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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEONARD BOONE, Defendant and Appellant.	A106268 (San Francisco County Super. Ct. No. 188003)

Leonard Boone timely appeals from a judgment sentencing him to 56 years to life in state prison in connection with the death of his 15-month-old son. On February 9, 2004, a jury found Boone guilty of second degree murder and of assaulting a child under the age of eight by means of force, resulting in his death. (Pen. Code, §§ 187 [murder], 273ab [assault resulting in child's death].)

Boone contends (1) the trial court inaccurately responded to a jury question posed during deliberations; (2) his conviction under section 273ab[1] was unconstitutional because that statute permits the state to impose a penalty for murder in the first degree without requiring proof of malice; and (3) the trial court erred in ruling it had no discretion to strike Boone's prior felony conviction. We find no reversible error as to Boone's first two claims, but remand the case because we conclude the trial court

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1 Unless otherwise indicated, all statutory references are to the Penal Code.

erroneously believed it lacked discretion to strike Boone's prior felony conviction for robbery.

BACKGROUND

On May 27, 2002, Boone had been living with his fifteen-month-old son, Hezekiah, and Hezekiah's mother, Jessica Jones. Jones testified she left Hezekiah with Boone part of that day at their apartment while she went to a friend's house. She returned to the apartment twice. The second time she saw Hezekiah lying on the bed next to Boone. Hezekiah appeared to be sleeping. She asked Boone why Hezekiah was sleeping so long and Boone told her he had given Hezekiah a shower. Jones tried to get near Hezekiah, but Boone held up his hand and told her Hezekiah was okay. After Boone fell asleep, Jones tried to revive Hezekiah but could not. Jones panicked, and ran out of the apartment with Hezekiah. After summoning the police, Hezekiah was taken to the hospital and pronounced dead.

The police videotaped an interview with Boone the day after Hezekiah died. In the videotape, Boone told a police officer he had been trying to toughen up Hezekiah for three weeks or a month by running into him from about four feet and putting his shoulder into Hezekiah's chest area. There were about twenty "toughen up" sessions, each lasting fifteen or twenty minutes. Boone said he wanted to toughen up Hezekiah because he had been allowing other kids to "do him wrong" by scratching and biting him. Boone told the officer he did not see anything wrong with the toughen up sessions. He said Hezekiah would stop crying when he told him to stop.

Boone said after he would run into Hezekiah, Hezekiah would fall back on the bed. However, the last time Boone hit him, Hezekiah fell back and hit his head on the headboard of the bed. Hezekiah stopped breathing, and Boone knew he was dead. Boone admitted to the officer Hezekiah died from Boone's attempts to toughen him up by running into and hitting him in the chest.

San Francisco's assistant chief medical examiner performed an autopsy on Hezekiah. At trial, the doctor opined Hezekiah bled to death from massive internal injuries caused by sustained multiple trauma. The right side of Hezekiah's liver was

pulverized, and his spleen was torn into small pieces. The doctor testified the lacerations to Hezekiah's spleen were of the kind that might occur in a victim in a high speed car crash not wearing a seat belt, or in a victim who had sustained significant blows to the abdomen, such as being kicked by a horse or punched by an adult with as much force as possible. This was one of the most severe cases of injury to the internal organs the doctor had ever seen; she had performed more than 1600 postmortem examinations. The doctor also testified she found 62 external contusions on Hezekiah's body. On cross-examination, the doctor testified she did not see any evidence on Hezekiah's body of an injury that looked like it was caused by a blow from a shoulder. However, she said it was possible a strike by a shoulder to a soft part of the abdomen, i.e., a part without underlying bony structures, would not leave evidence of a bruise on the surface, but still cause extensive internal injuries.

At trial, the prosecutor did not ask for first degree murder; he argued the killing was second degree murder based on implied malice. Defense counsel did not dispute Boone killed his son, or that the killing was a criminal act. Instead, he argued the crime was not murder because Boone lacked the requisite awareness for implied malice. He argued Boone could not tell he was injuring his son.

