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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN JOSE AVALOS, Defendant and Appellant.	E078623 (Super. Ct. No. FWV20002067) OPINION

APPEAL from the Superior Court of San Bernardino County. Daniel W. Detienne, Judge. Affirmed in part, reversed in part.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Eric A. Swenson, and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Unprovoked, defendant and appellant Juan Jose Avalos punched a co-worker in the nose, breaking it. A jury convicted defendant of assault by means of force likely to produce great bodily injury (GBI) (Pen. Code, § 245, subd. (a)(4); count 1).[1] The jury also found true as to count 1 the allegation that defendant personally inflicted GBI (§ 12022.7, subd. (a)). The jury found defendant not guilty of assault with a deadly weapon and found not true the attached GBI allegation (§ 245, subd. (a)(1); count 2). In a bifurcated trial the court found true the enhancements that defendant had a prior serious felony conviction (§ 667, subd. (a)(1)) and two prior strike convictions (strike priors) (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

The trial court struck defendant's prior serious felony conviction in the interest of justice and sentenced defendant to 25 years to life for the assault conviction under the Three Strikes law, plus three years for the GBI enhancement.

Defendant contends the trial court abused its discretion and committed prejudicial error by giving the jury an improper supplemental instruction on the definition of GBI in response to the jury's request for clarification of the meaning of GBI. Defendant further argues the trial court erred in denying his *Romero*[2] motion. We conclude the trial court did not abuse its discretion by denying defendant's *Romero* motion but committed

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[1] All further statutory references are to Penal Code.

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

prejudicial instructional error by giving an improper supplemental instruction on GBI.[3] We therefore reverse the GBI enhancement as to count 1 and affirm the judgment in all other respects.

II.

FACTS

On June 12, 2020, during defendant's lunch break, he went to a convenience store with co-workers, GR and PM. When they arrived at the store, defendant and PM got out of the car and went inside the store while GR, the driver, remained in his car. After defendant purchased beer for himself and his companions, defendant stood outside the store. PM exited the store and, for no apparent reason, defendant unexpectedly punched PM in the nose. PM fell backwards and lost consciousness for two or three seconds. He then got back up. A video camera at the convenience store recorded the incident.

PM testified that when he regained his senses, he got back up. He was wobbly and going in and out of consciousness. He felt excruciating pain in his nose, registering nine on a pain scale with 10 being the highest level of pain he had ever felt. Defendant punched PM again in the nose, causing PM pain registering 10 on the pain scale. When

[3] Even though the judgment is reversed based on instructional error, we address the *Romero* issue here on the merits because reversal based on instructional error may result in a retrial of the GBI allegation and resentencing. (See *Lockhart v. Nelson* (1988) 488 U.S. 33, 39 ["[T]he Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction"; *Burks v. United States* (1978) 437 U.S. 1, 14-15[Retrial is allowed "to rectify *trial error,*" such as an erroneous jury instruction.].)

PM came to his senses, he noticed his nose had become crooked. A photograph of PM's nose injury also showed his nose was crooked and swollen.

GR yelled at PM and defendant to get in the car. They did so, with defendant sitting in the front passenger seat and PM sitting in the back seat. GR gave PM a cloth to stop the bleeding. While PM held the rag up to his nose to control the bleeding, GR angrily asked defendant why he punched PM. Defendant smirked and said he was "'schizo'" and failed to take his "'meds'" that day. GR stopped his car and told defendant to get out. GR and defendant both got out and started fighting. Defendant pulled out a pocketknife and cut GR's bicep and stabbed GR in the rib area. Meanwhile PM got out of the car and called for medical assistance for his nose injury. Defendant charged at him and PM fled. Defendant then left the scene on foot. GR picked up PM and drove back to work with PM.

PM's nose bled for 20 to 30 minutes. PM did not initially seek treatment for his nose. After continuing to experience significant nose pain and swelling, PM went to Kaiser Permanente for treatment a week later. PM was told at Kaiser that his nose was fractured, but the X-ray of his nose taken on June 19, 2020, was negative for a fracture. Dr. Jung Lee nevertheless diagnosed PM with a nose fracture because his nose was deformed. Dr. Jung Lee testified that X-rays for nose fractures are not very accurate because the shape of the nose makes it difficult for an X-ray to show a fracture. Dr. Andrew Lee also testified PM's nose had been broken based on the history presented by

PM, the appearance of PM's crooked nose, and PM's pain when Dr. Lee pressed on areas of PM's nose.

Thirteen days after PM broke his nose, doctors tried to straighten PM's nose non-surgically but were unsuccessful because his nose had already begun to heal. When the doctors attempted to straighten his nose, PM experienced pain of nine on the pain scale, even though he was given local anesthesia. The procedure was unsuccessful because his nose had already begun to heal. PM declined the recommendation to surgically fix his nose under general anesthesia. PM continued to experience a high level of pain. PM testified he waited to seek medical treatment initially because he wanted to speak with a worker's compensation attorney before seeking treatment.

