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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMAR DAVID WILLIAMS,

Defendant and Appellant.

B229315

(Los Angeles County
Super. Ct. No. BA370727)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed and remanded with instructions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

An information filed by the Los Angeles County District Attorney's Office charged appellant Lamar David Williams (defendant) with one count of arson of an inhabited dwelling (Pen. Code, § 451, subd. (b)) and two counts of attempted murder (§§ 664, 187, subd. (a)).¹ The information further alleged that defendant had been convicted of an offense that qualified as a serious or violent felony under sections 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i) (the "Three Strikes" Law). Defendant pleaded not guilty and denied the special allegation.

A jury found defendant guilty of arson of an inhabited dwelling but was unable to reach verdicts on the two attempted murder counts, and a mistrial was declared as to those counts. The trial court granted the People's request to amend the information to include an allegation that defendant had served a prior prison term within the meaning of section 667.5, subdivision (b).

The trial court found the prior strike and prior prison term allegations to be true, and sentenced defendant to 16 years in state prison, calculated as the upper term of eight years, doubled to 16 years as a second strike. The trial court "stayed" sentencing under section 667.5, subdivision (b) and accorded defendant 542 days of presentence custody credit.

Defendant appeals his conviction on the following grounds: (1) the trial court committed prejudicial error by denying his request to impeach a witness with two misdemeanor prostitution convictions; (2) he was denied effective assistance of counsel at trial because defense counsel elicited damaging testimony from a witness; (3) the prosecutor committed misconduct during closing argument and defense counsel's failure to object constituted ineffective assistance of counsel; and (4) the trial court abused its discretion by refusing to strike defendant's prior strike conviction. Defendant further contends the one-year prison term enhancement under section 667.5, subdivision (b) must be stricken, and that he is entitled to additional presentence custody credit.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

We remand the matter to the trial court for resentencing under section 667.5, subdivision (b) and instruct the trial court to modify the abstract of judgment to reflect 587 days of total presentence custody credit. We otherwise affirm the judgment.

BACKGROUND

Vivian Sequen (Sequen) and her mother, Margarita Davila (Davila), lived together in apartment No. 2 at 6214 La Mirada Avenue in Los Angeles. Defendant, who lived in the building, met Sequen and the two started dating in July 2008. Sequen ended the relationship with defendant in April 2009. After the breakup, defendant telephoned Sequen more than 20 times, calling her names, accusing her of “sleeping around” and threatening to kill himself.

At approximately 2:00 a.m. on May 19, 2009, Sequen received calls from defendant on her home and cellular telephones. Defendant left messages in which he called Sequen a “scandalous whore.” Sequen felt uneasy and was unable to sleep. She was awake when she saw flames coming from the only door to the apartment. Sequen went to the bathroom, retrieved a towel, and attempted unsuccessfully to extinguish the fire. Both Sequen and Davila managed to open the door and eventually exit the apartment. Once outside, Sequen collapsed and began throwing up. She was treated for minor burns at a nearby hospital and subsequently released.

At approximately 3:20 a.m. on May 19, 2009, a 911 call was placed by an unidentified caller who reported seeing “a dark-skinned guy” enter the property at 6214 La Mirada Avenue and set fire to one of the rooms. The caller said the two women who lived in the room were screaming.

Los Angeles County Firefighter Jason Yim and 35 to 40 other firefighters responded to a radio call concerning a structure fire at 6214 West La Mirada Avenue at approximately 3:20 a.m. on May 19, 2009. Upon arriving at the scene, Yim saw fire “shooting out” from the apartment complex and noticed a car fire directly below the unit that was burning. Yim extinguished the car fire and proceeded through the stairwell of the apartment complex to join his partner in extinguishing the structure fire. In the

stairwell, Yim discovered a jacket, bag, and hat, along with a plastic container and a pack of matches. Arson investigators subsequently took possession of these items.

