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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON SUNG-UK PARK,

Defendant and Appellant.

D056619

(Super. Ct. No. SCD210936)

APPEAL from a judgment and order of the Superior Court of San Diego County, Francis M. Devaney, Judge. Affirmed.

A jury convicted Aaron Sung-Uk Park of attempted voluntary manslaughter based on heat of passion (Pen. Code,¹ §§ 192, 664) as a lesser included offense of attempted murder, and assault with a semiautomatic firearm (§ 245, subd. (b) (hereafter § 245(b)). As to both counts, the jury found true allegations that Park personally used a firearm (§ 12022.5, subd. (a)) and personally caused great bodily injury (§ 12022.7, subd. (a)). Park admitted the allegation in the fourth amended information (the information) that in

¹ All further statutory references are to the Penal Code.

2003 he suffered a prior serious felony conviction for assault with a deadly weapon (§ 245, subd. (a)(1), hereafter § 245(a)(1)) within the meaning of sections 667, subdivision (a)(1) (hereafter section 667(a)), 668 and 1192.7, subdivision (c), which also qualified as a prior strike conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 668, 1170.12). At the hearing, both defense counsel and Park informed the court that the prior serious felony conviction had been reduced to a misdemeanor.

Park brought both a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and section 1385 to strike the prior serious felony and strike conviction, and a motion for new trial based on ineffective assistance of counsel, prosecutorial misconduct, and other claims of error. The court denied both motions.

The court sentenced Park on the assault with a semiautomatic firearm conviction to the middle term of six years, doubled to 12 years under the Three Strikes law as a result of Park's prior strike conviction, plus consecutive terms of four years for his personal use of a firearm, three years for causing great bodily injury, and five years for having a prior serious felony conviction—for a total prison term of 24 years. As to the attempted voluntary manslaughter conviction, the court imposed, then stayed under section 654, one-third of the middle term of three years (i.e., one year), doubled to two years under the Three Strikes law. The court also stayed under section 654 a term of one year four months for the personal use of a firearm enhancement and a term of one year for the great bodily injury enhancement.

Park appeals, contending (1) his section 667(a) five-year sentence enhancement for his prior serious felony conviction should be stricken because that prior conviction

was reduced to a misdemeanor under section 17, subdivision (b) (hereafter section 17(b)), and then dismissed under section 1203.4; (2) the court abused its discretion by denying his *Romero* motion to dismiss his prior strike conviction; and (3) if this court determines the trial court's exercise of discretion in refusing to dismiss his prior strike conviction was "impacted by the absence of documentation" that his prior conviction had been reduced to a misdemeanor, then his trial counsel provided constitutionally ineffective assistance "in failing to provide documentation for the trial court's consideration."

We conclude that Park's admitted prior serious felony conviction is a prior serious felony conviction for purposes of section 667(a) notwithstanding its 2006 reduction to a misdemeanor under section 17(b)(3), and thus the court did not err by imposing the five-year serious felony enhancement under section 667(a), the court's order denying Park's *Romero* motion was not an abuse of discretion, and Park's ineffective assistance of counsel claim is unavailing. Accordingly, we affirm the order and judgment.

FACTUAL BACKGROUND

A. *The People's Case*

In September 2007 a group of passers-by, including victim Eric Joseph, attempted to stop a fight in which defendant Park was involved.

B. *The Defense Case*

The defense presented no witnesses and offered no evidence other than the following stipulation, which the court received in evidence:

"On September 17th, 2007, San Diego Police Department Officer, Tim Peterson, interviewed [Joseph] at the hospital. Mr. Joseph had been admitted to the hospital and medicated. Mr. Joseph stated that

he stepped in front of his friend to protect him. He said he hit the Asian male in the face. [The] [s]uspect then pulled out a black handgun and shot at him three times. The next day[,] on September 18th, 2007, Detective Hoover spoke to [Joseph] in the hospital. Mr. Joseph said he stepped between [his friend] and the shooter. The shooter pulled out a gun. [Joseph] did not tell Detective Hoover that he hit the shooter."

DISCUSSION

I. FIVE-YEAR PRIOR SERIOUS FELONY CONVICTION ENHANCEMENT

Park contends that the five-year sentence enhancement the court imposed under section 667(a) for his prior serious felony conviction for assault with a deadly weapon (§ 245(a)(1))² should be stricken because that conviction, a wobbler,³ was reduced to a misdemeanor in 2006 under section 17(b)(3)⁴ and dismissed under section 1203.4,

² Section 245(a)(1) provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment."

³ A wobbler is an offense that can be punished "as a felony or misdemeanor depending upon the severity of the facts surrounding its commission." (*People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 360, fn. 17.) Assault with a deadly weapon in violation of section 245(a)(1) is a wobbler because it can be punished as a felony or misdemeanor depending upon the severity of the facts surrounding its commission, as shown by the provisions of that statute (see fn. 2, *ante*).

⁴ Section 17, subdivision (b)(3) provides: "(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a *misdemeanor for all purposes* under the following circumstances: [¶] . . . [¶](3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (Italics added.)

subdivision (a) (hereafter section 1203.4(a)),⁵ and thus the five-year enhancement is an unauthorized sentence. We reject this contention.

A. *Background*

In 2003 Park was convicted in *People v. Park* (Super. Ct. Los Angeles County, No. VA075018-03) of one felony count of assault with a deadly weapon (§ 245(a)(1)). The court in that case suspended imposition of sentence and placed Park on formal probation for three years on condition that he serve 180 days in jail, be subject to gang conditions, receive violence counseling, among other terms and conditions.

On September 20, 2006, after Park completed his probation, his conviction was reduced to a misdemeanor under section 17(b) and then dismissed under section 1203.4.

In the present case, Park's prior section 245(a)(1) conviction was alleged in the information as a separately brought and tried serious felony conviction within the

⁵ Section 1203.4(a) provides in part: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, . . . or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code. . . . However, *in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.*" (Italics added.)

meaning of the five-year sentence enhancement provision set forth in section 667(a).⁶

After the jury returned its verdicts, Park waived his right to a jury trial with respect to that enhancement allegation. When discussing Park's plea regarding that allegation, both Park and his counsel indicated that the prior felony conviction had been reduced to a misdemeanor. The court indicated, however, that the prior conviction was alleged as a felony conviction and asked Park whether he wanted to "admit to having suffered that felony conviction." Park replied, "Yes, Your Honor." The court asked him, "You understood that you had the right to have the jury determine whether you had been previously convicted of a felony?" Park responded, "Yes, Your Honor." Park also answered "yes" when the court asked, "You waived that right to me earlier. Do you understand that?"

The court also explained to Park the consequences of admitting he had suffered that prior felony conviction. Specifically, the court stated that the prior conviction was "a first serious felony prior and . . . a strike prior" and explained that it "dictates to me at sentencing what I can do. Having a strike prior on your record at sentencing causes me to deny you probation, deny you the right to bail. It also causes me to double any sentence that I may impose upon you on the charges that the jury just returned the verdicts on."

⁶ Section 667(a)(1) provides: "In compliance with subdivision (b) of Section 1385, *any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive*, in addition to the sentence imposed by the court for the present offense, *a five-year enhancement for each such prior conviction* on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (Italics added.)

The court asked Park, "Do you understand those are the consequences of having this strike prior and this serious felony prior on your record?" Park replied, "Yes, Your Honor." Knowing and understanding those facts, Park freely and voluntarily admitted the existence of that prior felony assault with a deadly weapon conviction.

The prosecutor then stated, "I just also want to make clear [Park's] admitting it as a serious felony prior as well under [*section*] 667(a)(1), 668 and 1192." (Italics added.) The court responded, "[W]e'll note that," and then asked defense counsel, "You concur in your client's admission?" Park's counsel answered, "Yes, your honor."

The court then made the following findings: "[Park] has knowingly and voluntarily given up his right to jury trial on the prior. He has admitted to the prior. I will . . . accept his admission and find that [Park] has previously been convicted of the *felony* identified, and it's also alleged and will be found to be a *first serious felony prior pursuant to* [*sections*] 667(a)(1), 668 and 1192.7[, subdivision](c)." (Italics added.)

Before sentencing, Park moved for a new trial and brought his *Romero* motion to strike the prior strike conviction. The court denied both motions, and sentenced Park to a prison term of 24 years, which included a five-year term under section 667(a) for his prior serious felony conviction.

B. *Analysis*

In support of his claim that the section 667(a) five-year enhancement is an unauthorized sentence that should be stricken, Park relies on the provision of section 17(b)(3) that indicates that, when a court reduces a felony wobbler offense to a

misdemeanor under the circumstances specified in that subdivision (see fn. 4, *ante*), it "is a misdemeanor *for all purposes*." (Italics added.)

Thus, Park suggests that because his prior serious felony conviction was reduced under section 17(b)(3) to a misdemeanor "for all purposes" that conviction now must be deemed a prior *misdemeanor* conviction for purposes of section 667(a), which, as Witkin explains, "applies when a defendant convicted of a serious felony in the present case has a prior conviction of a *serious felony* in California." (3 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Punishment, § 340, p. 439, italics added.) Thus, he contends, his five-year enhancement is an unauthorized sentence because his prior serious felony conviction is now only misdemeanor conviction and section 667(a) does not apply.

Park's contention is unavailing. As the record shows his prior serious felony conviction was dismissed under section 1203.4 after it was reduced to a misdemeanor under section 17(b)(3), we must consider the provisions of section 17(b)(3) together with those of section 1203.4 in determining the effect of the section 17(b)(3) reduction of that conviction to a misdemeanor on the applicability and operation of section 667(a) in this case. Of particular significance here is the provision in section 1203.4(a) (see fn. 5, *ante*) that, "in any subsequent prosecution of the defendant for any other offense, *the prior conviction . . . shall have the same effect as if probation had not been granted or the accusation or information dismissed*." (Italics added.)

Thus, although Park's prior serious felony conviction was reduced to a misdemeanor under section 17(b)(3) and then dismissed, under the plain language of section 1203.4(a) that prior serious felony conviction has "the same effect" in the current

prosecution "as if probation had not been granted or the accusation or information dismissed." Construing sections 17(b)(3) and 1203.4(a) together, we conclude for purposes of section 667(a) in the instant criminal prosecution that Park's admitted prior serious felony conviction continues to be a prior serious felony conviction notwithstanding its 2006 reduction to a misdemeanor under section 17(b)(3).

Our conclusion is consistent with *People v. Feyrer* (2010) 48 Cal.4th 426, in which the California Supreme Court recently explained that, "[w]hen a trial court grants probation without imposing a sentence, sections 17 and 1203.4, read together, express the legislative purpose 'that an alternatively punishable offense remains a felony . . . until the statutory rehabilitation procedure has been had, at which time the defendant is restored' to his or her former legal status in society, *subject to use of the felony for limited purposes in any subsequent criminal proceeding.*" (*Feyrer, supra*, at pp. 439-440, italics added, quoting *People v. Banks* (1959) 53 Cal.2d 370, 391.)

Our conclusion that Park's admitted prior serious felony conviction continues to be a prior serious felony conviction for purposes of section 667(a), notwithstanding its 2006 reduction to a misdemeanor under section 17(b)(3), also finds support in the provisions of article I, section 28, subdivision (f)(4) of the California Constitution, which were originally enacted in 1982 as section 28, subdivision (f) of that article as part of The Victims' Bill of Rights (Proposition 8) (*People v. Castro* (1985) 38 Cal.3d 301, 305) and were recodified without change as a result of the voters' approval of Proposition 9 in 2008. (See Cal. Const., former art. I, § 28; cf. Cal. Const., art. I, § 28, subd. (f)(4).) Article I, section 28, subdivision (f)(4) provides in part:

"Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of . . . enhancement of sentence in any criminal proceeding." (Italics added.)

Under the foregoing plain language of California Constitution article I, section 28, subdivision (f)(4), "[a]ny" prior felony conviction "shall" be used in any subsequent prosecution "without limitation for purposes of . . . enhancement of sentence." Thus, Park's prior serious felony conviction must be used "without limitation for purposes of . . . enhancement of sentence" in the current criminal prosecution notwithstanding the 2006 reduction of that conviction to a misdemeanor under section 17(b)(3).

Furthermore, to the extent they cannot be reconciled, California Constitution, article I, section 28, subdivision (f)(4) prevails over Penal Code section 17(b)(3). It is well established that when two laws "governing the same subject matter cannot be reconciled the later in time will prevail over the earlier." (*Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7.) "Subdivision (b)(3) of section 17 was added by amendment in 1963." (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1270, citing Stats. 1963, ch. 919, § 1, pp. 2169-2170.) As already discussed, the provisions now found in article I, section 28, subdivision (f)(4) of the California Constitution were enacted in 1982 with the voters' approval of Proposition 8. (See *People v. Castro, supra*, 38 Cal.3d at p. 305.) Thus, as section 17(b)(3) predates those provisions, the latter prevails to the extent its provisions cannot be reconciled with those of the former.

We are also persuaded that our holding is supported by sound public policy. Placing a criminal defendant on probation for a serious felony wobbler provides that person an opportunity for rehabilitation, including the opportunity to have that felony reduced to a misdemeanor under section 17(b)(3) and then dismissed under section 1203.4(a), if his or her performance on probation demonstrates rehabilitation. (See *People v. Feyrer, supra*, 48 Cal.4th at pp. 439-440.) If a defendant knows that his or her serious felony wobbler will be treated as a serious felony in the future, even if it has been reduced to a misdemeanor under section 17(b)(3) and dismissed under section 1203.4(a), the defendant will know that any subsequent serious felony conviction he or she suffers may result in a five-year sentence enhancement under section 667(a). Such a rule provides the defendant with a strong incentive to not reoffend.

Finally, Park's reliance on *People v. Marshall* (1991) 227 Cal.App.3d 502 is unavailing. The *Marshall* court held that the trial court erred when it used the defendant's prior felony conviction for burglary to impose a five-year sentence enhancement under section 667(a) because the defendant's honorable discharge from the California Youth Authority rendered his prior felony conviction a misdemeanor for all purposes by operation of law under section 17, subdivision (c), which was added in 1976.⁷ (*Marshall, supra*, at pp. 504-505.) *Marshall* is inapposite as it did not address the import

⁷ Section 17, subdivision (c) provides: "When a defendant is committed to the Youth Authority for a crime punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, the offense shall, upon the discharge of the defendant from the Youth Authority, thereafter be deemed a misdemeanor for all purposes."

of Proposition 8 with respect to the issue presented here of whether a recidivist defendant's prior serious felony conviction that has been reduced to a misdemeanor under section 17(b)(3) and dismissed under section 1203.4 may be used in a prosecution for a subsequent serious felony offense to impose a five-year sentence enhancement under section 667(a).

II. *ROMERO MOTION TO STRIKE THE PRIOR STRIKE CONVICTION*

Park next contends the court abused its discretion by denying his *Romero* motion to dismiss his prior strike conviction. We reject this contention.

A. *Applicable Legal Principles*

Section 1385, subdivision (a) (hereafter section 1385(a)) provides in part that a trial court "may, either of [its] own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes."

In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court held that section 1385(a) permits a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law (§§ 667, subs. (b)-(i), 1170.12). (*Romero, supra*, at pp. 529-530.) The *Romero* court emphasized that "[a] court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385(a), and is subject to review for abuse." (*Romero*, at p. 530.) Although the Legislature has not defined the phrase "in furtherance of justice" contained in section 1385(a), *Romero* held that this language requires a court to consider both the constitutional rights of the defendant and

the interests of society represented by the People in determining whether to strike a prior felony conviction allegation. (*Romero*, at p. 530.)

In *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*), our state Supreme Court further defined the standard for dismissing a strike "in furtherance of justice" by requiring that the defendant be deemed "outside" the "spirit" of the Three Strikes law before a strike is dismissed: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385(a), or in reviewing such a ruling, the court in question 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 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 ."

In *People v. Carmony* (2004) 33 Cal.4th 367 (*Carmony*), our high state court held a trial court's decision not to dismiss a prior conviction allegation under section 1385 is reviewed under "the deferential abuse of discretion standard." (*Carmony*, at p. 371.) *Carmony* explained that when reviewing a decision under that standard, an appellate court is guided "by two fundamental precepts. First, ' [t]he 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.] Second, 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.' " ' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

B. *Background*

In support of his *Romero* motion to strike his 2003 prior serious felony and strike conviction for assault with a deadly weapon (§ 245(a)(1), Park cited his background, character, and prospects, noting that he had been working in Las Vegas in a position of trust at the Mirage Casino at the time of his arrest in this matter, he was a youth pastor, he had completed two years of college, and he wanted to work in casinos upon his release.

1. *Ruling*

Following oral argument, the court denied the motion, finding that Park is a "violent felon [and] repeat offender" who "does not fall outside the spirit of the Three Strikes law." In exercising its discretion, the court reviewed the factors discussed in *Williams, supra*, 17 Cal.4th 148 (hereafter referred to as the *Williams* factors), and found that Park's 2003 prior offense was violent in that he used "some type of stick or pole" and the offense was not remote in time, his current offense was "extremely violent" because he "took three shots at an unarmed victim," the two offenses were similar in that they both involved the use of violence, Park has a criminal record both as a juvenile and as an

adult, and his offenses "are increasing in severity" because he "went from stolen cars and theft offenses to an armed assault" with a pole, which is a deadly weapon, and now to assault with a gun.

The court noted that, "on the other side of the coin," there was "no issue of drug addiction [and] no gang affiliation"; Park expressed willingness to rehabilitate himself. He was educated and intelligent, held a job, and had family support.

C. *Analysis*

Applying the deferential abuse of discretion standard, as we must (*Carmony, supra*, 33 Cal.4th at p. 371), we conclude Park has failed to meet his burden on appeal of showing the court's denial of his *Romero* motion was an abuse of discretion. The record shows the court understood both the scope of its discretion to strike the prior conviction and the various *Williams* factors it was required to consider, which it did consider in exercising its discretion. The court examined whether Park should be deemed outside the spirit of the Three Strikes law, as it was required to do (*Williams, supra*, 17 Cal.4th at p. 161), and determined that Park is a violent recidivist felon who does not fall outside the spirit of the Three Strikes law. In making this determination, the court made findings, supported by the record, that Park's prior and current offenses were similar in that they both involved the use of violence; Park has a criminal record both as a juvenile and as an adult, and his offenses are "increasing in severity." The court did not neglect to consider Park's positive attributes, such as his expressed willingness to rehabilitate himself, his employment, education, and family support, and the fact that he is not addicted to drugs and has no gang affiliation.

As discussed, *ante*, an appellant does not carry his burden on appeal by merely showing reasonable people might disagree on whether to strike a prior conviction allegation. (*Carmony, supra*, 33 Cal.4th at p. 378.) Here, at best, Park has merely shown reasonable people might disagree on whether to strike the prior conviction allegation. Accordingly, we affirm the court's order denying his *Romero* motion.

III. *INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM*

Last, Park contends that, if this court determines the trial court's exercise of discretion in refusing to dismiss his prior strike conviction was "impacted by the absence of documentation" that his prior conviction had been reduced to a misdemeanor, then his trial counsel provided constitutionally ineffective assistance "in failing to provide documentation for the trial court's consideration." This contention is unavailing.

A. *Applicable Legal Principles*

Generally, in order to show that defense counsel provided ineffective assistance at trial, the burden is on the defendant to show both " 'that [his] counsel's performance fell below an objective standard of reasonableness; *and* . . . that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

B. *Analysis*

Park asserts that, "[a]lthough it was mentioned in [his *Romero* motion] papers that [his] prior conviction had been reduced to a misdemeanor, that information was not

corroborated in the probation report, and was not mentioned by the trial court as a factor it considered in determining whether to strike [Park's] prior strike conviction." He contends "[t]hese circumstances *suggest* the trial court *may* not have fully considered the circumstance that the prior conviction was ultimately deemed a misdemeanor, and dismissed" (italics added), and thus, "[t]o the extent this Court finds the trial court's exercise of discretion to have been impacted by the absence of documentation concerning the ultimate disposition of the prior, then trial counsel was ineffective in failing to provide documentation for the trial court's consideration."

The record shows the court carefully and properly considered the circumstances underlying the prior conviction, not its legal status as a felony or misdemeanor. The record shows the court read Park's *Romero* motion papers, which expressly informed the court that "[t]he 2003 conviction that [he] admitted to was reduced to a misdemeanor by the sentencing court, which was aware of all the facts and circumstances of that case. Knowing about those circumstances, the court in that case deemed that the offense was a misdemeanor." The court was thus aware of the reduction of the prior felony conviction to a misdemeanor, which, in any event, was not relevant to its ruling on Park's *Romero* motion. While the circumstances underlying the prior conviction were relevant under *Williams, supra*, 17 Cal.4th at page 161, which requires the trial court to consider "the nature and circumstances of [the defendant's] . . . prior serious and/or violent felony convictions," the reduction of the prior conviction to misdemeanor status was not.

Park's ineffective assistance of counsel claim is based on mere speculation that defense counsel's failure to document that the prior serious felony conviction had been

reduced to a misdemeanor contributed to the court's well-supported decision to deny Park's *Romero* motion. We conclude Park has failed to meet his burden of demonstrating either that his counsel's performance fell below an objective standard of reasonableness or that, assuming counsel committed the alleged unprofessional error, there is a reasonable probability that, but for that assumed error, a determination more favorable to Park would have resulted.

DISPOSITION

The judgment and order are affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.