III.

INSTRUCTION ON GREAT BODILY INJURY

Defendant contends his GBI enhancement (§ 12022.7, subd. (a)) should be reversed because the trial court gave a supplemental instruction erroneously instructing the jury on the meaning of GBI. We agree.

A. *Procedural Background*

Defendant was charged and convicted of committing assault by force likely to cause GBI (§ 245, subd. (a)(4); count 1). The jury also found true a GBI enhancement, which is the subject of this appeal (§ 12022.7, subd. (a)). The enhancement provision, section 12022.7, subdivision (a), provides: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or

attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

The jury was given form instruction CALCRIM No. 3160, which states: "*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." During jury deliberations, the jury twice requested the trial court to provide additional clarification of the meaning of GBI. The jury requested the court to provide "[a] definition of 'minor to moderate and great bodily injury.'" The trial court responded by repeating the CALCRIM No. 3160 definition of GBI previously given to the jury.

After deliberating a couple of hours after receiving the court's response, the jury submitted a second written request seeking clarification of the meaning of GBI. The jury inquired: "What criteria would indicate 'minor and moderate harm'? Could you please provide examples?" In response, the trial court stated: "The court cannot provide any examples. However, great bodily injury does not include injuries that are superficial, short-lived, or transitory. [¶] Also, please read jury instruction 200, the paragraph that starts with 'some words or phrases. . . .' [¶] The issue of whether or not great bodily [injury] exists is a question of fact for the jury."

About an hour after receiving the court's response to the jury's second GBI inquiry, the jury advised the court it had reached a verdict, in which the jury found defendant guilty of count 1 and found true the attached GBI enhancement.

B. *Standard of Review*

We apply a "de novo standard of review to a claim of instructional error. [Citations.] '"It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions." [Citation.] When a defendant claims an instruction was subject to erroneous interpretation by the jury, he must demonstrate a reasonable likelihood that the jury misconstrued or misapplied the instruction in the manner asserted. [Citation.] In determining the correctness of jury instructions, we consider the entire charge of the court, in light of the trial record.'" (*People v. Medellin* (2020) 45 Cal.App.5th 519, 538 (*Medellin*).)

C. *Supplemental Instruction on GBI*

The court has a sua sponte duty to instruct on each of the elements of a GBI enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) "The trial court should give amplifying or clarifying instructions when the terms used in an instruction '"have a 'technical meaning peculiar to the law.'"' [Citations.]" (*People v. Woodward* (2004) 116 Cal.App.4th 821, 834.) "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning." (*People v. Estrada* (1995) 11 Cal.4th 568, 574; accord, *People v. Cross* (2008) 45 Cal.4th 58, 68 (*Cross*); *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306-1307.) "Thus, . . . terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance." (*People v. Estrada*, *supra*, at pp. 574-575; accord, *People v.*

Lopez, *supra*, at p. 1307.)

Section 1138 "imposes upon the court a duty to provide the jury with information the jury desires on points of law." [fn. omitted.] If, however, "' the original instructions are themselves full and complete, the court has discretion under . . . section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information."' [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 985.) "[C]omments diverging from the standard are often risky. . . . But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, italics omitted.)

Here, the trial court properly responded to the jury's first GBI inquiry by repeating the CALCRIM No. 3160 definition of GBI. No further elaboration was required because the instruction terms used to define GBI, such as "significant," "substantial," "minor," and "moderate," are not technical terms. The form instruction does not state any word or phrase having a technical, legal meaning that *differs* from GBI's nonlegal meaning. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012; see also *Cross*, *supra*, 45 Cal.4th at p. 68.)

The instruction does not define "significant," "substantial," "minor," or "moderate." Nor do the pertinent authorities ascribe special meaning to these terms. (See §§ 12022.53, subd. (d), 12022.7, subd. (f); *Cross*, *supra*, 45 Cal.4th at pp. 63-66.)

"'The term "great bodily injury" has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration.'" (*People v. Escobar* (1992) 3 Cal.4th 740, 750, fn. 3 (*Escobar*).) Thus, "[t]he jurors' common understanding of [significant, substantial, minor, and moderate] was all that was required." (*People v. Raley* (1992) 2 Cal.4th 870, 901.) There was no need to instruct the jury on the meaning of terms in common usage, which are presumed to be within the understanding of persons of ordinary intelligence. (*Ibid.*)

When the jury persisted in again requesting clarification of the meaning of GBI, the trial court reasonably felt compelled to provide the jury with more than the GBI definition already given. But the court's supplemental instruction diverged from the statutory definition of GBI and from the standard, full, and complete instruction, CALCRIM No. 3160. This resulted in the court providing an incorrect and potentially misleading definition of GBI.