Arson investigator Robert Hernandez (Hernandez) arrived at the apartment complex at approximately 4:20 a.m. During his preliminary investigation, Hernandez smelled gasoline from the debris near the car that had been on fire. He also observed hydrocarbon sooting marks, indicating that gasoline had dripped from the second floor of the apartment complex to the carport. Further investigation showed that the fire had started on the second floor and then spread to the carport.

Hernandez inspected the items recovered in the stairwell. Among the items was a CD player, glasses, a checkbook with checks in the name of "Lamar D. Williams," a toothbrush, toothpaste, and a white plastic container. Further examination of the white plastic container revealed that it contained gasoline.

Hernandez concluded that a flammable liquid had been placed at the door of Sequen's apartment and ignited. Some of the flaming liquid dripped over the walkway outside the apartment door down to the first floor carport, igniting the car. The flammable liquid also seeped under the apartment door and ignited various combustible materials. Hernandez found no accidental causes and determined that the fire was intentionally set.

While at the scene, Hernandez also spoke with Fabricio Tovar (Tovar), who had made the 911 call reporting the fire. Hernandez listened to the 911 recording and recognized Tovar's voice as the caller. He described Tovar as "scared" and reluctant to speak with him. Tovar nevertheless did speak with Hernandez for approximately 30 minutes and told Hernandez he saw a black male on the second floor of Sequen's apartment building pour something on the floor from a white container and then ignite it. Tovar identified the man as the boyfriend of one of the women who lived in the apartment and believed the boyfriend's name sounded like "Omar."

Los Angeles Police Department Criminalist Conrado Salonga, a forensic fingerprint specialist, recovered two identifiable latent fingerprints from the white plastic container found at the crime scene and one identifiable latent fingerprint from the hat

recovered at the crime scene. Forensic print specialist David Velarde compared defendant's fingerprints with the latent fingerprints found at the crime scene and determined that both sets of prints were made by the same person.

A DNA sample was recovered from the inside rim of the hat recovered at the crime scene and compared to a reference DNA sample obtained from defendant. A comparative analysis of the two samples confirmed that the DNA found inside the hat came from defendant.

On the day of the fire, defendant was on parole and required to wear a GPS tracking bracelet. Between 1:00 a.m. and 2:00 a.m. on May 19, 2009, California Department of Corrections Parole Officer Jose Rojas received a "bracelet strap violation" alert from defendant's GPS bracelet, indicating that the bracelet had been tampered with or removed. Thereafter, Rojas received "low battery" and "message gap" alerts from defendant's tracking bracelet.

Kenrick Sedacy (Sedacy), a handyman for the eight-building complex that includes 6214 La Mirada Avenue, said that he knew defendant, who used to live in one of the buildings. Sedacy often saw defendant with Sequen, and the two would often "hang out" by the stairs and stairwell near the apartment. Sedacy recognized the jacket, hat, and knapsack found in the stairwell as belonging to defendant.

Defendant acknowledged that the jacket and hat recovered in the stairwell below Sequen's apartment belonged to him. He claimed he had Sedacy's permission to store his belongings in a closet that was located in the stairwell below Sequen's apartment. Defendant also claimed he had been "jumped" two days before the fire, and that his backpack, which held his checkbook and wallet, had been stolen. Defendant denied setting fire to any residence or attempting to kill Sequen or Davila. He also denied removing his GPS bracelet and said he was wearing the ankle bracelet when he was arrested on June 12, 2009.

DISCUSSION

I. Denial of request to impeach

Before jury selection commenced, defense counsel asked that he be allowed to impeach Tovar, who had made the 911 call, with evidence of prior misdemeanor convictions for petty theft and prostitution. The prosecutor conceded use of the petty theft conviction but opposed use of the prostitution convictions, arguing that prostitution was not a crime of moral turpitude. The trial court agreed with the prosecutor, and over defense counsel's objection, denied the request to admit into evidence Tovar's misdemeanor prostitution convictions. The jury was informed of Tovar's March 7, 2008 conviction for petty theft. The jury was also informed that a warrant had been issued for Tovar's arrest for failure to appear at the trial. Defendant contends the trial court committed prejudicial error by denying his request to impeach Tovar with evidence of the two misdemeanor prostitution convictions.

