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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR HERNANDEZ HINOJOSA,

Defendant and Appellant.

B271831

(Los Angeles County  
Super. Ct. No. VA134701)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debra Cole-Hall, Judge. Affirmed.

Hancock and Spears, Alan E. Spears, 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, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Hector Hernandez Hinojosa appeals from a judgment of conviction of carjacking, taking and driving of a stolen vehicle, misdemeanor hit and run, and assault with a deadly weapon. On appeal, he contends the trial court abused its discretion when it declined to dismiss one or both of his prior strikes, and that his attorney was ineffective because he did not object to the aggravating factors cited in the prosecution's sentencing memorandum. We find no reversible error and affirm.

### **FACTUAL AND PROCEDURAL SUMMARY**

On April 9, 2014, defendant stole Joel Orense's white Honda parked on La Reina Avenue in the City of Downey. A few hours later, he made a left turn in the car at the intersection of 166th Street and Bloomfield Avenue in the City of Cerritos, where he crashed Orense's vehicle into Susie Choi's Mercedes Benz. Defendant exited the stolen vehicle, and fled the scene without ascertaining whether Choi was hurt. The collision caused her airbag to deploy. As a result, Choi suffered a cut on her forehead and needed to be assisted out of the vehicle. Meanwhile, defendant, appearing anxious, pounded on the hoods and windows of nearby vehicles, telling drivers to let him into their cars and give him a ride. Some witnesses exited their vehicles and chased defendant.

Upon being chased, defendant left the scene and eventually traveled a short distance on Bloomfield Avenue where he found Nancy Zaragoza in a parking lot, sitting alone in her SUV. Defendant entered the vehicle and asked Zaragoza for a ride. Zaragoza immediately got out. Defendant followed. With a knife pointed at Zaragoza, defendant told her to give him the "fuckin' keys." Zaragoza complied.

Defendant then drove off in the SUV. Zaragoza and her coworker, who had arrived at the scene, called 911, which led police to begin searching for defendant. He was located in the city of Cerritos. During the police pursuit, defendant traveled at a high speed and weaved in and out of lanes. At one point he was on the wrong side of the road. He did stop at traffic lights. After finding himself stuck in street traffic, defendant stopped, exited the vehicle, and surrendered without resisting. A deputy then searched the stolen SUV and found a knife in the open position on the passenger-side floorboard.<sup>1</sup>

Defendant was charged with carjacking as to Zaragoza (count 1; Pen. Code, § 215, subd. (a)<sup>2</sup>); taking/driving a stolen vehicle as to Zaragoza (count 2; Veh. Code, § 10851, subd. (a)); taking/driving a stolen vehicle as to Orense (count 3; *ibid.*); hit and run driving as to Choi (count 4; *id.*, § 20002, subd. (a)); and assault with a deadly weapon as to Zaragoza (count 5; § 245, subd. (a)(1)). A deadly and dangerous weapon enhancement was alleged as to count 2 for the use of a knife. (§ 12022, subd. (b)(1).)

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<sup>1</sup> Defendant's defense at trial was that his actions were caused by methamphetamine-induced delusions. He had not mentioned using methamphetamine or having paranoid delusions when interviewed after his arrest, and had not exhibited symptoms of being under the influence of methamphetamine. He also testified he had suffered a head injury in 2011 when he was struck by a driver while riding his bicycle. The resulting injury affected his memory, but his expert agreed that his memory deficits played no role in the crimes for which he was on trial.

<sup>2</sup> All further statutory references are to this code unless otherwise indicated.

It also was alleged that defendant had two prior strike convictions within the meaning of the Three Strikes law. One of the priors also was alleged to be a serious felony, for which he had served a prior prison term. (§§ 667, 667.5, 1170.12.)

In two separate jury trials, defendant was convicted on four counts. At the first trial, he was convicted of hit and run driving as to Choi (count 4). The jury deadlocked on the remaining counts, and the trial court declared a mistrial. At the second trial, the jury convicted him of carjacking as to Zaragoza (count 1); unlawful driving or taking of a vehicle as to Orense (count 3), and assault with a deadly weapon as to Zaragoza (count 5). Count 2, taking/driving a stolen vehicle as to Zaragoza, was dismissed at the request of the prosecution prior to the first trial.