It would have been more appropriate for the court to again refer the jury to the original jury instruction definition of GBI, or alternatively advise the jury that words and phrases not specifically defined in CALCRIM No. 3160, such as "significant," "substantial," "minor," and "moderate," are common parlance to be applied using their ordinary, everyday meanings. The trial court was not required to instruct the jury further on the meaning of those common usage terms, and the trial court's attempt to do so

risked committing instructional error, which, in fact, occurred, as discussed below. (*People v. Raley*, *supra*, 2 Cal.4th at p. 901.)

GBI is defined in section 12022.7, subdivision (f) as "a significant or substantial physical injury." The jury was given form instruction CALCRIM No. 3160, which states: "*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." This definition comports with the law. (See §§ 12022.7, subd. (f), 12022.8; *Cross*, *supra*, 45 Cal.4th at pp. 63-64; *Escobar*, *supra*, 3 Cal.4th at pp. 749-750; *People v. Miller* (1977) 18 Cal.3d 873, 883 [GBI means "significant or substantial bodily injury or damage as distinguished from trivial or insignificant injury or moderate harm"].)

Courts have long held that determining whether a victim has suffered physical harm amounting to GBI is not a question of law for the court but a factual inquiry to be resolved by the jury. (*Escobar*, *supra*, 3 Cal.4th at p. 750; *People v. Wolcott* (1983) 34 Cal.3d 92, 109.) "'A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description.'" (*Escobar*, *supra*, 3 Cal.4th at p. 752, quoting *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836; *People v. Clay* (1984) 153 Cal.App.3d 433, 460.) Where to draw that line is for the jury to decide.

Proof that a victim's injury is "great," that is, significant or substantial within the meaning of section 12022.7, "is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury." (*Cross*, *supra*, 45 Cal.4th at p. 66; see also *People v. Quinonez* (2020) 46

Cal.App.5th 457, 464 (*Quinonez*).) "While 'any medical treatment obtained by the victim is relevant to determining the existence of "great bodily injury" [citation], the statutory definition and relevant CALCRIM instruction . . . do not require a showing of necessity of medical treatment.'" (*Quinonez*, *supra*, 46 Cal.App.5th at p. 464, quoting *People v. Wade* (2012) 204 Cal.App.4th 1142, 1150, italics omitted.) Even physical pain or damage, such as abrasions, lacerations, and bruising, can constitute GBI. (*Quinonez*, *supra*, at p. 464.) A finding of GBI by the jury "rests on the facts as presented at trial in the context of the particular crime and the particular injuries suffered by the victim." (*Cross*, *supra*, 45 Cal.4th at p. 65; see also *Escobar*, *supra*, 3 Cal.4th at p. 750; *People v. Sargent* (1978) 86 Cal.App.3d 148, 152; *People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140.)

In *People v. Kimbrel* (1981) 120 Cal.App.3d 869 (*Kimbrel*), the defendant argued that the court erred in not *sua sponte* giving the GBI definition stated in CALJIC No. 9.03 (4th ed. 1979). CALJIC No. 9.03 defines GBI as "'significant or substantial bodily injury or damage; it does not refer to trivial or insignificant or moderate harm.'" (*Kimbrel*, *supra*, 120 Cal.App.3d at p. 873.) The *Kimbrel* court held that the absence of instruction on the definition of GBI did not constitute prejudicial error and affirmed the judgment. (*Id*. at p. 870.)

The *Kimbrel* court noted that "[a] trial court has no *sua sponte* duty to give amplifying or clarifying instructions in the absence of a request where the terms used in the instructions given are 'commonly understood by those familiar with the English

language'; it does have such a duty where the terms have a 'technical meaning peculiar to the law.'" (*Kimbrel*, *supra*, 120 Cal.App.3d at p. 872.) The *Kimbrel* court concluded that GBI is a commonly understood phrase and that there was no error in omitting the CALJIC No. 9.03 definition because the CALJIC No. 9.03 definition was neither helpful nor necessary to the understanding of GBI. (*Kimbrel*, *supra*, at pp. 872-873.)

The *Kimbrel* court reasoned: "The substitution of 'significant' or 'substantial' for 'great,' in the context of bodily injury, makes no gains on meaning. The substitution of one general term for another results from a misappraisal of its semantic utility. At its best, the practice is an innocuous bit of loquacity. At its worst, it is a misleading refinement which introduces flab for leanness of meaning as with the use of the spongy word 'substantial.' 'Substantial' is one of 'the flexible words, the words which can be squeezed into any shape, or stuffed into any hole that needs plugging with a soft plug.' (Mellinkoff, The Language of the Law (1963) p. 448.)" (*Kimbrel*, *supra*, at pp. 873-874, fn. omitted.)

The *Kimbrel* court added: "Also misleading is the attempted negative definition of great bodily injury as 'not [referring] to trivial or insignificant injury or moderate harm.' It is, of course, trivially true that a great bodily injury is not a trivial or insignificant or moderate injury. The converse, however, is false. Not every nontrivial or insignificant or nonmoderate injury is 'great.' [fn. omitted] The impulse to define words of ordinary English is unfortunately pervasive. It should be curbed." (*Kimbrel*, *supra*, 120 Cal.App.3d at p. 874.)