DISCUSSION

I. Trial Court's Response to the Jury's Question During Deliberations Was Proper.

a. Factual Background

On February 5, 2004, before closing arguments, the court gave the standard jury instructions defining malice aforethought, defining second degree murder, defining involuntary manslaughter, and distinguishing murder and manslaughter. Each of these instructions either defined or referred to implied malice. (See CALJIC Nos. 8.11 ["Malice Aforethought – Defined], 8.31 (Jan. 2005) ["Second Degree Murder – Killing Resulting from Unlawful Act Dangerous to Life], No. 8.45 [Involuntary Manslaughter – Defined], No. 8.51 [Murder and Manslaughter Distinguished – Nature of Act Involved] (Jan. 2005 ed.).)

The case went to the jury on February 6. On February 9, after a juror was excused and replaced with an alternate, the court instructed the jury to set aside its past deliberations and begin deliberating anew. New deliberations began shortly after 11:20 a.m.

During deliberations, the jury sent the court a note containing three questions. The jury submitted the note either at 12:30 p.m., as indicated on the note, or at 1:30 p.m., as defense counsel indicated on the record. The first of the jury's questions pertained to the definition of implied malice, relevant to the first count of second degree murder. The jury asked: "What is the definition of 'knowledge of the danger to human life' and 'knowledge of risk of danger to human life' i.e. does danger to human life mean 'possible death' or just 'possible injury'? (Does it depend on the defendant's personal knowledge or is it knowledge that a reasonable person would have?)"

After the trial court conferred with counsel "at length," the court sent the jury its answers. Over the objection of Boone's trial counsel, the court provided a written response to the first question as follows: " 'Knowledge of the danger to human life' as used in CALJIC No. 8.11 ["Malice Aforethought" – Defined], includes a defendant's knowledge of a likely risk of death or serious bodily injury and conscious disregard of such risk. Whether or not the evidence meets the definition is for you to decide. [¶] Implied Malice requires the defendant's knowledge of the risk. Refer also to CALJIC No. 8.51 [Murder and Manslaughter Distinguished – Nature of Act Involved]."

At 3:40 p.m. that day, the jury returned guilty verdicts.

b. Analysis

Boone argues his due process rights to a fair trial were violated when the court provided the jury with the nonstandard instruction that "knowledge of the danger to human life" includes "a defendant's knowledge of a likely risk of . . . serious bodily injury." Boone asserts that implied malice instead requires "a subjective awareness of a high probability of death with a wanton disregard thereof." We conclude there is no reasonable likelihood the court's instruction misled the jury because it was properly

based on the standard jury instructions the court also gave the jury, as well as being consistent with definitions of implied malice provided in case law. (*People v. Cain* (1995) 10 Cal.4th 1, 36-37 [considering reasonable likelihood instruction would have misled the jury in light of the other correct and applicable instructions the court gave].)

1. Second Degree Murder and Implied Malice.

"Second degree murder is defined as the unlawful killing of a human being *with malice aforethought*, but without the additional elements – i.e., willfulness, premeditation, and deliberation – that would support a conviction of first degree murder." (*People v. Martin Nieto Benitez* (1992) 4 Cal.4th 91, 102 (*Nieto Benitez*) [emphasis in original].) "[M]alice may be either express or implied. . . . It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188.)

"The courts and writers are in agreement on the impossibility of giving the phrase ["malice aforethought"] a definitive and precise meaning." (1 Witkin & Epstein, California Criminal Law (2000), Crimes Against the Person, § 165, p. 780.) Reflecting judicial attempts to translate the statutory definition of implied malice "into a tangible standard a jury [could] apply," two lines of decisions developed. One line held "malice could be implied where 'the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.' [Citations.]" (*Nieto Benitez, supra,* 4 Cal.4th at pp. 103-104.) This definition is close to the one advocated by Boone. "The alternate strand [of decisions] held that malice could be implied where the killing was proximately caused by ' "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." ' [Citations.]" (*Id*.) Although the Supreme Court concluded these two definitions of implied malice "actually articulated one and the same standard," the court held that "the better practice" was "to charge juries 'solely in the straightforward language of the "conscious disregard for human life" definition of

implied malice, ' " currently set forth in CALJIC Nos. 8.11 and 8.31. (*Id.* at p. 104; CALJIC Nos. 8.11, 8.31 (Jan. 2005 ed.).)

2. The Court's Response to the Jury's Question Regarding the Definition of "Knowledge of the Danger to Human Life" Was Proper.

The jury asked whether knowledge of danger to human life in the standard implied malice instructions referred to knowledge of " 'possible death' or "just 'possible injury.' " This question suggests at least one juror may have had a reasonable doubt about whether Boone knew his son's *death* was possible, as opposed to whether he knew just *injury* to his son was possible. In light of the other standard instructions provided the jury, the court's response made it clear the jury had to find more than that Boone knew just injury was possible; the jury had to find he knew there was "a likely risk of death or serious bodily injury." We conclude the court's response was proper. Consequently, the trial court's response did not violate Boone's due process rights. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526 [in reviewing jury instruction, we determine whether the instruction, as likely understood by the jury, states the applicable law correctly].)[NC1]

In providing this instruction, the court in effect referred the jury to portions of the standard CALJIC instructions the court had already given. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234 (*Weeks*) [no constitutional violation where the trial court in response to the jury's question directed its attention to the proper instruction already given and thereafter the jury did not submit another question].) Both involuntary manslaughter and second degree murder require as an element that there be an "unlawful killing." (CALJIC Nos. 8.31, 8.45 (Jan. 2005).) One definition of an "unlawful killing" is a killing occurring during the commission of an act "which involves a high degree of risk of death or great bodily harm." (CALJIC No. 8.45 (Jan. 2005 ed.).) Awareness of a "high degree of risk of death or great bodily harm" is one of the distinctions between involuntary manslaughter and second degree murder: "[i]f a person causes another death . . . *without realizing the risk* involved, he is guilty of involuntary manslaughter. If, on the other hand, the person *realized the risk* . . . , malice is implied, and the crime is

murder." (CALJIC No. 8.51 (Jan. 2005 3d.) [emphasis added].) Consequently, it was proper for the court, based on the CALJIC instructions, to explain that "knowledge of the danger to human life . . . includes a defendant's knowledge of a likely risk of death or serious bodily injury . . . ."

The trial court's response to the jury's question is consistent with a long line of decisions speaking of implied malice in terms of a likely risk of serious bodily injury. For example, in *People v. Poddar* (1974) 10 Cal.3d 750, our Supreme Court stated that "[i]n order to find 'wanton disregard' [for human life] it must be shown that the accused was both aware of his duty to act within the law and acted in a manner likely to cause death or *serious injury* despite such awareness." (*Id*. at p. 758, fn. 11 [emphasis added]; see also *People v. Coddington* (2000) 23 Cal.4th 529, 592-593 (*Coddington*) [evidence of defendant's "[k]nowledge that serious bodily injury was likely to occur" permitted "an inference of implied malice" and thus it was error for the trial court to fail to instruct on an implied malice theory of second degree murder]; *People v. Conley* (1966) 64 Cal.2d 310, 322 (*Conley*) [if a defendant "does an act that is likely to cause serious injury or death to another, he exhibits that wanton disregard for life or antisocial motivation that constitutes malice aforethought"].) In *People v. Matta* (1976) 57 Cal.App.3d 472 (*Matta*), the Court of Appeal similarly explained that "malice may be implied from the doing of an act in wanton and willful disregard of an unreasonable human risk, i.e., the willful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death or *great bodily injury* may result." (*Id.* at p. 480 [emphasis added]; see also *People v. Teixeira* (1955) 136 Cal.App.2d 136, 150 (*Teixeira*) ["Thus, to constitute murder there has to be either an intent to kill or such wanton and brutal use of the hands without provocation as to indicate that they would cause death or serious bodily injury so as to indicate an abandoned and malignant heart"]; *People v. Spring* (1984) 153 Cal.App.3d 1199, 1205 [quoting *Teixeira* with approval]; cf. 1 Witkin & Epstein, California Criminal Law, *supra,* Crimes Against the Person, § 167, pp. 781-782 [in listing different kinds of mens rea fulfilling malice aforethought requirement, using same

formulation of implied malice as used by the court in *Matta, supra,* 57 Cal.App.3d 472, 480].)

Moreover, the court's response is consistent with numerous decisions involving implied malice second degree murder in the context of vehicular homicide. These decisions do not require the defendant's actual knowledge at the time of the fatal collision that driving under the influence was likely to result in death. (See, e.g., *People v. Watson* (1981) 30 Cal.3d 290, 300-301 (*Watson*) [concluding defendant's conduct in consuming alcohol before driving at excessive speeds was "an act presenting a great risk of harm or death" and supported "a conclusion that defendant acted wantonly and with a conscious disregard for human life" such that he could be held on a second degree murder charge]; *People v. Brogna* (1988) 202 Cal.App.3d 700, 708-709 ["One who drives a vehicle while under the influence after having been convicted of that offense knows better than most that his conduct . . . entails a substantial risk of harm to himself and others"]; *People v. Contreras* (1994) 26 Cal.App.4th 944, 948-950, 955-956 [in rejecting defendant's argument there was no evidence he knew "his conduct created a substantial risk of death to another," concluding there was sufficient evidence he "subjectively was aware of the risk to human life" based on his poor driving record, a prior non-injury accident, and "the known inadequacy of his brakes"]; *People v. Olivas* (1985) 172 Cal.App.3d 984, 987-988 ["Phrased in everyday language, the state of mind of a person who acts with conscious disregard for life is, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed'"].)

The cases Boone cites are not to the contrary. None states knowledge of a likely risk of serious bodily injury is insufficient for implied malice. And they do not, as Boone asserts, limit the definition of malice to "a subjective awareness of a high probability of death." As we discuss *supra*, our Supreme Court has held this definition articulates the same standard as the "conscious disregard for life" definition which currently appears in CALJIC No. 8.11. (*Nieto Benitez, supra,* 4 Cal.4th at p. 104; see also *People v. Dellinger* (1989) 49 Cal.3d 1212, 1215, 1222 [approving of CALJIC No. 8.11's current definition of implied malice]; *Watson, supra,* 30 Cal.3d at pp. 300-301 [using CALJIC No. 8.11's

current definition, as well as the "high probability" of death definition].) Indeed, several of the same cases which specifically define implied malice with reference to a likely risk of serious bodily injury equate that risk with a high probability of death or with danger to human life. (See, e.g., *Matta, supra*, 57 Cal.App.3d at p. 480 ["wanton disregard for human life" may be implied from doing "an act that involves a high probability that it will result in death" and from doing an act with "a plain and strong likelihood that death or great bodily injury may result"]; *Conley, supra*, 64 Cal.2d at p. 322 [malice is exhibited by doing "an act that is likely to cause serious injury or death" and by doing an act "highly dangerous to human life"]; *Coddington, supra*, 23 Cal.4th at pp. 592-593 ["knowledge that serious bodily injury was likely to occur" and "an intent to do an act that is dangerous to human life"].)

3. The Court Also Properly Responded to the Jury's Question Regarding Subjective Versus Objective Knowledge.

Boone also argues the trial court did not answer with "concrete accuracy" the last part of the jury's question regarding whether the knowledge of danger to human life must be Boone's "personal knowledge" or the knowledge of a hypothetical "reasonable person." We conclude the trial court's response was adequate. The court correctly responded "[i]mplied [m]alice requires the defendant's knowledge of the risk." The trial court thus made it clear the jury was to focus on the defendant's knowledge, and not that of "a reasonable person." In addition, the court properly directed the jury to "[r]efer also to CALJIC No. 8.51" on this issue. CALJIC No. 8.51 explains that implied malice requires the defendant to actually realize the risk of danger to human life: "[i]f a person causes another's death . . . without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder." (CALJIC No. 8.51 (Jan. 2005 ed.); see also *Weeks, supra,* 528 U.S. at p. 234 [no constitutional violation where the trial court in response to the jury's question directed its

attention to the proper instruction already given and thereafter the jury did not submit another question].)