Subject to Evidence Code section 352, past misconduct involving moral turpitude is admissible to impeach a witness in a criminal trial. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.) Prostitution is a crime of moral turpitude. (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708-709.) The trial court accordingly erred by denying defendant's request to impeach Tovar solely on the ground that the misdemeanor prostitution convictions were not for crimes of moral turpitude. That error, however, was harmless under the circumstances of this case. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

There was overwhelming evidence of defendant's presence at the scene of the crime. Defendant's possessions, including a checkbook in his name, were recovered at the crime scene, as were his DNA and fingerprints. Defendant's fingerprints were found on a plastic container from which gasoline had been poured and subsequently ignited. There was also evidence that defendant's GPS tracking device had been tampered with or removed shortly before the fire was started. In light of this evidence, it is not reasonably probable that the jury would have reached a more favorable verdict had evidence of Tovar's convictions for misdemeanor prostitution been admitted.

II. Alleged ineffective assistance of counsel

During cross-examination of Hernandez, defense counsel elicited testimony that Tovar had identified defendant as the person who started the fire. Defendant claims defense counsel provided ineffective assistance by doing so.

The defendant bears the burden of proving ineffective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) To establish constitutionally inadequate assistance of counsel, a defendant must prove (1) deficient performance by counsel as determined by prevailing professional standards, and (2) prejudice, or a reasonable probability that, but for the deficient performance, the trial would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696 (*Strickland*); *In re Cudjo* (1999) 20 Cal.4th 673, 687.) To demonstrate prejudice, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] . . . [¶] . . . The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland, supra*, at pp. 693-694; see *People v. Weaver* (2001) 26 Cal.4th 876, 961.)

A reviewing court defers to counsel’s reasonable tactical decisions when examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412), and there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” (*Strickland, supra*, 466 U.S. at p. 689.) “‘Reviewing courts will reverse convictions [on appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 939, 980, quoting *People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Defendant’s ineffective assistance of counsel claim is premised on the assumption that defense counsel had no plausible tactical reason for questioning Hernandez about his interview with Tovar. The record shows, however, that defense counsel articulated a

rational reason for his cross-examination. Defense counsel told the trial court that he intended to cross-examine Hernandez in order to point out inconsistencies between Tovar's recorded 911 call and his statement to Hernandez and to highlight issues that Hernandez should have pursued further. The record also shows that defense counsel's cross-examination of Hernandez was consistent with his stated purpose. Defense counsel asked Hernandez if he had questioned Tovar about how Tovar knew gasoline was in the white plastic container found at the crime scene and what Tovar was doing outside the building at 3:30 a.m. Defense counsel also asked Hernandez whether he had checked Tovar for ignition devices of his own and if Hernandez had asked why Tovar had not assisted Sequen and her mother. Defense counsel's line of questioning did not constitute ineffective assistance of counsel.

III. Alleged prosecutorial misconduct

Defendant claims the prosecutor committed misconduct during her closing argument by telling the jury that "uncontroverted evidence" showed that Tovar identified defendant as the person who set fire to Sequen's door. "To preserve such a claim for appeal, 'a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. [Citations.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 960.) Defendant concedes that no objection was made in the trial court below. His claim of prosecutorial misconduct is therefore forfeited. (*Ibid.*)

Even were we to consider defendant's claim as a proper subject of this appeal, it fails on the merits. The alleged misconduct consists of the following statements by the prosecutor:

"Now, you heard the 911 call that was placed by [Tovar], and Investigator Hernandez told you that he interviewed [Tovar] at the scene while he was speaking to other witnesses. [Tovar] told [Hernandez] that he also lived in that apartment complex on La Mirada, but he was in one of the other buildings, not the same building as Ms. Sequen and Ms Davila lived in. He told [Hernandez] that he knew [Sequen], [Davila] and the defendant because they were all neighbors in that same apartment complex. He testified -- well, he told [Hernandez] that right before the fire started, he

was walking on La Mirada, and he heard noises coming from that second story outside of apartment number two. He walked over the front of the gate the leads to the parking lot where the parking -- the carports are located, and he saw a dark-skinned man pouring something from a white container in front of apartment number two. He observed the dark-skinned man do something with his hands, and then the door caught on fire. He started screaming at the dark-skinned man. He then told [Hernandez] that he saw the dark-skinned man run past him as he exited the stairwell where all those items were left, and he recognized the dark-skinned man as the boyfriend of the girl that lived in apartment number two, [Sequen]. *We all know the defendant was the ex-boyfriend of Ms. Sequen. That is uncontroverted evidence.* He told [Hernandez] that he thought the person's name sounded something like Omar.” (Italics added.)

Viewed in context, the prosecutor's statement regarding “uncontroverted evidence” clearly refers to the sentence immediately preceding it -- “We all know the defendant was the ex-boyfriend of Ms. Sequen.” Defendant's former romantic relationship with Sequen was uncontroverted and had been established by Sequen's testimony as well as defendant's own testimony. The prosecutor's statements were neither deceptive nor misleading and did not constitute misconduct. Defense counsel's failure to object accordingly did not constitute ineffective assistance of counsel.

IV. Motion to strike prior conviction

Defendant contends the trial court abused its discretion by not striking a 1990 conviction for rape. Section 1385, subdivision (a) authorizes a trial court to strike prior felony conviction allegations “in furtherance of justice” in cases brought under the Three Strikes law. (§ 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530 (*Romero*).)² In determining whether or not to strike a prior conviction under the Three Strikes law, the trial court “must consider whether, in light of the nature and

² Section 1385, subdivision (a) provides in relevant part: “The judge or magistrate 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.” A court may dismiss a prior strike conviction under section 1385, subdivision (a) in the absence of a motion by the prosecuting attorney and over the prosecuting attorney's objection. (*Romero, supra*, 13 Cal.4th 497.)

circumstances of [the defendant's] 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.) A party challenging a trial court's ruling under section 1385 bears the burden of showing that the court ruled in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) A trial court's decision on whether to strike a prior conviction allegation is reviewed for abuse of discretion. (*Romero, supra*, 13 Cal.4th at p. 504.)

Defendant failed to establish an abuse of discretion by the trial court. Although the 1990 conviction was not recent, the record shows that defendant continued to engage in a pattern of criminal behavior following that conviction. He was convicted in 2004 for felony transportation/sale of marijuana and again in 2005 for failing to update his registration as a sex offender. He committed the current crime within five years of being released from custody for the latter felony conviction. Given these facts, we cannot conclude that the trial court's refusal to strike defendant's 1990 felony conviction was an abuse of discretion.

V. Remand for resentencing under section 667.5

The parties agree that the trial court improperly stayed a one-year prison term enhancement pursuant to section 667.5, subdivision (b). That statute provides for a one-year enhancement of the prison term for each prior separate prison term served for any felony, subject to an exception that is not applicable here. "Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]" (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) The trial court accordingly erred by staying the section 667.5, subdivision (b) enhancement. The matter must be remanded to the trial court to either impose or strike the one-year enhancement under section 667.5, subdivision (b).

VI. Presentence custody credit

The parties also agree that defendant is entitled to a total of 587 days of presentence custody credit. Defendant was arrested on June 12, 2009, and sentenced on November 4, 2010. He served a total of 511 days of actual custody. Because defendant was convicted of a violent felony as defined in section 667.5, subdivision (c), he is entitled to conduct credit calculated at 15 percent of his actual time in custody, limited to the nearest whole number not exceeding 15 percent. (§ 2933.1; *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.) Defendant is therefore entitled to 76 days of conduct credit (511 days x 15% = 76.65). His total presentence custody credit should be 587 days (511 days + 76 days). The abstract of judgment must be amended accordingly.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion whether to impose or strike the prior prison term enhancement under section 667.5, subdivision (b), and with instructions to modify the abstract of judgment to reflect a total of 587 days of presentence custody credit. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD