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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHELL ANTWONE JOHNSON, Defendant and Appellant.	B276504 (Los Angeles County Super. Ct. No. LA081109)

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin L. Herscovitz, Judge. Affirmed.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Michell Antwone Johnson of second degree robbery.[1] On appeal, defendant contends: (1) the trial court erred in excluding evidence of third party culpability; (2) the trial court abused its discretion in failing to dismiss one or more of his prior strikes; and (3) the trial court erred in admitting evidence of defendant's prior convictions for impeachment. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 11, 2014, Sean Cohen was at his business, Re-Cell It, which bought used electronics and resold them online. The front and rear portions of the store were separated by a wall and a door; only store employees went to the rear of the store. Shortly before 8:00 p.m., Cohen was preparing to leave the shop. He had organized and cleaned earlier that evening and was alone. Cohen left through a rear exit and approached his car which was parked at the back of the shop. Two men approached, one of whom was later identified as defendant. Defendant had a gun. He also had a cigarette in his mouth and was holding a "Big Gulp" drink cup.

The two men told Cohen to open the door of the shop. Defendant flicked the butt of his cigarette in the back area of the store. Cohen went directly into the bathroom in the shop. He told the two men to do "whatever they needed" and to leave him alone. The men demanded that Cohen help them, threatening to shoot him if he did not assist them. They forced Cohen to load

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[1] Throughout the proceedings in the trial court, defendant was referred to as "Antwone Norwood," however, the information and the notice of appeal identify him as Michell Antwone Johnson, listing "Antwone Norwood" as his alias. We use the term "defendant" in this appeal.

store merchandise into a bag. Defendant set his drink cup on Cohen's desk. Cohen put the merchandise—mainly cell phones—into bags. The men filled a box with laptops. They then emptied the cash register and told Cohen to lie down on the floor in the rear of the store. They again threatened to shoot and kill him if he did not comply. The two men took Cohen's keys. He could hear his car doors open and close several times. The owner of a neighboring salon saw two men loading up Cohen's car. She assumed they were Cohen's friends and asked them to help her move a table inside her shop. They refused. One of them said he was busy and had to pick up his daughter.

The men took several additional loads of merchandise to Cohen's car then went back inside the shop and told Cohen to lie down in the bathroom. His cell phone rang. The two men grabbed the phone, left, and drove away in Cohen's car. Cohen got up, locked the door, and called 911. He later found his cell phone in the toilet. When police arrived they collected the Big Gulp cup and a cigarette butt, which was on top of a Swiffer sweeping tool. Defendant's DNA was found on the cup and the cigarette butt. Cohen identified defendant at trial as one of the two men.

Defendant testified at trial. According to defendant, on the day of the incident he went into Re-Cell It to see if the shop would repair or buy his cell phone. Cohen quoted what defendant considered to be an extremely high price to fix the phone, then offered an insultingly low price to buy the phone. Defendant became angry, used profanity, knocked some items off a counter, and left the shop. On cross-examination, defendant testified he was smoking a cigarette when he went into the store. He said he probably threw it down during the confrontation, but he was

unsure. He was drinking soda from a Big Gulp cup when he went into the store but he was not sure when or where he put it down. He could not explain how the cigarette butt got to the back of the store. He denied entering the store from the rear door. He admitted that when he was interviewed by a detective he did not tell the detective about the incident with Cohen at the store. He testified he did not remember the incident during the interview; he was thinking only of the detective's statement that there had been a robbery and that he was not involved. He could only think about not wanting to be held accountable for something he did not do.

A jury found defendant guilty of one count of second degree robbery (Pen. Code, § 211).[2] The jury found not true the allegation that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). Defendant admitted suffering three prior strike convictions, and five prior convictions within the meaning of section 667.5, subdivision (b). The trial court sentenced defendant to a total prison term of 41 years to life. This appeal followed.

DISCUSSION

I. The Trial Court Did Not Bar Evidence of Third Party Culpability

Defendant argues the trial court abused its discretion in excluding evidence of third party culpability. We disagree with defendant's interpretation of the record and find no error.

A. Background

During the defense cross-examination of the investigating police officer, defense counsel asked if the officer was familiar

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[2] All further statutory references are to the Penal Code unless otherwise noted.

with another suspect with the last name Jackson. The officer indicated he had no independent knowledge of the suspect. In reviewing the notes of previous detectives while on the stand, the officer saw the name in a follow-up report. When defense counsel asked for the suspect's first name, the trial court sustained a hearsay objection.

Outside the presence of the jury, the court asked what evidence linked the other suspect to the scene of the crime. Defense counsel indicated Jackson had one of the stolen phones and another detective—detective Martinez—spoke to Jackson on the telephone. Martinez told Jackson he would like to meet to discuss the matter further, but Martinez never followed through with a meeting. Defense counsel indicated he thought his office had subpoenaed Martinez but they had not, and he was trying to track Martinez down. The trial court stated the investigating officer's testimony repeating Martinez's report was hearsay and again sustained the objection.

Later, the prosecutor indicated Martinez was available, but questioned what the offer of proof would be as to Martinez. The court inquired. Defense counsel explained that Cohen, the victim, told Martinez he discovered one of the stolen phones was for sale on the craigslist website. The person selling the phones was Jackson. Martinez set up an appointment with Jackson, but Martinez later canceled and the police did not contact Jackson again.

The court suggested Cohen's testimony was a foundational requirement for Martinez's testimony about Jackson. Defense counsel agreed.

The court then asked how evidence regarding Jackson exonerated defendant. Defense counsel argued the evidence would show the police department "dropped the ball" and did not conduct a complete investigation. The trial court noted there were "tens of items stolen in this case, which means there's potentially tens of people who have received stolen property. Any one of them could have put their item on craigslist. None of that evidence would ever help this jury to decide whether or not [defendant] was one of the perpetrators of the robbery."

Still, the court continued: "You know, if you want to call back Mr. Cohen and attempt to lay a foundation, I'll let you call back Mr. Cohen and ask with specificity; but his suspicion—I mean, if the person gave the serial number of a cell phone and that serial number was one of the cell phones stolen on the date in question, then you've got something – some hard evidence that should have been followed up on. [¶] But just Mr. Cohen's suspicion that – I don't know if we're talking about one laptop, one cell phone. Are we talking about someone advertising multiple items? I don't have any of that information before me in the record because Mr. Cohen was never asked."

After further discussion, and the reading of an excerpt from the police report regarding Jackson,[3] the court further indicated: "If you want to call back Mr. Cohen as a foundational requirement to see if there's any more specificity than his mere suspicion that an iPhone or Android phone or some other phone

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[3] The excerpt was as follows: "The victim called and said he believed that one of his stolen phones was on craigslist. The victim directed Detective O'Shea to the site, and he noticed the name of Kevin and a cell phone number, and that's when they did the check. It came back to Kevin Lee Jackson—and then . . . ."

may have been his and the police didn't investigate – I mean, how many ads are there on craigslist for used cell phones? Hundreds? Thousands? . . . So I don't really see where we're going there. If you want to call back Mr. Cohen . . . we can have a 402 hearing to see the foundational requirement of what the police were told by him insofar as his personal investigation; but, when we get to the point, how does that exonerate [defendant]?"

Following defendant's testimony, counsel indicated the defense would have no more witnesses. The following colloquy ensued:

"The Court: And I take it you've reevaluated, in light of your client's testimony, not to call Detective Martinez or –

[Defense counsel]: That's correct. We spoke about that. He had certain questions about it, and I explained to him what the court ruling was, so he didn't quite understand it.

The Court: Okay. But I assume that part of the strategy has changed now that your client has testified? I assume that was the reason why you don't want to call them?

[Defense counsel]: Yes, your honor."

B. Discussion

On appeal, defendant argues the trial court barred him from offering evidence of third party culpability. We disagree with this interpretation of the proceedings. Our review of the record, as detailed above, reveals the trial court did not exclude the evidence defendant sought to offer. Instead, the trial court sustained a hearsay objection to the testimony of the investigating officer. The officer had no personal knowledge of Jackson, or of Martinez's interactions with Jackson, and could only read from another officer's report. Defendant does not challenge the ruling on the hearsay objection. The court then

indicated it would allow defendant to re-call Cohen to lay a foundation for the evidence about the police department's contact with Jackson, including Martinez's testimony. Defendant expressly chose not to re-call Cohen to lay the foundation for Martinez's testimony. The trial court did not bar the evidence.

Defendant contends the trial court's questions or suggestions that the evidence regarding Jackson would not help the jury decide defendant's culpability were "in effect" a statement that it would be "pointless" to call Martinez as a witness. However, the record belies this claim. The trial court expressed its skepticism about the evidence. Yet, despite this critical view of the proposed testimony, the court expressly allowed defendant the opportunity to lay a foundation for the testimony—even inquiring at the close of the defense case about the potential Martinez testimony. We therefore disagree that it was futile for defendant to proceed with calling Cohen for an Evidence Code section 402 hearing, as the trial court allowed, to lay a foundation for the Martinez testimony.

Moreover, even were we to accept defendant's contention that the trial court's comments about the proposed Martinez testimony were effectively a ruling regarding evidence of third party culpability, we would find no abuse of discretion. " 'To be admissible, the third-party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.' [Citation.] However, 'evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence

linking the third person to the actual perpetration of the crime.' [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 140–141.)

Here, there were two perpetrators involved in the robbery, defendant's presence at the scene was established by DNA evidence, and it was unclear how "Jackson" had come into possession of the phone, or whether it could even be reliably determined to have been one stolen from the victim's store. Thus, to the extent the evidence was offered to show third party culpability, the court appropriately questioned whether it would be sufficient to raise a reasonable doubt about defendant's guilt. And, as explained above, the court allowed for further development of the evidence, which defendant declined to do. We find no error.

II. The Trial Court Did Not Abuse its Discretion in Denying Defendant's *Romero* Motion

A. Background

Defendant filed a motion requesting that the court, in the interest of justice, dismiss his three prior strike convictions: a 2001 burglary, a 2002 burglary, and a 2007 robbery. Defendant asked the court to consider the mitigating factors that he had the support of his wife; he had provided loving support to his family; he was employed "when work is available"; his past included abandonment by his father, drug use by his mother, and little parental support during his teen years; and he expressed remorse for his past. Defendant further argued no person was seriously injured during the prior offenses and the current victim was not physically harmed. He contended his prior convictions were "years ago when defendant was young and stupid."

The trial court denied the motion. The court explained that although the jury found the firearm allegation not true, "even if it was not a real gun this was a serious, large scale, armed robbery of a single man where the taking included his leased Mercedes Benz, cash, electronics, almost all showing on videotape . . . . So look at the current events, the current offense cannot be any more serious or violent." The court then considered defendant's criminal history and the circumstances of the underlying strike offenses. The court found there were no mitigating factors in the prior crimes and concluded it would not be in the interest of justice to vacate any of the strike convictions.

B. Discussion

" '[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 Penal Code 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.' ([*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)].)" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

We review the trial court's ruling for an abuse of discretion. " '[I]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] Where the record is silent [citation], or '[w]here the record demonstrates that the trial court balanced the

relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]. Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors described in *Williams, supra,* 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion." (*People v. Carmony*, *supra,* 33 Cal.4th at p. 378.)

There were no such extraordinary circumstances in this case. The trial court noted defendant had a continuous string of criminal behavior throughout his adult life, including the three prior strikes. When he committed the instant offense he was still on parole for a 2013 conviction for being a felon in possession of a firearm. Further, even without a weapon, the instant offense was, as the trial court described, a large scale, serious robbery, in which defendant and an accomplice repeatedly threatened to kill the victim. While defendant offered up his family support and involvement as a mitigating factor, the trial court could reasonably consider his pattern of serious criminal behavior and conclude defendant could not be deemed outside the spirit of the

Three Strikes law. (*People v. Solis* (2015) 232 Cal.App.4th 1108, 1125.) We find no abuse of discretion.

III. The Trial Court Did Not Abuse its Discretion in Admitting Defendant's Prior Convictions for Impeachment

At trial, the court admitted evidence of defendant's 2001 and 2002 burglary convictions and the 2013 firearm possession conviction, for impeachment purposes only. The court excluded evidence of two other convictions: a 2007 robbery conviction and an 2011 conviction for petty theft with a prior. Defendant contends the trial court should have excluded evidence of his prior convictions under Evidence Code section 352. We find no abuse of discretion.[4]

" ' "[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude." ' [Citation.] Beyond this, the ' "trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes. . . ." ' [Citation.].) 'When determining whether to admit a prior conviction for impeachment

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[4] We disagree with the People's argument that defendant forfeited his arguments on appeal by failing to object on similar grounds in the trial court. At trial, defense counsel explicitly invoked Evidence Code section 352 as the basis for defendant's objection to the admission of evidence of his prior convictions. As we understand his argument on appeal, he contends the factors set forth in *People v. Beagle* (1972) 6 Cal.3d 441, abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1189-1190, support his argument that the trial court should have excluded evidence of the prior convictions as more prejudicial than probative under Evidence Code section 352. We find the argument was preserved for review.

purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 722.)

Defendant argues the trial court should have excluded evidence of the burglary convictions because (1) there was no evidence the burglaries reflected on defendant's honesty or veracity; and (2) the prior convictions were too remote.[5] We disagree.

As explained in *People v. Castro* (1985) 38 Cal.3d 301, any felony conviction involving moral turpitude may be used to impeach, even if the immoral trait is something other than dishonesty. (*Id.* at p. 314.) Further, "any felony conviction evincing moral turpitude, as here, 'has some "tendency in reason" (Evid. Code, § 210) to shake one's confidence in [a witness's] honesty.' [Citation.]" (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1496; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) The trial court could appropriately conclude these prior convictions reflected on defendant's veracity without a showing that the burglaries involved an intent to commit theft.[6] (*People v. Knowlden* (1985) 171 Cal.App.3d 1052, 1056–1057.)

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[5] Although the headings in defendant's appellate briefing assert the trial court erred in admitting his "convictions" for impeachment, the argument in the brief challenges only the admission of evidence of the burglary convictions.

[6] Several cases defendant cites to support his argument considered whether a burglary may be considered a crime of moral turpitude if it involves an intent to commit a crime other

Further, the burglary convictions were not excessively remote, particularly in light of defendant's intervening convictions in 2007, 2011, and 2013. (*People v. DeCosse* (1986) 183 Cal.App.3d 404, 411–412.) "Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior." (*People v. Mendoza*, *supra,* 78 Cal.App.4th at pp. 925–926.)

The trial court could reasonably conclude the probative value of the prior burglary convictions as impeachment evidence outweighed any prejudicial effect. The burglary convictions were probative of defendant's credibility and the court limited the questioning such that the jury did not hear any facts regarding the underlying offenses. Defendant testified despite the impeachment evidence. We find no abuse of discretion and no violation of his constitutional right to a fair trial. (*People v. Robinson* (2011) 199 Cal.App.4th 707, 716.)

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than theft. These cases were decided before the passage of Proposition 8 in 1982 and the subsequent enactment of article I, section 28 of the California Constitution. Cases decided after Proposition 8 and our high court's decision in *People v. Castro, supra,* have concluded burglary, regardless of its nature, is a crime of moral turpitude and is admissible for impeachment. (*People v. Plager* (1987) 196 Cal.App.3d 1537, 1545; *People v. Hunt* (1985) 169 Cal.App.3d 668, 675; *People v. Knowlden, supra,* 171 Cal.App.3d at pp. 1056-1057.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.