II. Penal Code Section 273ab Does Not Violate Due Process.

Boone argues his conviction under Penal Code section 273ab cannot stand because it is "an unconstitutional end-run around the Due Process requirement that premeditated and deliberated express malice be proved in order to obtain a penalty of 25 years-to-life for an unlawful homicide." But as Boone admits, "Due Process challenges to section 273ab have been rejected by the Fourth District in *People v. Albritton* (1998) 67 Cal.App.4th 647 [(*Albritton*)] and *People v. Malfavon* (2002) 102 Cal.App.4th 727 [(*Malfavon*)] and by the Third District in *People v. Norman* (2003) 109 Cal.App.4th 221 [(*Norman*)]." And no California decision has concluded section 273ab violates the due process clause. We agree with the analysis in *Albritton*, *Malfavon* and *Norman*, and likewise conclude section 273ab does not violate due process.

Penal Code section 273ab provides that that "[a]ny person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. Nothing in this section shall be construed as affecting the applicability of subdivision (a) of section 187 [murder] or 189 [murder of first or second degree]." (Pen. Code, § 273ab.)

Boone asserts *Albritton*, *Malfavon* and *Norman* do not resolve his contention that, in enacting section 273ab, the Legislature did not have the discretion to omit the traditional murder element of malice "from a statute that results in the same punishment as first degree murder." Not so. For example, the defendant in *Norman* contended section 273ab "violates the due process clause of the Fourteenth Amendment because the state must prove all elements of a charged offense, which, in defendant's view, is a disguised version of first degree murder, only without malice. Defendant specifically alleges that section 273ab is, in effect, a state effort to avoid the requirement to prove 'premeditated and deliberated express' malice in a first degree murder case, by simply

defining an assault that results in death with the same penalty as first degree murder." (*Norman, supra,* 109 Cal.App.4th at p. 226.)[2]

More specifically, the defendant in *Norman*, like Boone, argued "that section 273ab is unconstitutional because the Legislature 'exceeded the constitutional limits placed on its power to redefine the traditional elements of murder.' " (*Norman, supra,* 109 Cal.App.4th at p. 227.) Like Boone, the defendant in *Norman* traced "the history of California penal law and the evolution of the murder statutes to establish that malice is required to support a murder conviction." (*Id.*) Like Boone, the defendant then relied upon "legislative history to prove the Legislature intended to make it easier to convict defendants of murder when the victim is a child by deleting the element of malice." (*Id.*) And like Boone, the defendant in *Norman* relied on *Jones v. United States* (1999) 526 U.S. 227, 242 (*Jones*) to argue "that states may not redefine crimes by omitting elements from the definition of crimes *and 'instead to require the accused to disprove such elements*.' " (*Norman, supra,*109 Cal.App.4th at p. 227 [emphasis in original].)

The Court of Appeal in *Norman* responded to these arguments by first noting section 273ab is not a murder statute. (*Norman, supra,* 109 Cal.App.4th at p. 227.) "Defendant describes the intent of the Legislature to make it easier to get a murder conviction without malice or premeditation, but analyzes the legislative materials, instead of the statute. Defendant has not tendered any ambiguity in the statute necessitating the resort to outside materials for interpretation. The statute speaks for itself. It is not a murder statute; it is an assault statute." (*Id*; see also *Albritton, supra*, 67 Cal.App.4th at p. 659 ["[I]t is a misnomer to call section 273ab a murder statute and it is more akin to a child abuse homicide statute"]; *Malfavon, supra,* 102 Cal.App.4th at pp. 739-740 [rejecting argument based on legislative history that section 273ab is a murder statute enacted for the purpose of circumventing the requirements for murder].) Boone admits

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2 The defendant in *Norman*, like Boone, attacked the constitutionality of section 273ab on its face; he did not argue there was a lack of malice in the case as he, like Boone, had also been convicted of second degree murder. (*Norman, supra,* 109 Cal.App.4th at p. 226.)

"that on its face, [section 273ab] purports to proscribe not murder, but an assault which results in death." We agree section 273ab is not a murder statute and thus reject Boone's assertion that section 273ab "redefines" the crime of murder.