Here, the trial court gave CALCRIM No. 3160, which is similar to CALJIC No. 9.03. But CALCRIM No. 3160 does not define GBI in terms of what GBI is "not," perhaps in deference to *Kimbrel's* reproach of such wording. CALCRIM No. 3160 instructs that GBI "means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." However, the trial court's response to the jury's second inquiry requesting clarification of the meaning of GBI is flawed for the same reason noted in *Kimbrel*, of providing an "attempted negative definition" of GBI, stating that GBI "'does not include injuries that are superficial, short-lived, or transitory.'" The *Kimbrel* court notes that "[t]he universe of 'nots' is spacious indeed. It is, of course, also true that a great bodily injury is not a warm or blue or brackish injury." (*Kimbrel*, *supra*, 120 Cal.App.3d at p. 874, fn. 4.)

The trial court's attempt to define GBI as what it is "not," is also a misleading refinement because it suggests that if an injury is not superficial, short-lived, or transitory, the injury is "great." (*Kimbrel*, *supra*, 120 Cal.App.3d at p. 874.) But some injuries that are not superficial, short-lived, or transitory might be "moderate" injuries, rather than GBI. The supplemental GBI instruction is thus misleading in that a reasonable juror might assume that, because PM's broken nose injury was not superficial, short-lived, or transitory, it was GBI, when it could also be a moderate injury. The jury requested the trial court provide criteria indicating "minor or moderate harm," and the trial court's supplemental instruction was a potentially misleading response. A "superficial" injury generally would indicate a minor injury but the instruction does not

provide any additional differentiation between what constitutes a moderate injury and GBI. Therefore a juror might incorrectly conclude that, because the injury was not superficial, the injury was GBI.

As to the other two terms, "short-lived" and "transitory," which are stated in the supplemental instruction as not being GBI, the supplemental instruction incorrectly states such injuries do not constitute GBI. The California Supreme Court in *Escobar* held to the contrary, that such injuries may constitute GBI. (*Escobar*, *supra*, 3 Cal.4th at p. 750.) The Supreme Court noted that GBI "need not be so grave as to cause the victim '"permanent," "prolonged," or "protracted"' bodily damage." (*Cross*, *supra*, 45 Cal.4th at p. 64, quoting *Escobar*, *supra*, at p. 750; see also *Quinonez*, *supra*, 46 Cal.App.5th at p. 464.)

The California Supreme Court in *Escobar* concluded that it previously erred in holding in *People v. Caudillo* (1978) 21 Cal.3d 562 that there was no GBI because the victim's injuries were characterized as "transitory and short-lived," rather than "severe or protracted in nature." (*Id.* at p. 588; *Escobar*, *supra*, 3 Cal.4th at p. 748.) The *Escobar* court found fault with *Caudillo's* holding and rationale because, "[i]n effect, the court reinstated the very criteria that the Legislature itself had seen fit to renounce." (*Escobar*, *supra*, at p. 749.) The *Escobar* court held that imposing a section 12022.7 GBI enhancement does not require the jury to find that the injury is permanent, prolonged, or protracted disfigurement, impairment, or loss of bodily functions. (*Escobar*, *supra*, at pp. 749-750.)

Here, under *Escobar*, *supra*, 3 Cal.4th 740, the trial court's supplemental instruction incorrectly stated GBI does not include short-lived or transitory injuries. Under *Escobar*, depending on the particular injuries, a jury could properly find short-lived or transitory injuries constitute GBI.[4]

D. *Prejudicial Error*

Because we conclude the GBI supplemental instruction was incorrect and potentially misleading as a whole, we must determine whether giving the supplemental instruction was prejudicial error.

"In general, a trial court's failure to adequately answer a jury's question during deliberations is subject to prejudice analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836 [(*Watson*)]." (*People v. Fleming* (2018) 27 Cal.App.5th 754, 768.) But, as here, where an instruction omits or misdescribes an element of a charged offense, in violation of the right to a jury trial guaranteed by our federal Constitution, "'the effect of this violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24 [(*Chapman*)].' [Citations.] Under the *Chapman* standard, we determine 'whether beyond a reasonable doubt the jury verdict would have been the same absent the error.' [Citations.]" (*People v. Fleming*, *supra*, at p. 768; see also *Cross*, *supra*, 45 Cal.4th at p. 69 [the "reasonable likelihood" standard for reviewing ambiguous

[4] However, as the People note in their respondent's brief, such erroneous instruction language regarding "short-lived or transitory injuries" benefitted defendant, not the prosecution and thus was not prejudicial because it made it more difficult for the prosecution to establish GBI.

instructions under the United States Constitution requires inquiring whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation of that document]; *California v. Roy* (1996) 519 U.S. 2, 5-6 [the *Chapman* framework applies where an instruction misdescribes an element]; *People v. Breverman* (1998) 19 Cal.4th 142, 165 [misdirection of the jury under state law "is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome."].)

Here, the trial court's erroneous response to the jury's inquiry about the meaning of GBI was prejudicial under both the *Chapman* and *Watson* standards. There is a reasonable probability that the error affected the outcome. The record contains evidence that could have rationally led the jury to find that PM did not suffer GBI, and there is a reasonable likelihood that the jury misconstrued or misapplied the supplemental instruction in an improper or erroneous manner. (*People v. Centeno* (2014) 60 Cal.4th 657, 667.)

The People cite *Nava* for the proposition that any error in the trial court giving the supplemental GBI instruction that a bone fracture was a significant and substantial injury was harmless error under the *Chapman* prejudicial error standard. In *Nava*, the defendant was convicted of breaking the victim's nose during an assault. The *Nava* court held there was prejudicial instructional error and reversed the jury's finding of GBI on the ground the trial court usurped the jury's fact-finding responsibility to determine whether the

victim's nose injury was GBI. (*People v. Nava* (1989) 207 Cal.App.3d 1490, 1492, 1494 (*Nava*).)

The *Nava* court concluded that "a bone fracture does not qualify automatically as a great bodily injury." (*Nava*, *supra*, 207 Cal.App.3d at p. 1497.) This is because "bone fractures exist on a continuum of severity from significant and substantial to minor." (*Id.* at p. 1496.) It was therefore error "for the trial court to instruct the jury that a bone fracture was a significant and substantial injury within the meaning of section 12022.7." (*Nava*, *supra*, at p. 1498.)

Because the instructional error resulted in the trial court usurping the factfinding function of the jury by instructing that the GBI element of the enhancement had been established, the *Nava* court concluded that, while the victim's nose injury involved a bone fracture that required medical attention, the jury could have found it was not serious enough to constitute GBI. (*Nava*, *supra*, 207 Cal.App.3d at pp. 1498-1499.) "While a doctor had to set the victim's nose . . . , no surgery was involved, no life threatening impairment of breathing occurred and there [was] no evidence of a curtailment of the victim's daily activities. While a jury could very easily find the harm . . . to be great bodily injury, a reasonable jury could also find to the contrary." (*Id.* at p. 1499.) The *Nava* court therefore concluded that under *Chapman* the instructional error was not harmless. (See *Chapman*, *supra*, 386 U.S. at p. 21.)

Here, the trial court did not instruct the jury that the victim's nose injury was GBI. However, in a supplemental instruction, the court provided a potentially misleading and incorrect instruction elaborating on the meaning of GBI. (*Nava*, *supra*, 207 Cal.App.3d at p. 1498.) Therefore, under either the *Chapman* or *Watson* standard, the instructional error was prejudicial because, as in *Nava*, "[w]hile a jury could very easily find the harm . . . to be great bodily injury, a reasonable jury could also find to the contrary." (*Id*. at p. 1499.)

Medellin, *supra*, 45 Cal.App.5th at page 530, is similar to the instant case in that the trial court properly instructed the jury on GBI by giving CALCRIM Nos. 875[5] and 3160. The prosecution improperly argued during closing argument that GBI may be shown by a greater than minor injury alone. The defense responded during closing argument that a finding of GBI required the jury to find the injuries were not only more than minor, but also greater than moderate injuries. The People argued on appeal that the prosecutor's closing argument was not prejudicial. The court in *Medellin* disagreed and reversed the convictions of assault with force likely to cause GBI (§ 245, subd. (a)(4)), and the accompanying GBI enhancements (§ 12022.7). (*Medellin*, *supra*, at p. 530.)

The *Medellin* court explained that the prosecutor's misstatement of the meaning of GBI was error because "the prosecutor plainly misstated the law and the People concede as much. The cases defining great bodily injury have long required more than moderate

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[5] CALCRIM No. 875 instructs on the crime of assault with force likely to cause GBI (§ 245, subd. (a)), and includes the same definition of GBI stated in CALCRIM No. 3160.

harm but the prosecutor argued more than minor harm alone was sufficient. The prosecutor's misstatement here rises to error because there was '"a reasonable likelihood the jury understood or applied the [prosecutor's argument] in an improper or erroneous manner."' [Citation.] [¶] The arguments left the jury with two separate definitions for great bodily injury—greater than minor harm, or, greater than both minor *and* moderate harms." (*Medellin*, *supra*, 45 Cal.App.5th at p. 533.)

The court in *Medellin* also concluded that "CALCRIM Nos. 875 and 3160's 'greater than minor or moderate harm' language created an invalid legal theory as to what constitutes great bodily injury . . . . [¶] In sum, the CALCRIM great bodily injury definition 'may impermissibly allow a jury to' find great bodily injury means greater than minor harm alone is sufficient. [Citation.]" (*Medellin*, *supra*, 45 Cal.App.5th at p. 534.) The court in *Medellin* thus concluded that the definition of GBI in CALCRIM Nos. 875 and 3106 is deficient and requires modification. (*Medellin*, *supra*, at pp. 534-535.)[6]

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[6] We disagree with *Medellin* on this point and agree with the dissent in *Medellin* that "'[A] jury instruction cannot be judged on the basis of one or two phrases plucked out of context . . . .' [Citation.] Thus, it is improper to assess the correctness of the instructional definitions of great bodily injury by focusing exclusively on the use of 'or' in the phrase 'minor or moderate harm.' Rather, that phrase cannot be divorced from the one that immediately precedes it: 'injury that is *greater than*' (italics added). '[I]njury that is greater than minor or moderate harm' cannot reasonably be read to mean injury that is more than minor but less than moderate. Such an interpretation simply does not make sense, legally or grammatically, particularly when the phrase is preceded by the explanation that great bodily injury means physical injury that is 'significant or substantial.' In my view, there is no reasonable likelihood the jury would parse the instruction in such a tortured way as to create the ambiguity the majority finds. [Citations.] 'We credit jurors with intelligence and common sense [citation] and do not assume that these virtues will abandon them when presented with a court's instructions.

[footnote continued on next page]

In a footnote, *Medellin* states that "The Supreme Court made clear in *Escobar*, *supra*, 3 Cal.4th 740, 751, that the Legislature *intended* to *generally* define great bodily injury, and we are bound to follow their decision. [Citation.] To the extent that definition has proven unworkable in practice, that issue is not before this court. (Cf. *People v. Guest* (1986) 181 Cal.App.3d 809, 811-812 [great bodily injury is not unconstitutionally vague, but suggesting it is 'an "I know it when I see it" standard.'].) Further explication of great bodily injury rests with the Legislature and the Supreme Court." (*Medellin*, *supra*, 45 Cal.App.5th at p. 535, fn. 11.) We agree with *Medellin* that it would be helpful if the Legislature or our high court would provide greater clarification of the statutory definition of GBI, which could be incorporated in CALCRIM Nos. 875 and 3160.

In concluding the prosecutor's misstatement of the definition of GBI was prejudicial error, the *Medellin* court noted that the sentencing court stated that "'the extent of injuries in this case is at the least serious end of the continuum.'" (*Medellin*, *supra*, 45 Cal.App.5th at p. 535.) The *Medellin* court held that a reasonable jury could have found the injuries were more than minor, but not more than moderate. (*Id*. at pp. 535-536.)

[Citations.]' [Citations.]" (*Medellin*, *supra*, 45 Cal.App.5th 519, dissent, at p. 539; see also *People v. Sandoval* (2020) 50 Cal.App.5th 357, 360 ["We find *Medellin* unpersuasive on this issue and conclude CALCRIM Nos. 875 and 3160 do not permit a reasonable finding of ambiguity."].)

Under *Medellin*, we also conclude that there was prejudicial error, even though the trial court properly instructed the jury with CALCRIM Nos. 875 and 3106. Those instructions were insufficient to alleviate the risk of the jury misunderstanding the law as a result of the erroneous GBI supplemental instruction. A reasonable jury could have incorrectly found, based on the erroneous supplemental instruction, that PM's nose injury constituted GBI because the injury was more than minor. (*Medellin*, *supra*, 45 Cal.App.5th at p. 536.) While there was evidence PM's injury was more than moderate, there was also evidence to the contrary. Evidence supporting a finding PM's nose injury was less than GBI includes evidence PM did not seek medical care until a week after the injury, he refused surgery to repair his nose injury, and his nose x-ray was negative for a fracture.

In addition, the jury's questions during deliberations indicate that the jury was seeking assistance in differentiating GBI from minor and moderate harm. Rather than clarifying the distinction between GBI and moderate harm, the supplemental instruction potentially misdirected the jury into erroneously assuming that if the injury was not superficial, short-lived, or transitory, it was GBI. While the jury may have disregarded the incorrect supplemental GBI instruction and pieced together an accurate understanding of GBI from CALCRIM No. 3160 and the other instructions as given, we are not prepared to assume that it did so.

It is significant that, within about an hour of the trial court providing the jury with the supplemental instruction, the jury notified the court that it had a verdict. This suggests that, in reaching its GBI finding, the jury relied on the erroneous supplemental instruction, which did not correctly describe or clarify the meaning of a "moderate" injury and erroneously suggested that, if the injury was not superficial, short-lived, or transitory, it was GBI. The supplemental instruction allowed the jury improperly to find moderate injury qualified as GBI. Defendant argues the GBI supplemental instruction could be reasonably construed as requiring a finding that the injury need only be greater than minor. We agree. There is a reasonable likelihood that the jury understood the supplemental GBI instruction as allowing a finding of GBI if the injury was greater than minor, without consideration of whether the injury was moderate rather than GBI. Under these circumstances, we conclude that giving the jury the supplemental GBI instruction was prejudicial error under both the *Chapman* and *Watson* prejudicial error standard. We therefore reverse the judgment.

IV.

ROMERO ERROR

Defendant contends the trial court abused its discretion by denying his motion to strike his prior strike convictions under section 1385 and *Romero*, *supra*, 13 Cal.4th 497. We disagree.

A. *Procedural Background*

The amended information alleged two prior strike convictions (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)), for robbery and attempted robbery, committed on the same occasion in 2004, against different victims. Following a bifurcated trial, the court found the two strike prior allegations true.

Defendant filed a *Romero* motion with attached exhibits, including a biopsychosocial assessment. He argued that he did not fall with the Three Strikes law because (1) his two prior strikes were from a single incident committed when he was a juvenile, (2) the two prior strikes occurred 18 years before the current crimes, (3) the impact of his environment in which he grew up in a high crime area, (4) his residential instability, (5) a lack of parental guidance, and his parents were alcoholics. Defendant had a traumatic childhood and exposure to drugs and alcohol at a young age. Although he had not been diagnosed with any mental health issues, at the age of five, defendant had seen someone die, and when he was 15 years old, he saw a family member die. In addition, he had been incarcerated at the age of 16 years for 15 years.

Defendant acknowledged he used a gun when committing the two prior strike offenses, was sentenced to 19 years in prison, and was released on parole in 2017. Defense counsel also informed the court that defendant was willing to stay sober and complete a drug treatment program, and had been conditionally accepted into the Salvation Army rehabilitation program.

In response, the prosecution argued that in the currently charged GBI assault, defendant engaged in highly violent conduct without any provocation, resulting in injury requiring surgery to the victim's nose. Defendant's history reflected that he spent a significant amount of time incarcerated. In 2002, he was arrested for committing robbery and attempted robbery (the two strike priors) against different victims. Although there was a lengthy period of time between when he committed the two priors and his subsequent crimes, this was because he was sentenced to 19 years in prison. After his release in 2017, he started committing crimes again. In 2018 and 2019, defendant was convicted of driving under the influence (Veh. Code, § 23152, subd. (b)) and hit and run (Veh. Code, § 2002, subd. (a)). While on probation for those crimes, defendant committed the GBI assault in 2020. The prosecution argued that defendant's criminal history showed a consistent pattern of recidivism and escalation in the seriousness of his crimes. Therefore, striking his strike priors was not in the interest of public safety.

The trial court noted it had reviewed defendant's *Romero* motion and attached exhibits, including the biopsychosocial assessment by Juan Ramos, and the prosecution's opposition. The trial court denied the motion, acknowledging the following mitigating factors: Defendant's two prior strikes were from the same incident; the incident occurred over 18 years before; at the time of the prior offenses, defendant was 16 years old; defendant was a good student and was in the G.A.T.E. program; defendant had taken college courses in juvenile hall; and when he was released in 2017, he found employment.

The trial court stated it balanced these mitigating factors against the following aggravating factors: Defendant committed the 2002 robbery and attempted robbery priors with a codefendant; defendant wore a mask and used a gun; he was on parole at the time of his current offense; he had served a lengthy term in state prison as a result of the robbery priors; shortly after his release from prison, he committed other crimes and the current violent offense; without any provocation, defendant punched the victim square in the face, resulting in the victim suffering serious injuries, consisting of a fractured nose, which became crooked and required surgery. The trial court thus concluded: "So weighing all that together, I don't believe that this is a case where the court should strike a strike, and the motion to do so is so denied."

B. *Applicable Law*

The purpose of the Three Strikes law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses." (§ 667, subd. (b).) It "establishes a sentencing norm" of longer sentences for repeat offenders and "carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so." (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).) "In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Ibid*.)

A trial court may, "in furtherance of justice," strike a prior conviction under the Three Strikes law. (§ 1385, subd. (a); *Romero*, *supra*, 13 Cal.4th at pp. 529-530.) In

considering whether to strike a prior strike conviction, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) Only "extraordinary" circumstances warrant finding that a defendant who is a career criminal "falls outside the spirit of the three strikes scheme." (*Carmony*, *supra*, 33 Cal.4th at p. 378; *People v. Philpot* (2004) 122 Cal.App.4th 893, 907.) We review the trial court's decision for an abuse of discretion. (*Carmony*, *supra*, at p. 375.)

"Cumulative circumstances, including that a defendant's crimes were related to drug addiction and the defendant's criminal history did not include actual violence, may show that the defendant is outside the spirit of the Three Strikes law. [Citation.] Also, an abuse of discretion may be found where a trial court considers impermissible factors, and, conversely, does not consider relevant ones." (*People v. Avila* (2020) 57 Cal.App.5th 1134, 1140-1141, citing *Carmony*, *supra*, 33 Cal.4th at p. 378.)

On appeal, defendant has the burden to """show that the sentencing decision was irrational or arbitrary.""" (*Carmony*, *supra*, 33 Cal.4th at p. 376.) Absent """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.""" (*Id*. at pp. 376-377.)

