose," (*People v. Collie*, *supra*, at p. 64), this is not such a case. The evidence of appellant's prior felony convictions did not dominate the People's case and was substantially relevant to prove the charges of being a felon in possession of a firearm and ammunition. (See *People v. Padilla* (1995) 11 Cal.4th 891, 950, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Appellant contends that the statement in *Valentine* is dictum, and if presented squarely with the issue of whether the trial court had a sua sponte duty to give limiting instruction in this case, our Supreme Court would find such a duty. Specifically, appellant contends the rule stated in *Collie* does not apply where, as here, the fact of the prior conviction is established by stipulation rather than by testimony or other means because a stipulation is not "evidence" and a jury is more likely to misuse the fact of the conviction if it is proved by stipulation rather than by other means. We disagree. A stipulation, at least as used in this context, is certainly evidence of the fact it seeks to prove—appellant's prior felony conviction. Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." The stipulation at issue here, which was a thing "presented to the senses," was offered to prove the existence of a fact, i.e., that appellant had suffered a prior felony conviction. Accordingly, the stipulation was evidence because it was a means to prove appellant's prior conviction.

This conclusion is not altered by the cases appellant cites, *Harris v. Spinali Auto Sales*, *Inc.* (1966) 240 Cal.App.2d 447 and *People v. Bonin* (1989) 47 Cal.3d 808. In

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[5]Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

Harris v. Spinali Auto Sales, *Inc.*, the court cited the treatise Corpus Juris Secundum as stating, "'A stipulation, although it is not itself evidence, is the equivalent of, and may be relied on as, proof, …'" (*Harris*, at pp. 452-453.) The court, however, was not considering whether the stipulation at issue in that case was "evidence" within the meaning of Evidence Code section 140, or within the rule regarding the trial court's duty to give limiting instructions as stated in *People v. Collie*. In citing this treatise, the court recognized that a stipulation is proof; in this case it was used to prove the fact of appellant's prior felony conviction. Moreover, cases the court cited in *Harris* have stated that a stipulation is evidence. (*Harris*, *supra*, at p. 453; see *LeVanseler v. LeVanseler* (1962) 206 Cal.App.2d 611, 613 [a stipulation regarding what an individual would testify to if called as a witness "was evidence in the case, to be considered and weighed by the court, along with all of the other evidence"]; *Rubattino v. Ind. Acc. Com.* (1944) 65 Cal.App.2d 288, 296, disapproved on other grounds in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79, 85 [court was "in accord" with the respondent's contentions that a stipulation of facts "may be relied upon as evidence"].)

Neither does *People v. Bonin* aid appellant. In *Bonin*, our Supreme Court stated that where an offer to stipulate to certain facts is made, the facts covered by the proposed stipulation are removed from dispute; accordingly, testimony elicited to prove such facts is irrelevant and inadmissible. (*People v. Bonin*, *supra*, 47 Cal.3d at pp. 848-849.) The court did not consider whether the stipulation was itself "evidence" within the meaning of either Evidence Code section 140 or the rule regarding the trial court's duty to give limiting instructions as stated in *People v. Collie*, and therefore has no application here.

We do not believe, as appellant contends, that a jury is more likely to misuse the fact of appellant's prior felony conviction if it is proved by stipulation rather than by testimony. As a result of the stipulation, the prosecutor could not produce other evidence of the number and nature of appellant's prior felony convictions, thereby protecting appellant from undue prejudice that might arise from such evidence. (*People v.*

Valentine, *supra*, 42 Cal.3d at pp. 181-183.)[6] We fail to see how a sanitized stipulation can create greater prejudice to a defendant than if the prosecution was able to present evidence, in the form of testimony or documents, of the number and nature of the defendant's prior convictions—a situation where there is no sua sponte duty to give a limiting instruction. In either situation, whether to seek a limiting instruction is a tactical decision properly left to defense counsel, since defense counsel might conclude that the risk of a limiting instruction (unnecessarily highlighting a defendant's status as a felon) outweighed the questionable benefits such an instruction would provide. (See *People v. Maury* (2003) 30 Cal.4th 342, 394 [defense counsel not incompetent for failing to request a limiting instruction on cross-admissible evidence where "reasonable attorney may have tactically concluded that the risk of a limiting instruction … outweighed the questionable benefits such instruction would provide"]; *People v. Hawkins* (1995) 10 Cal.4th 920, 942, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; *People v. Johnson* (1993) 6 Cal.4th 1, 49, 50.)

We also reject appellant's contention that the jury instructions given in this case created a risk of confusing the jury as to the proper use of the stipulation because the jury was instructed to accept the fact of conviction as proven. The court in *Collie* recognized that "[e]vidence of past offenses may not improperly affect the jury's deliberations if … the evidence is obviously used to effect one or more of the many legitimate purposes for which it can be introduced." (*People v. Collie*, *supra*, 30 Cal.3d at p. 64.) Where a stipulation is entered into for the purpose of proving a prior felony conviction, the fact of that conviction is "obviously used" to effect a legitimate purpose—in this case, to prove an element of the offenses of being a felon in possession of a firearm and ammunition.

It is apparent from the jury instructions given here that the obvious use of the stipulation was only to prove an element of the crimes charged. The only direct reference

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[6]We do note that appellant did testify after the jury was informed of the stipulation to his prior felony conviction, and his attorney elicited from him that he had been convicted of two felonies involving moral turpitude.

to the stipulation to appellant's prior felony conviction is in the instructions given with respect to the crimes of being a felon in possession of a firearm and a felon in possession of ammunition.[7] These instructions show that the stipulation was "obviously used" only to prove an element of the offense charged, and was so obviously not used to prove a propensity to commit crimes, that an instruction on limited admissibility was not essential to the jury's understanding of the case. (*People v. Haylock* (1980) 113 Cal.App.3d 146, 150.)

The jury was never instructed, as appellant suggests, that it could consider the stipulation in arriving at verdicts on all counts. Instead, the jury was instructed to apply the *law*, as stated in the jury instructions, to the *facts*; the instructions never stated that the stipulation had any purpose other than to prove an element of the felon-in-possession counts. While the jury was also instructed that it may consider the fact that a witness was convicted of a felony *only* for the purpose of determining the believability of that witness,

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[7]The jury was instructed, in pertinent part, on these counts as follows: "The defendants are accused in counts three and four of having violated Section 12021(a)(1) of the Penal Code, a crime. [¶] Every person who, having previously been convicted of a felony, owns or has in his possession or under his custody or control any pistol, revolver or other firearm is guilty of a violation of Section 12021(a)(1) of the Penal Code, a crime. [¶] In this case the previous felony conviction has already been established by stipulation so that no further proof of that fact is required. You must accept as true the existence of this previous felony conviction. [¶] There are two kinds of possession: Actual possession and constructive possession. [¶] … [¶] In order to prove this crime, each of the following elements must be proved: [¶] One, the defendant had in his possession or had under his control a firearm, and; [¶] Two, the defendant had knowledge of the presence of the firearm." (CALJIC No. 12.44.)

"The defendants are accused in count nine of having violated Section 12316(b)(1) of the Penal Code, a crime. [¶] Every person prohibited by law from owning or possessing a firearm, who owns, possesses or has under his custody or control any ammunition or reloaded ammunition, is guilty of a violation of Penal Code Section 12316(b)(1), a crime. [¶] Persons prohibited by law from owning or possessing a firearm include, but are not necessarily limited to, persons convicted of a felony. [¶] In this case the previous felony conviction has already been established by stipulation so that no further proof is required. You must accept as true the existence of the previous felony conviction. [¶] … [¶] In order to prove this crime, each of the following must be proved: [¶] One a person knowingly owned, possessed or had under his custody or control ammunition or reloaded ammunition; [¶] Two, that person was prohibited by law from owning or possessing a firearm." (CALJIC No. 12.49.)

the logical conclusion from this instruction, when coupled with the instructions on the elements of the felon-in-possession counts, is that the fact of appellant's prior felony convictions could only be used to determine his credibility and to prove his status as a felon for purposes of establishing an element of the possession of a firearm and ammunition counts.

Appellant has not met his burden of showing that the federal or state Constitution requires, as a matter of due process of law, that the trial court had a sua sponte duty to give a limiting instruction in this case. The cases appellant relies on, *Spencer v. Texas* (1967) 385 U.S. 554, *Richardson v. Marsh* (1987) 481 U.S. 200, and *People v. Ratcliff* (1990) 223 Cal.App.3d 1401 do not compel such a conclusion. In *Spencer*, the United States Supreme Court noted the function of limiting instructions relating to evidence of prior convictions in an habitual offender prosecution as protecting the "defendants' interests." (*Spencer v. Texas*, *supra*, at p. 561.) That decision, however, does not establish as a matter of federal constitutional law an entitlement to a sua sponte instruction whenever evidence of a prior conviction is presented, either by stipulation or other evidence. While in *Richardson v. Marsh*, *supra*, the court summarized its holding in *Spencer* as "evidence of the defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt," this statement was dictum. (*Richardson v. Marsh*, *supra*, at p. 207.) Finally, in *People v. Ratcliff*, the Court of Appeal was not presented with the issue of whether a trial court is required to give a limiting instruction sua sponte. (*People v. Ratcliff*, *supra*, at p. 1407.)

In sum, we conclude the trial court did not err in failing to give a limiting instruction, sua sponte, with respect to the stipulation to appellant's prior felony conviction.

B. Ineffective Assistance of Counsel*

Appellant contends he received ineffective assistance of counsel because his trial counsel failed to make a motion to sever his case from that of his codefendant. Although West's attorney asked the court for a severed trial or a separate jury if the prosecutor intended to introduce evidence of appellant's statements, which the court denied because the prosecutor did not intend to introduce such evidence, appellant's counsel did not make a motion to sever appellant's trial from West's. Appellant contends that such a motion would have been granted because West's defense, presented through Gibson's testimony, was antagonistic to his, in that the acceptance of West's defense necessarily precluded appellant's acquittal.

The defendant bears the burden of establishing inadequate assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) To succeed in this sort of claim on a direct appeal, the appellate record must make it clear that the challenged omission was a "mistake beyond the range of reasonable competence." (*People v. Montiel* (1993) 5 Cal.4th 877, 911.) To prevail, the defendant must show: "(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Duncan* (1991) 53 Cal.3d 955, 966.)

Once a defendant has met these burdens, "the appellate court must look to see if the record contains any explanation for the challenged aspect of representation" such as an "informed tactical choice" by counsel. (*People v. Pope*, *supra*, 23 Cal.3d at p. 425.) "Where the record does not illuminate the basis for the challenged acts or omissions [of counsel], a claim of ineffective assistance is more appropriately made in a petition for habeas corpus." (*Id.* at p. 426.)

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*See footnote, *ante*, page 1.

In the instant case, the record does not show why appellant's trial counsel did not file a motion to sever, nor is there any indication that counsel was asked to explain this omission. However, it is entirely possible defense counsel determined that such a motion had no merit. The failure to bring a worthless motion is not incompetence, and a lawyer is not required to file a frivolous motion simply to protect against subsequent charges of inadequate representation. (Cf. *People v. McNight* (1985) 171 Cal.App.3d 620, 625, fn. 5.) Reviewing courts are not to become engaged in the "'perilous process of second-guessing.'" (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.) As appellant has not overcome the presumption that the challenged conduct was part of defense counsel's trial strategy, we cannot assume counsel was incompetent. On this record, we cannot say counsel's performance was deficient.

Even assuming competent counsel would have moved to sever the cases, appellant fails to show prejudice, i.e., that the motion would have been granted. Penal Code section 1098 in pertinent part provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials."

> "The matter of granting separate trials nevertheless remains largely within the discretion of the trial court [citation], guided by the principles set out in *People v. Massie* (1967) 66 Cal.2d 899 …. The court should separate the trial of codefendants 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.' [Citation.]" (*People v. Turner* (1984) 37 Cal.3d 302, 312; overruled on another point in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150.)

In *People v. Hardy* (1992) 2 Cal.4th 86, the Supreme Court found that a "classic case" for joint trial is presented when defendants are charged with having committed "'common crimes involving common events and victims[.]'" (*Id.* at p. 168.) In so finding, the court stated that "[a]lthough there was some evidence before the trial court that defendants would present different and possibly conflicting defenses, a joint trial under such conditions is not necessarily unfair.… [Citation.] If the fact of conflicting or

antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.' [Citation.]" (*Ibid.*)

The *Hardy* court also made the following observation: "As the Supreme Court of Kentucky opined: '[N]either antagonistic defenses nor the fact that … one defendant incriminates the other amounts, by itself, to unfair prejudice. … That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than *against* a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.'" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 169, fn. 19, quoting *Ware v. Com.* (Ky. 1976) 537 S.W.2d 174, 177.)

That West and appellant had inconsistent defenses did not compel severance of their trials. Both West and appellant were present when the marijuana and gun were found in Gibson's car, therefore it would have been natural for them to place the blame on each other. The prosecution offered evidence sufficient to support verdicts convicting both defendants. This was not a case where only one defendant could be guilty. The prosecution did not charge both appellant and West and then leave it to them to convince the jury that the other was the person. The prosecution's theory was that both defendants possessed the marijuana and the gun. The evidence West offered to support his attempt to shift blame to appellant would have been admissible had the prosecution sought to offer it. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1287-1288.) For these reasons, severance of West's and appellant's trials was not required.

In sum, "given the Legislature's preference for joint trial of jointly charged defendants, and the advantages of such a trial, [Gibson's] testimony alone would not have been sufficient to justify severance of an otherwise proper joint trial. (*People v. Keenan* (1988) 46 Cal.3d 478, 499-501 ….)" (*People v. Freeman* (1994) 8 Cal.4th 450, 496.)

C. Refusal to Entirely Dismiss Prior Felony Convictions*

Appellant contends the trial court abused its discretion under Penal Code section 1385 by denying his request to dismiss one of his prior strike allegations. Respondent argues to the contrary. We agree with respondent.

1. Sentencing Evidence and Hearing

According to the probation report, appellant's criminal history started in 1980, when appellant (born in 1967) was found to have committed a violation of Penal Code section 488, petty theft. Seven years later, in 1987, appellant was convicted in Bakersfield of violating Penal Code sections 12025, subdivision (b) (carrying a concealed firearm), and 1203, subdivision (a), and given three years' misdemeanor probation. That same year, in a separate case in San Fernando, appellant was also convicted of carrying a concealed weapon in violation of Penal Code section 12025, subdivision (a) and given two years' misdemeanor probation. Three months later, appellant was convicted of violating Vehicle Code section 10851, subdivision (a) (unlawfully taking a vehicle without the owner's consent), and given three years' felony probation.

In the later part of 1987, appellant was convicted of violating Penal Code sections 245, subdivision (a)(2) (assault with a firearm), 12022.5 (use of a firearm in the commission of a felony), 246 (discharge of a firearm at an inhabited dwelling), and 12025, subdivision (b) (carrying a concealed firearm). For these offenses, appellant was sentenced to state prison for five years. Appellant was paroled twice and violated probation each time. In 1992, he was convicted of violating Penal Code section 415 (disturbing the peace), and served one day in jail. Finally, in 2001, appellant was convicted of violating Penal Code section 148, Health and Safety Code section 11357, subdivision (b) (possession of marijuana), and Vehicle Code sections 21956 and 40508, subdivision (a) (failure to appear).

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*See footnote, *ante*, page 1.

The probation report stated there were five aggravating circumstances: the crime involved a large quantity of contraband, i.e., approximately two pounds of marijuana; appellant was armed with a firearm at the time of the commission of the crime; appellant's prior convictions as an adult were numerous; appellant had served a prior prison term; and appellant's prior performance on probation and parole had been unsatisfactory in that he continued to commit new crimes and violate set terms. There were no mitigating circumstances.

Appellant requested the trial court dismiss the prior strike convictions in the instant case pursuant to Penal Code section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. Appellant argued the court should strike the priors because imposition of a life sentence would be particularly severe and disproportionate to the offenses appellant was convicted of, the current charges were neither "serious" nor "violent" felonies, and appellant did not have a repetitive history of committing multiple serious or violent felonies, as the prior strikes stem from one 14-year-old case when appellant was 20 years old.

The prosecution's opposition summarized the circumstances of appellant's prior juvenile and adult record. The prosecutor took issue with appellant's characterization of the nature of the present charges, contending that the current convictions for possession of a firearm and ammunition by a felon to be of a violent nature because of the potential for violence inherent in possessing a weapon. The prosecutor argued there was no basis to strike any of the strikes because appellant had consistently maintained criminal activity and had not "learned his lesson."

At the sentencing hearing, defense counsel argued that appellant should not receive a life sentence for the type of offenses appellant was convicted of, since they were neither serious nor violent felonies, and appellant's prior strikes arose out of an old case, where appellant was identified as having shot at an inhabited dwelling, although no gun was ever found. The court noted appellant had gotten out of prison for those

offenses in 1994. Appellant's counsel further argued that if the court struck one of the strikes, appellant would still be looking at a potential term of nearly 10 years.

The prosecutor stated that appellant's prior convictions arose from an incident where an independent, undercover officer, who was at the civic auditorium after a rap concert, heard gunshots, turned around, and saw appellant crouching down, pointing his gun and shooting at the back of a car occupied by four people. The driver of the car was shot in the ear and one of the other passengers was also injured, either by a gunshot or broken glass. The prosecutor argued that throughout appellant's criminal history, he has been involved with drugs and marijuana, along with violence or the potential for violence.

The court stated:

> "To get right to the point, my concern is that he had a conviction, this shooting conviction, this 245 conviction with the weapon and went to prison, apparently got a break on his prison term at that time, came out and is back in possession of a gun and weapon again, which indicates to the Court a serious danger to society. [¶] The Court has to find—in order to strike a strike, it has to be in the interests of justice, and I don't know where the justice is in striking a strike at this time. It sounds like … this sentence is necessary for protection. It's the reason this particular law was passed. The law, three strikes law, was to protect against this very type of thing. So that's where the Court is at."

After listening to statements from appellant and his mother, the court stated:

> "There has been a motion by [appellant] to strike the prior strikes pursuant to Penal Code Section 1385, and it is in a sense a close call here, but the Court has to find circumstances or at least has to be able to find that it's in the interests of justice. And the problem that the Court has with this particular case is the issue of a loaded firearm after the [appellant's] prior convictions, and the Court would really be, I think, stretching it to say that it would be in the interests of justice to strike one of the strikes in light of the circumstances of this particular case. [¶] I know [appellant's mother] challenges the conviction, but the fact is that the jury found [appellant] to be guilty, guilty of the crime of possession of that weapon."

After the court began to sentence appellant, the court stated that it wanted to look at an issue because although the court believed the recommended sentence of 25 years to

life on the firearm possession charges was appropriate, such a sentence on the drug counts would seem to be excessive. The court asked the attorneys if it could "strike the strikes from a particular count in the interests of justice because of it being a crime of possession of drugs, this was marijuana, and not strike it on the 12021, which I think is very serious offense, possession of the weapon, which was a loaded weapon?" After a short recess to research the matter, the court stated counsel had provided it with such authority and again proceeded to sentence appellant, stating:

> "[W]ith respect to counts one and two, those particular counts involve the drugs. In light of the leniency which the voters seemed to have approved in California with respect to drug possession, although these were possessed for purposes of sale, the Court concludes that it is of [*sic*] the interest of justice pursuant to Penal Code Section 1385 that the priors be stricken with respect to those two counts. [¶] The Court doesn't conclude the same way with respect to count four, because this is a serious crime. As I previously indicated, the crime for which [appellant] had been convicted, which were strike crimes, involved a weapon. And the Court therefore … can find no circumstances that would promote the interests of justice by striking the priors with respect to count four."

2. Motion To Dismiss

The review of a trial court's decision whether or not to dismiss a prior strike under Penal Code section 1385, like most other discretionary trial court rulings, is limited in scope. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434; see also *People v. Benevides* (1998) 64 Cal.App.4th 728, 735.) This is true in part because appellate courts must give great deference to discretionary trial court rulings and will disturb them only upon a clear showing of abuse which results in a manifest miscarriage of justice. (See *People v. Jordan* (1986) 42 Cal.3d 308, 316.) As explained by our Supreme Court,

> "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of

the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

Here, the record establishes the trial court acted to achieve legitimate sentencing objectives, after a thoughtful and conscientious assessment of all relevant factors. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-164; see also *People* v. *Superior Court* (*Romero*), *supra*, 13 Cal.4th at p. 530.) Appellant has not shown the trial court acted improperly in refusing to dismiss his prior convictions with respect to the weapons counts. (*People v. Barrera* (1999) 70 Cal.App.4th 541, 553-555; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1336-1337.)

DISPOSITION

The judgment is affirmed.

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GOMES, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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BUCKLEY, J.