Both parties filed sentencing memoranda. The prosecution asked the court to select the upper term for the carjacking and assault convictions under the Three Strikes law.<sup>3</sup> In support, it

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<sup>3</sup> Section 667, subdivision (e)(2)(A) provides: “[I]f a defendant has two or more prior serious and/or violent felony convictions . . . the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of: (i) Three times the term otherwise provided as punishment for each current felony conviction . . . (ii) Imprisonment in the state prison for 25 years. (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any [applicable] enhancement. . . .” “[T]he procedure for calculating the minimum term under option 1 is as follows: The trial court selects the upper, middle or lower term in accordance with section 1170, subdivision (b) just as it would if there were no three strikes law. The court then triples the selected term. If the resulting term is greater than the terms under options 2 and 3, the court imposes the resulting term as the minimum term of the

cited the following circumstances in aggravation: (1) Defendant threatened Zaragoza with a knife, and he used profanity to acquire the car keys. He showed disregard for the safety of others by zig-zagging through traffic during the police chase. The crime involved great violence, great bodily harm, and threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. (Cal. Rules of Court, rule 4.421(a)(1).) (2) Defendant used a weapon—a knife—at the time of the commission of the crime. (*Id.*, rule 4.421(a)(2).) (3) Zaragoza was alone and unarmed. Therefore, she was a particularly vulnerable victim. (*Id.*, rule 4.421(a)(3).) (4) Defendant was armed with a knife, and his attempt to escape put other people’s lives at risk, posing serious danger to the public. (*Id.*, rule 4.421(b)(1).) (5) Defendant’s prior convictions for attempted robbery with the use of a firearm and battery with serious bodily injury were either numerous or of increasing seriousness. He committed his current crimes while on parole. (*Id.*, rule 4.421(b)(2).) (6) He had served a prior prison term. (*Id.*, rule 4.421(b)(3).) (7) He was on parole when the current crimes were committed. (*Id.*, rule 4.421(b)(4).) (8) And his prior performance on parole was unsatisfactory. (*Id.*, rule 4.421(b)(5).)

In his sentencing memorandum, defendant acknowledged three circumstances in aggravation: (1) He was armed with a weapon at the time of the commission of the crime. (Cal. Rules of Court, rule 4.421(a)(2).) (2) He had served a prior prison term. (*Id.*, rule 4.421(b)(3).) (3) He was on parole when the crime was

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indeterminate life sentence. If the resulting term is less than the terms under options 2 and 3 the court imposes whichever of these latter two options yields the greater minimum term.” (*People v. Keelen* (1998) 62 Cal.App.4th 813, 820.)

committed. (*Id.*, rule 4.421(b)(4).) He also asserted four circumstances in mitigation: (1) The crime was committed because of an unusual circumstance. (*Id.*, rule 4.423(a)(3).) (2) He did not harm or threaten victims and exercised caution to avoid harm to persons or damage to property. (*Id.*, rule 4.423(a)(6).) (3) He mistakenly believed he had a claim or a right in the possession of the property taken, or mistakenly believed his conduct was legal. (*Id.*, rule 4.423(a)(7).) (4) He was suffering from a mental condition that significantly reduced culpability for the crime. (*Id.*, rule 4.423(b)(2).)

Defendant admitted his prior strike convictions of attempted robbery with a gun and battery with great bodily injury. At the subsequent sentencing hearing, he filed a *Romero*<sup>4</sup> motion to strike his prior strike convictions. The motion emphasized his young age, and that he had received his first strike at the age of 17, his second strike at 20, and his third strike at 23. The motion also argued that he was outside the spirit of the Three Strikes law because his father had died when he was only 14 years of age. The death of his father caused his mother to work long hours and leave him unsupervised for much of his adolescence, which led to his drug addiction and several misdemeanor and felony convictions. The motion also mentioned defendant's memory loss after being hit by a car while riding a bicycle at age 19. The prosecution opposed the *Romero* motion, arguing defendant had multiple chances to learn to obey the law but failed to take advantage of them and regularly reoffended. It emphasized the elements of violence in defendant's strike priors: that he used a gun during the attempted robbery and that he

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<sup>4</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

seriously injured a teenager during the assault, as well as the danger his most recent crimes posed to himself and others.

The trial court denied the request to strike prior strike convictions: “[T]he court does have the discretion to strike strikes. In looking over defense counsel’s motion, he does make a—I guess the proper word is emotional argument regarding the age of the defendant and the life of the defendant after his father died, and his mom was working hard trying to support him and that he turned to drugs and unfortunately that led to the crimes that have been committed by the defendant.

“The District Attorney’s Office focuses on the criminal history of the defendant, and it began in 2005 with at least four home-on-probation sentences. Then he had the strike—the attempted 211 when he was a juvenile and went to CYA, then he had the conviction in 2012 when he was sent to prison. And he was released from prison in 2013, and then in 2014, he committed the crime which was the subject of the trial in this case.

“At this time the defense request to have the court strike the strikes is denied.”

The court imposed a term of life in prison with a minimum of 25 years on count 1, and a consecutive five-year term under section 667, subdivision (a)(1). For count 3, the court imposed a consecutive low term of 16 months, which was doubled pursuant to section 1170.12, subdivisions (a) through (d). The court imposed and stayed a 25-year term on count 5 pursuant to

section 654, and imposed and stayed the six-month term on count 4 in the interest of justice.<sup>5</sup>

This appeal followed.

## DISCUSSION

A trial judge “may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.” (§ 1385.) In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court held this statute allowed a trial court to strike an allegation that a defendant previously had been convicted of a “serious” or “violent” felony. (*Id.* at p. 504.) In deciding whether to strike such a prior conviction, the trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious 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*).)

The issue on appeal is whether the trial court abused its discretion. Our review is deferential. Absent contrary evidence in the record, we presume the trial court correctly applied *Williams* and properly exercised its discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) “In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited

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<sup>5</sup> The abstract of judgment omits count 4, and must be corrected to accurately reflect the conviction and sentence on that count.



circumstances.” (*Ibid.*) “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.” (*Ibid.*) Thus, reversal is permissible in only limited circumstances, such as when the trial court was unaware of its discretion to dismiss, when the trial court considered impermissible factors in declining to dismiss a prior conviction, or when the trial court’s sentencing is arbitrary, capricious, or patently absurd. (*Id.* at 378.) We do not reverse where the record is silent, or where we might disagree with how the trial court balanced the factors that determined the result. (*Id.* at pp. 378–379.)

We presume the trial court reviewed all relevant factors unless the record clearly shows otherwise. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310; see also *People v. Holguin* (1989) 213 Cal.App.3d 1380, 1317–1318 [“unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors [citations]”].) Here, the trial court expressly acknowledged it had discretion to strike the priors and it reviewed the arguments both sides made in the *Romero* briefs. Those arguments addressed defendant’s prior convictions, current conviction, and his personal and family history. Further, the result of the trial court’s decision to deny the *Romero* motion—a sentence of a life term in prison with a minimum of 25 years on the carjacking count—is

not arbitrary, capricious, or patently absurd under the specific facts of this case.

Defendant invites us to reweigh the relevant factors and contends that the trial court should have allocated greater weight to factors favorable to him and less or none to those that are unfavorable. He also calls on us to draw inferences in his favor on all relevant factors, something we cannot do under the deferential standard of review on appeal.