C. *Discussion*

Defendant contends the trial court abused its discretion by not adequately considering the cumulative circumstances of his prior strikes in conjunction with the possibility of striking only one of his two strike priors. We disagree. Defendant has not cited any evidence in the record demonstrating that the trial court did not consider these factors. On the contrary, the record shows that the trial court considered all relevant factors when deciding defendant's *Romero* motion. This is apparent from the court's comments made during the *Romero* motion hearing. The court made introductory remarks stating it had read and considered defendant's *Romero* motion and attachments, as well as the People's opposition. One of the *Romero* motion attachments was a biopsychosocial assessment of defendant, which provided a detailed history of defendant's past, including his history of substance abuse, addiction, and a traumatic childhood.

The record of the *Romero* motion proceedings, including the briefs, attachments, and transcript of the motion hearing, also demonstrates that the trial court properly considered the applicable law and appropriately weighed the mitigating and aggravating factors. When denying defendant's *Romero* motion, the trial court noted that under *Romero* and *Williams*, it was required to consider the nature and circumstances of defendant's present felonies, prior convictions, and his background, character, and prospects. The court quoted *Williams*, acknowledging that, in considering whether to strike a prior strike conviction, the trial court "must consider whether, in light of the

nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, *supra*, 17 Cal.4th at p. 161.)

The trial court's reference to this language reflects that it was aware of and considered the appropriate factors when ruling on defendant's *Romero* motion. It also reflects that the trial court was aware it had the discretion to strike one or both of defendant's strike priors, but denied striking either of them after concluding that the aggravating factors outweighed the mitigating factors.

Defendant nevertheless argues the trial court failed to consider all relevant evidence and the option of striking only one of the two strikes, but has not affirmatively demonstrated this. We are foreclosed from making such assumptions regarding the trial court's undisclosed thought processes. Fundamental principles of appellate review require an appellate court to presume the judgment is correct unless the appellant affirmatively demonstrates otherwise. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 477.) This court also must indulge all intendments and presumptions that support the judgment on matters as to which the record is silent. (*Ibid.*)

"""A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate

practice but an ingredient of the constitutional doctrine of reversible error."' [Citations.] Moreover, '" a trial court is presumed to have been aware of and followed the applicable law. [Citations.]"' [Citation.]" (*People v. Leonard*, *supra*, 228 Cal.App.4th at p. 478.) Here, the record showed that the trial court appropriately weighed defendant's mitigating and aggravating factors when deciding whether to strike either of defendant's strike priors.

Even though the court did not mention that it considered the length of defendant's potential sentence as a factor, it may be presumed the court took this into consideration when deciding the *Romero* motion, as well as other mitigating factors, such as defendant's traumatic upbringing, addiction, and young age when he committed the strike priors. There is nothing in the record showing such factors were ignored or disregarded by the court. To the contrary, the record shows the trial court was aware of all mitigating factors, considered them, and appropriately weighed them against the aggravating factors.

Mitigating factors mentioned by the court included defendant's young age of 16 years when he committed the two strike priors, and that the two strike offenses were committed on one occasion. However, the court noted that it was questionable whether the fact the two strikes occurred at about the same time was a mitigating factor because the offenses were committed against two separate victims during separate acts of robbery and attempted robbery, resulting in a conviction for robbery of one victim and another conviction for attempted robbery of the other victim.

Another mitigating factor mentioned by the court was that the two priors occurred 18 years before the charged offenses. But any mitigating significance is countered by the fact defendant was incarcerated during most of the time between when he committed the two priors in 2002, his release from prison in 2017, and his subsequent offenses in 2018 (driving under the influence), 2019 (hit and run), and 2020 (the charged GBI assault). A crime is not considered remote if the defendant's crime-free tenure is spent incarcerated. (*People v*. *People v. Beasley* (2022) 81 Cal.App.5th 495, 501; *People v. Vasquez* (2021) 72 Cal.App.5th 374, 390 ["In analyzing whether a defendant's prior criminal conduct was 'remote,' a trial court should consider whether the defendant 'was incarcerated a substantial part of the intervening time and thus had little or no opportunity to commit' additional crimes."]; *People v. Steele* (2002) 27 Cal.4th 1230, 1244-1245, [the defendant's prior crime was not "remote" where the defendant spent many years in prison during the intervening period].) The trial court here therefore reasonably concluded that, although there was an 18-year span between commission of his two priors in 2002 and the charged crimes in 2020, remoteness as a mitigating factor did not apply.

Although the court did not specifically mention defendant's addiction issues and traumatic childhood as mitigating factors, it can be presumed from the record that the court considered these factors by reviewing the biopsychosocial assessment and weighing all of defendant's circumstances when deciding whether to strike any of defendant's strike priors. The court added that under section 1385, subdivision (c), striking

defendant's strike priors would endanger public safety and therefore it was not in the furtherance of justice to strike both enhancements to do so.

We conclude the trial court appropriately denied defendant's *Romero* motion by weighing the mitigating and aggravating factors, and reasonably finding the aggravating factors outweighed the mitigating factors.

V.

DISPOSITION

The GBI enhancement to count 1 is reversed based on instructional error, and the judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.