Next the court in *Norman* properly concluded that because section 273ab is not a murder statute, the merger rule announced in *People v. Ireland* (1969) 70 Cal.2d 522, 539 (*Ireland*), also relied upon by Boone, has no application. (*Norman, supra,* 109 Cal.App.4th at pp. 227-228.) The merger rule states that a conviction under a murder statute based on the felony-murder doctrine "cannot be based on an assault resulting in death because such a rule 'would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault – a category which includes the great majority of all homicides.' "[3] (*Id*. at p. 227 [quoting *Ireland, supra*, 70 Cal.2d at p. 539]; see also *Malfavon, supra,* 102 Cal.App.4th at pp. 738-739 [rejecting similar *Ireland* merger rule argument because *Ireland* did not involve a criminal statute enacted by the Legislature (like section 273ab), but prosecutorial exploitation of the felony-murder rule].)

The *Norman* court also properly rejected the defendant's argument "that due process bars legislative efforts to take certain elements of crimes from a jury." (*Norman, supra,* 109 Cal.App.4th at p. 228.) The U.S. Supreme Court in *Jones, supra*, 526 U.S. 227 and its predecessors held "invalid statutes that permit less than proof beyond a reasonable doubt on an element of the crime or prohibit the fact finder from considering certain evidence, such as intoxication, when determining whether an element of the crime is present. [Citations.] It is the requirement that an accused must *disprove* an element that concerned the court in . . . *Jones*. Otherwise, as *Jones* said, the states are free to choose the elements of their crimes. (*Jones, supra*, 526 U.S. at p. 241 . . . .)" (*Norman, supra,* 109 Cal.App.4th at p. 228.) Lawmakers are not prohibited "from defining the

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[3] The court in *Norman* also noted in that particular case, the defendant, like Boone, had also been convicted of second degree murder based on malice instructions, and not based on any felony-murder theory. (*Norman, supra,* 109 Cal.App.4th at pp. 227-228.)

elements of a different crime." (*Id*; see also *Albritton, supra,* 67 Cal.App.4th at pp. 659-660 [noting the defendant failed to identify "any viable constitutional reason why the state cannot criminalize such conduct and make it a separate crime when the victims are young children. Considering the purpose of the statute – to protect children at a young age who are particularly vulnerable – there can be no dispute of the gravity of the governmental interest involved"]; *Malfavon, supra*, 102 Cal.App.4th at p. 738 ["Prescribing punishment for various forms of homicide is distinctly within the police power of the state, as is the definition of the elements of crimes and the delineation of their punishments"].))

Finally, the fact that the penalty for first degree murder and for a violation of section 273ab is identical is immaterial. "The Legislature exercised its prerogative in selecting the range of punishment, and there is no principle of law that precludes the same punishment for different crimes." (*Norman, supra,* 109 Cal.App.4th at p. 228; see also *Malfavon, supra*, 102 Cal.App.4th at p. 737 [in rejecting argument section 273ab is an unconstitutional attempt to impose a penalty identical to that for first degree murder without proving malice, reasoning that neither the due process clause nor any other constitutional provision, requires " 'a State to fix or impose any particular penalty for any crime it may define or to impose the same "proportionate" sentences for separate and independent crimes' "].)

III. The Trial Court Erroneously Concluded It Had No Discretion to Strike Boone's Prior Felony Conviction.

a. Factual Background

The information alleged two prior felony convictions: (1) on January 25, 1994 for robbery (Pen. Code, § 212.5) and (2) on October 24, 1995 for willful harm or injury to a child (Pen. Code, § 273a). The robbery conviction was charged as a "strike" (Pen. Code, § 667, subds. (d) & (e), 1170.12, subds. (b) & (c)), as a prior serious felony (Pen. Code, § 667, subd. (a)), and as a prior conviction resulting in a prison sentence (Pen. Code, §

667.5, subd. (b)). The child endangerment conviction was charged only as a prior conviction resulting in a prison sentence. (Pen. Code, § 667.5, subd. (b).)

Boone waived jury trial on the prior conviction allegations. On February 19, 2004, the court found those allegations to be true.

Before the sentencing hearing on March 12, 2004, the People filed a short sentencing memorandum asserting the applicable statutes required Boone to be sentenced to 56 years to life in prison. The memorandum does not discuss the facts of the case or Boone's criminal history. Boone's counsel did not file any sentencing recommendation.

At the sentencing hearing, the trial court started off by saying the People's recommended sentence appeared to be "mandatory." Defense counsel did not directly dispute this, but asked the court to strike "all the other allegations" and impose the sentence of 25 years to life, which would be the sentence for a conviction under section 273ab without a prior strike or any enhancements. (Pen. Code, § 273ab.) The court then asked the prosecutor whether the court was "capable of striking" the prior strike, "which doubles punishment." (Pen. Code, § 667, subds. (d) & (e), 1170.12, subds. (b) & (c).) The prosecutor said no; "I think the laws forbid[] the People, on these facts and with this history, from striking a strike prior." The prosecutor then proceeded to discuss the facts surrounding the prior conviction for child endangerment (involving a different child), as well as to challenge defense counsel's assertion that Boone had accepted responsibility for the death of his son. At the conclusion of his arguments, the prosecutor stated "the law is not discretionary," and "the law demands [Boone's sentence] be doubled, that a 5 year enhance[ment] be added to a serious felony prior, and 1 year for his prison prior." After hearing more discussion from defense counsel and Boone about the child endangerment conviction the following discussion took place:

The Court: ". . . I am going to make a finding here – I trust [the prosecutor's] research on this. [¶] I reviewed the statutes. I came to the conclusion that I do not have the authority to strike the prior. [¶] So if on appeal I am wrong, we can bring it back for resentencing. I am inclined – I'd be inclined to strike the prior."

The Prosecutor: "Yes."

The Court: "You just told me I can't strike the prior. I am receiving your –"

The Prosecutor: "No. I think that is –"

The Court: "That is the way I read the statute too. [¶] Well, if I strike the prior, you will appeal it; if I don't strike it, he will appeal it."

The Prosecutor: "Well, I will let the court go forward."

The Court: "I am going on the understanding, based on [the prosecutor's] representations, that I do not have the authority to strike the prior in this. My review of the statute seems to verify that."

The court then imposed on Boone the sentence recommended by the People – 56 years to life. The court first sentenced him to 25 years to life for the conviction under section 273ab, doubled for the prior strike (the robbery conviction) pursuant to section 667, subdivision (e)(1). In so doing, the court stated, "You realize I cannot strike it." The court also imposed a five-year consecutive sentence pursuant to section 667, subdivision (a) for a prior serious felony conviction, and an additional one-year consecutive sentence pursuant to section 667.5, subdivision (b) for a prior conviction resulting in a prison sentence. The court stayed the second degree murder conviction under section 654.

b. Analysis

Boone argues this case must be remanded for resentencing because the trial court erred in ruling it had no discretion to strike Boone's prior felony conviction. We conclude the trial court erroneously believed it lacked discretion to strike Boone's prior felony conviction for robbery. We remand the case to permit the court to exercise its discretion either to strike or not to strike Boone's prior felony conviction for robbery, and, if necessary, for resentencing.

It is well established a trial court has discretion under section 1385 sua sponte to dismiss a strike (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 (*Romero*) [discretion to strike prior felony conviction allegations in Three Strikes case]) and to dismiss a "prison prior" (*People v. Bradley* (1998) 64 Cal.App.4th 386, 392, 395

[discretion to strike a section 667.5, subdivision (b) prior prison term enhancement]). (See also *People v. Meloney* (2003) 30 Cal.4th 1145, 1155 [as a general matter, a trial court has discretion under section 1385 "to dismiss or strike an enhancement, or to 'strike the additional punishment for that enhancement in the furtherance of justice' "].) Consequently, the trial court in this case clearly had discretion to dismiss the robbery conviction and to impose a sentence not doubled by the Three Strikes law or lengthened by a "prison prior" enhancement.

" 'Discretion is the power to make the decision, one way or the other.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) The court stated several times on the record its belief it did not have the power to strike. Consistent with its belief, the court indicated it otherwise would have been inclined to strike the robbery conviction. Contrary to what the Attorney General asserts, there is no indication in the record the trial court believed striking the conviction would be an abuse of discretion given the facts of the case. The court apparently based its conclusion it lacked authority on its interpretation of the statutes – not on the facts of the case or Boone's criminal history.

It is an abuse of discretion for a trial court to fail to strike a prior felony conviction allegation "where the trial court was not 'aware of its discretion' to dismiss [citation] . . . ." (*Carmony, supra,* 33 Cal.4th at p. 376.) In such a case, the appropriate remedy is remand: "*Romero* establishes that where the record *affirmatively* discloses that the trial court *misunderstood* the scope of its discretion, remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion . . . ." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944 [emphasis in original]; see also *People v. Benevides* (1998) 64 Cal.App.4th 728, 735 (*Benevides*) [remand is the appropriate relief "when a trial court's refusal or failure to exercise its section 1385 discretion to dismiss or strike is based on a mistaken belief regarding its authority to do so"]; *People v. Fritz* (1985) 40 Cal.3d 227, 229 ["Because the record reveal[ed] . . . the trial court erroneously believed it had no discretion to strike the prior" and indicated "the trial court believed that imposition of a consecutive five-year sentence for the serious felony enhancement

was mandatory," the judgment was vacated and the case remanded "to the trial court to permit it to resentence defendant with an accurate view of its powers"].)

In lieu of remand, the Attorney General asks us to "decide whether, under the facts of this case, any court could rationally decide that this was the exceptional case in which the three strikes law, though applicable, should be deemed inapplicable." We decline to do so. (See *Benevides, supra,* 64 Cal.App.4th at p. 735 ["The appellate courts do not have the power to substitute their discretion for that of the trial court or to direct the trial court to exercise its discretion" to dismiss or not to dismiss]; *Carmony, supra*, 33 Cal.4th at p. 377 [in reviewing the trial court's refusal to dismiss two strikes, the Court of Appeal should not have "substituted its own judgment for the judgment of the trial court" and thereby "eviscerated the trial court's discretion" under *Romero*].) We conclude the record is inadequate for us to, in effect, review the case as though the court had exercised its discretion to dismiss the strike. First, the trial court did not indicate on the record why it was inclined to strike the conviction. (See *Romero, supra*, 13 Cal.4th at pp. 531-532 [where trial court "did not set forth its reasons for striking the prior felony conviction allegations," ordering remand to trial court instead of the Court of Appeal because the inadequate record made it inappropriate for the Court of Appeal to consider whether the trial court abused its discretion].) In fact, aside from its belief the statutes mandated the sentence it imposed, the court did not indicate any reasons in support of or against Boone's sentence. Second, because the court made clear from the outset its belief it lacked authority to dismiss the strike, defense counsel may have been chilled during the sentencing hearing from arguing that mitigating factors were present which would justify striking the conviction.

Nonetheless, in order to provide the trial court with some guidance on remand, we emphasize the court's "discretion to dismiss, or strike, one or more of a defendant's prior convictions [is] 'subject . . . to strict compliance with the provisions of section 1385 and to review for abuse of discretion.' " (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 472 (*McGlothin*).) "In deciding to strike a prior, a sentencing court is concluding that an exception to the scheme should be made because, for articulable reasons which can

withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." (*Id*. at p. 474.) The court must "consider the nature and circumstances of the present crimes; the defendant's prior convictions; his background, character and prospects." (*Id*. at pp. 474-475.) In *McGlothin*, we concluded the trial court abused its discretion in striking a prior. (*Id*. at p. 470.) Our opinion provides a step-by-step approach for determining when a defendant such as Boone " 'may be deemed outside the [Three Strikes] scheme's spirit . . . and hence should be treated as though he had . . . not previously been convicted of one or more serious and/or violent felonies.' " (*Id*. at p. 475.)

On remand, the trial court should conduct a hearing "to determine whether to dismiss" the robbery conviction "pursuant to section 1385. If the court decides to dismiss [this felony conviction finding], the court should proceed to resentence [Boone]. If the court decides not to dismiss [the] finding, the court should remand [Boone] to the custody of the Department of Corrections to serve the remainder of his term." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 260.)

DISPOSITION

The judgment is vacated and the case remanded for the limited purpose of determining whether to dismiss Boone's robbery conviction and, if necessary, for resentencing.

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Parrilli, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.