Defendant argues that current and prior convictions and parole violations are present in almost every Three Strikes case and therefore should have minimal significance when deciding to impose a Three Strikes sentence. This is incorrect. According to *Williams, supra*, 17 Cal.4th 148, 161, we are to give “preponderant weight . . . to factors intrinsic to the scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions.” (*Ibid.*) Thus, contrary to defendant’s argument, his “present felonies and prior serious and/or violent felony convictions” are important considerations to the Three Strikes scheme. (*Ibid.*)

Defendant argues the factors in aggravation included in the prosecution’s sentencing memorandum were improper, and therefore created a misperception of defendant’s current and prior felonies, all of which led to the denial of his *Romero* motion. First, defendant denies acting callously by arguing that although he used an expletive when demanding the keys from Zaragoza, the single use of an expletive has never amounted to a circumstance in aggravation. While that may be correct, the prosecution’s sentencing memorandum listed the use of an expletive together with the use of a knife, not separately. The expletive was offered as an attendant circumstance to a relevant

factor. (Cf. *People v. Bradford* (1997) 15 Cal.4th 1229, 1378 [explanation of defendant's conduct surrounding violent activity relevant to understanding that activity].) Second, defendant argues that there is no indication in the record that he threatened anyone's life. Yet, he does not challenge his jury conviction of assault with a deadly weapon based upon the use of a knife against Zaragoza, which we must presume is supported by substantial evidence. He may not challenge that conviction indirectly through an appeal from the denial of a *Romero* motion.

Alternatively, defendant argues that there was an improper dual use of the knife under section 1170, subdivision (b) because although he was punished for its use as an element of the assault conviction, it also was offered as an aggravating factor that subjected him to a sentence enhancement. This argument is not convincing for several reasons. First, defendant's sentence on the assault count was stayed. His active Three Strikes sentence was imposed on the carjacking count, and use of a deadly weapon is not an element of carjacking. (*People v. Calderon* (2013) 214 Cal.App.4th 656, 664.) Second, section 1170, subdivision (b) prohibits the imposition of "an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." This prohibition applies to *determinate* sentencing. The only relation it bears to *indeterminate* life sentencing under the Three Strikes law is through the first option in section 667, subdivision (e)(2), which allows tripling the upper term for the underlying offense. (See *People v. Keelen*, *supra*, 62 Cal.App.4th at p. 820.) While the prosecution suggested tripling the upper term for both the carjacking and assault offenses, the record does not indicate the court followed that suggestion. Rather, the court chose the

minimum term of 25 years for both offenses under the second option in section 667, subdivision (e)(2)(iii), to which the prohibition in section 1170, subdivision (b) does not apply.

Third, the record does not show that any separate sentence enhancement was imposed based on the use of a knife. To the extent defendant may be understood to argue that the Three Strikes law is itself an enhancement, that sentencing scheme automatically applies to defendants with qualifying prior and current felony convictions “[n]otwithstanding any other law.” (*People v. Acosta* (2002) 29 Cal.4th 105, 132, citing § 667, subd. (f)(1).) Fourth, the use of a knife is a circumstance of defendant’s current felonies the court may consider in deciding whether to exercise leniency in striking a prior conviction. (See *Williams*, *supra*, 17 Cal.4th p. 161.) Thus, it was a proper factor to consider in denying the *Romero* motion. Defendant also relies on the prosecution’s decision to use his reckless driving as an aggravating factor but not bring a separate charge based on it. Prosecutorial discretion allows the prosecution to advance charges as it sees fit. (*People v. Birks* (1998) 19 Cal.4th 108, 129.) The decision not to charge yet another crime does not indicate defendant did not drive dangerously. The record demonstrates that defendant crashed into Choi’s Mercedes Benz and fled the scene of that accident. Moments later, he led the police on a pursuit in Zaragoza’s stolen SUV where he drove at high speed, weaving in and out of traffic, and at one point driving on the wrong side of the road.

Defendant argues that, contrary to the prosecution’s depiction, Zaragoza was not any more vulnerable than any other carjacking victim: “She was neither elderly nor visibly disabled in any fashion, and appellant did not take advantage of a position

of trust or confidence. Although she was apparently not sitting with anyone in her vehicle, she was just outside of her work-place and was, in fact, immediately aided by a co-worker.” In his reply brief, appellant claims that the characterization of Zaragoza as vulnerable is “sexist” and “nonsense.” To the contrary, the record depicts the carjacking as involving an unsuspecting woman, alone, inside her vehicle in a parking lot. It is not unprecedented to infer vulnerability when women are relatively isolated. (See, e.g., *People v. Daniels* (2009) 176 Cal.App.4th 304, 315 [defendant approached woman “when she was alone and vulnerable”].)<sup>6</sup> Defendant also argues that the current crimes were committed under an unusual circumstance in that there was no sophisticated criminal plan, and this fact should serve as a factor in mitigation. To support his argument, defendant argues that the entire situation was a spontaneous reaction driven by panic: “[i]t appears appellant went to work that day intending simply to do his job, and, whether or not the product of his methamphetamine-use, he panicked in the face of having to return to custody.” Whether or not a sophisticated plan existed is immaterial because defendant’s actions were reckless and dangerous; they posed significant danger to the public and were part of a course of conduct that involved multiple victims. The jury rejected the defense that he lacked criminal intent because his actions were induced by methamphetamine use; thus, that claim carries no weight on appeal. The current crimes, like the

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<sup>6</sup> Since the factors listed in the prosecution’s sentence memorandum were relevant to the *Romero* motion and supported by the record, we disagree with defendant’s claim that defense counsel was ineffective in not objecting to them.

strike priors, involved violent, dangerous conduct, which easily could have resulted in injury.

Defendant also asks us to reweigh his background, character, and prospects. He contends that “[r]easonable minds cannot differ that appellant, in light of his background, mental problems, and drug abuse” is outside the spirit of the Three Strikes law. First, defendant argues that it is improper to label him a “career criminal” when he was only 22 at the time of the current crimes and there was only a “scant” five-year period between his first and third strike. We disagree.

Initially, we note that defendant was almost 23 years old at the time of the current crimes, and his first strike was almost six years old. His criminal history shows he was charged with his first crime, possession of a knife on school grounds, in 2006, at the age of 14. Just three months later, he was charged with discharge of a firearm in public and resisting a peace officer. Defendant was then charged with vandalism in 2007. He received his first strike in 2008 at age 17, his second strike in 2012 at age 20, followed by his current strike two years later. ~ This timeline indicates that defendant has engaged in criminal behavior for half of his life. His tendency to reoffend is comparable to that of a middle-aged criminal. Defendant emphasizes that he was a law-abiding citizen for almost a year between his release from prison and the current crimes. Even assuming that is so, he was still on parole when he reoffended.

That youth is not an excuse for recidivism is clear from the Legislature’s policy decision to allow juvenile adjudications for qualifying crimes committed at the age of 16 and after to be used as prior strikes under the Three Strikes law. (See *People v. Smith* (2003) 110 Cal.App.4th 1072, 1078, citing §§ 667, subd. (d)(3),

1170.12, subd. (b)(3).) “Sentence enhancement based on recidivism flows from the premise that the defendant’s current criminal conduct is more serious because he or she previously was found to have committed criminal conduct and did not thereafter reform. A prior juvenile adjudication, like a prior adult conviction, is a rational basis for increased punishment on the basis of recidivism. Indeed, a juvenile prior demonstrates that the defendant did not respond to the state’s attempt at early intervention to prevent a descent into further criminality.” (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1024].)

Finally, defendant contends that his culpability was minimal because he was suffering from methamphetamine addiction at the time of these crimes. Relatedly, he argues that his memory loss is a circumstance that weighs in favor of striking a prior strike. The trial court was under no obligation to place greater weight on these factors. (See *People v. Carrasco* (2008) 163 Cal.App.4th 978, 992–994.) Defendant’s expert conceded that defendant’s memory loss played no role in the crimes he committed. As we have explained, the jury rejected defendant’s defense that he lacked criminal intent because his actions were methamphetamine induced.

The trial court did not abuse its discretion in declining to strike one or both of defendant’s priors.

### **DISPOSITION**

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect defendant’s conviction and sentence on count 4 (hit and run driving) and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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We concur:

EPSTEIN, P. J.

WILLHITE, J.

COLLINS, J.