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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY BROWN, Defendant and Appellant.	B234117 (Los Angeles County Super. Ct. No. BA360070)

APPEAL from a judgment of the Superior Court of Los Angeles County. Henry J. Hall, Judge. Reversed and remanded in part; affirmed in part.

Valerie G. Wass, 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, Senior Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Anthony Brown was convicted, following a jury trial, of four counts of attempted second degree robbery in violation of Penal Code sections 211 and 664,[1] six counts of second degree robbery in violation of section 211, one count of possession of a firearm by a felon in violation of section 12021, subdivision (a)(1), and one count of assault with a deadly weapon in violation of section 245, subdivision (a)(1). The jury found true the allegations that appellant personally used a firearm in the commission of the robberies within the meaning of section 12022.53, subdivision (b) and personally and intentionally discharged a firearm in the commission of the count 8 robbery within the meaning of section 12022.53, subdivision (c). The jury also found true the allegation that appellant personally used a firearm in the commission of the assault within the meaning of section 12022.5, subdivision (a).

Appellant appeals from the judgment of conviction, contending that the trial court's order that he pay $10,000 in attorney's fees for his court appointed lawyer was improper. Appellant further contends that the trial court abused its discretion in refusing to strike any of his prior strike convictions, and that his third strike sentence constitutes cruel and unusual punishment. Appellant also contends that the abstract of judgment and sentencing minute order must be corrected to reflect the trial court's oral pronouncement of sentence. We reverse the order requiring appellant to pay attorney's fees and remand this matter for further proceedings on that issue. We order the abstract of judgment corrected, as set forth in the disposition. The judgment is affirmed in all other respects.

Facts

Between July 10 and August 3, 2009, appellant committed a series of robberies and attempted robberies at nine different locations in downtown Los Angeles. All of the robberies were recorded by surveillance cameras, and the resulting still photos and videos were played for the jury at appellant's trial.

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

Appellant began his series of robberies at a branch of Citibank located on East First Street. He entered the branch about 11:00 a.m. on July 10, 2009, walked up to teller Arturo Ramos, pointed a black handgun at him and said, "Give me the hundreds." Ramos said that he did not have any money. Appellant asked who did. Ramos looked at another teller, Sue Susuki. Appellant walked over to her, pointed his gun at her and said something. Susuki "yelped." Appellant fled without any money. Ramos identified appellant as the robber from a photographic lineup and at trial.

In the afternoon of July 10, appellant entered the California Bear Credit Union at 100 South Main Street in Los Angeles, walked up to teller Gayl Pinnock, pointed a black handgun at her and said, "I'd advise you to give me all the hundreds." Pinnock gave appellant a stack of hundred-dollar bills totaling about $6,000. Appellant took the money and left.

On July 23, 2009, about 8:25 p.m., appellant entered a Rite Aid store on West Seventh Street, approached cashier Esther Alejo, asked for cigarettes, walked around the store, then returned and asked Alejo for money. Alejo said that she was closing. Appellant pulled out a handgun, took money from the cash register and left the store. Alejo identified appellant from a photographic lineup.

On July 25, 2009, about 3:50 p.m., appellant entered a Chase bank on South Figueroa, walked up to teller Xochilt Gamez Ruiz, and asked if he could cash a check. Gamez Ruiz asked if appellant had an account with the bank. Appellant pulled up his shirt, revealing a gun. He put his hand on the gun and said, "Give me the fuckin' money or I'll kill you." Gamez Ruiz was afraid and could not move. Another bank worker turned around. Appellant put the gun in his waistband and fled without any money.

In the evening of July 25, appellant entered a Denny's restaurant on South Figueroa and was seated by the hostess, Dina Cruz. Appellant made several trips to the restroom, then approached Cruz when she was at the cash register. He lifted his shirt, displayed a gun and demanded money. Cruz asked appellant if he was serious. He threatened to shoot her. Cruz opened the register and began giving appellant money. He reached over, grabbed the money and fled.

On July 27, 2009, about 7:00 p.m., appellant entered a Big Lots store on West Seventh Street, left and returned carrying a plastic bag. He went to cashier Rebecca Fernandez, asked where he could find rubbing alcohol, walked away and then returned with rubbing alcohol. Appellant put his right hand into the register's open cash drawer and used his left hand to point a gun at Fernandez. He told Fernandez to give him money. She stepped back and appellant took about $300 from the register. As appellant walked away, he encountered security guard Carla Zanotti. He pointed a gun at her head as he walked by her. Fernandez and Zanotti identified appellant at the preliminary hearing and trial.[2]

On July 29, 2009, about 9:00 p.m., appellant entered a Farmer Boys restaurant located on South Alameda, walked up to cashier Jasmin Ivona Lopez Coultas and placed a food order. As she was preparing appellant's food, she saw appellant holding a handgun. She asked, "Are you kidding?" Appellant said, "I'm not joking around." He fired the gun, hitting a refrigerator behind Lopez Coultas. Appellant then left, firing one more shot as he left. Lopez Coultas identified appellant in a photographic lineup and at trial.

On August 1, 2009, about 6:00 p.m., appellant entered a Pollo Loco restaurant on East Ninth Street, walked up to the cashier area, pointed a gun at employees Silvia Velasquez and Gabriela Tirado, and told Tirado to give him money. Tirado opened her register and gave appellant money. He left.

On August 3, 2009, in the evening, appellant entered a Burger King restaurant on South Central Avenue, and placed an order with assistant manager Jose Francisco Ruiz. When Ruiz opened the register, appellant pointed a gun at Ruiz and said, "Give me the money and don't do anything stupid." Ruiz gave him the money. Appellant then demanded money from another register. Ruiz opened that register and appellant grabbed the money from it and fled.

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[2] Earlier, both women had identified a person other than appellant as the robber.

In response to appellant's series of robberies, Los Angeles Police Department Officer Matthew Valencia conducted surveillance of a Carl's Jr. restaurant at Olympic and Main around closing time on August 5, 2009. He had viewed surveillance video from the Pollo Loco robbery. Around 8:00 p.m., Officer Valencia observed appellant attempt to enter the restaurant. Appellant could not get in because the doors were locked. Appellant looked like the robber in the video. Police officers arrested appellant about a block from the Carl's Jr. The officers found a loaded handgun in appellant's waistband.

Appellant made two statements to police, one on the day of his arrest and one the next day. The first interview was video-taped, the second audio-taped. The video tape and portions of the audio tape were played for the jury at trial.

In the first interview, appellant admitted his involvement in the Citibank, Rite Aid, Big Lots, Pollo Loco, Burger King, Denny's and Farmer Boys robberies and attempted robberies. He said that he used a plastic gun at the Citibank robbery and then bought a real gun. He used the money from the robberies to buy drugs. He admitted discharging the gun at Farmer Boys.

In the second interview, Detective Veronica Conrado showed appellant photographs from the Citibank, California Bear Credit Union, and Farmer Boys incidents. Appellant acknowledged that he was the person shown in the photographs. Appellant again acknowledged committing robberies or attempted robberies at Citibank, California Bear Credit Union, Burger King, Farmer Boys, Pollo Loco, Denny's and Rite Aid. Appellant was shown a photograph from Chase bank, but he denied attempting to commit a robbery there.

At trial, appellant testified on his own behalf and denied committing any of the attempted robberies or robberies. He denied that he was the person in the surveillance photos and videos. Appellant explained that he had a drug problem, but he had plenty of money to buy drugs when he got out of prison. At that time, he had $20,000 available to him. He falsely confessed to the robberies because the arresting officer agreed to let him have a hit of crack cocaine. He knew the facts of the robberies because he was left alone in an interview room with police reports about the robberies and he read those reports.

Appellant also called Timothy Williams as an expert on police procedures. Williams criticized Officer Rodriguez for using various tactics during appellant's arrest and also for leaving appellant alone with the police reports.

Discussion

1. Attorney fees

Appellant contends that the trial court failed to comply with the notice and hearing requirements of section 987.8 governing payment of the costs of the public defender or court-appointed counsel. He further contends that there is no evidence that he had the present ability to pay these costs and no evidence of the actual amount of the legal fees incurred by the County for appellant's court-appointed attorney. Respondent contends that appellant has forfeited these claims by failing to object in the trial court.

We agree that appellant has forfeited his claims concerning lack of notice and the form of the hearing. (*People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1394-1396.)

Appellant's other claims are not forfeited. "Where, as here, the defendant's objections to the fee order go to the sufficiency of the evidence to support the order, no objection need be made in the trial court. [Citation.] Thus, defendant did not waive his right to object to the lack of any finding concerning his ability to pay." (*People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1421.)

a. Sufficiency of the evidence – ability to pay

The court made the following finding on appellant's ability to pay: "Mr. Brown, I'm going to also – I am very impressed by the fact that the last time you were in prison, you managed to earn $12,000 presumably doing legal work for your colleagues." The court ordered appellant to pay $10,000 in attorney's fees.

The amount of attorney's fees that a defendant may be ordered to pay is limited to the amount the defendant has the financial ability to pay in the six months following the hearing on this issue. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217-1218 [reversing order that defendant pay attorney's fees on ground that there was no evidence

that she would be able to pay the amount ordered over the six months following the hearing]; see § 987.8, subd. (g)(2)(B).)

Appellant acknowledges that there is evidence that he earned $12,000 while in prison doing legal work for other prisoners, but points out that he was in prison for four years. He contends that there is no evidence to show that he was capable of earning $12,000 in a six month period. We agree.

The only breakdown of appellant's income in prison is found in a statement from appellant's prison account covering a four month period just prior to his release from prison. That statement shows three deposits in four months: $400 in December, $500 in January and $1,000 in February. Thus he earned $1,900 in four months, an average of $475 per month. At that rate, appellant would earn $2,850 in a six month period. That is nowhere close to the $10,000 ordered by the court.[3]

Respondent points out that appellant testified during trial that he had about $20,000[4] available to him when he got out of prison on an earlier offence and suggests that this money could be considered in determining appellant's ability to pay attorney's fees. The trial court did not rely on this money. We cannot do so either. Appellant testified that he had the money in May 2009, when he was released from prison. The sentencing hearing in this case was held in May 2011. There is no basis to infer that appellant still had all the money from prison two years later.

b. Sufficiency of the evidence - attorney's fees

The trial court made the following finding concerning the amount of the attorney's fee award: "I am going to find, based on the complexity of this case, the fact that Mr.

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[3] Another method of determining income, suggested by appellant, would be to infer that his earnings were spread equally over that time period. Under that method, appellant would earn $1,500 in a six month period. This too falls short of the $10,000 payment ordered by the trial court.

[4] Appellant clarified that he had a check from his prison account for $9,229, $200 in gate money, and another $8,000. Those figures total $17,429.

Atherton did both the trial, which he had to pick up at the last minute, and a preliminary hearing and had to prepare in a very truncated fashion, that the appropriate attorney's fees are $10,000, and I'm imposing those."

"Penal Code section 987.8 . . . does not give the court any discretion to determine the reasonable value of those services. [Citation.] The court must review evidence of the actual costs to the county before it can assess costs or attorney's fees to the defendant. [Citation.]" (*People v. Poindexter* (1989) 210 Cal.App.3d 803, 810-811; see also *People v. Viray*, *supra*, 134 Cal.App.4th at p. 1217 [there must be evidence of number of hours and cost to county of those hours].)[5]

Here, there was no evidence at all of the hours worked by defense counsel, or the cost to the county of those hours. The court simply determined what it believed to be the reasonable value of counsel's services. The court's valuation is not evidence and is not sufficient to support the amount of the award.

c. Remedy

The order concerning attorney's fees is vacated. The matter is remanded to the trial court for further proceedings. (*People v. Flores* (2003) 30 Cal.4th 1059, 1068.)

2. Motion to strike prior convictions

The trial court sentenced appellant to a determinate term of 145 years and an indeterminate term of 278 years to life. Appellant contends that the trial court abused its discretion in refusing to strike two or more of his three prior strike convictions, so that he could be sentenced to a lengthy determinate term, or an indeterminate term with a lower minimum parole eligibility period.

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[5] Costs also include "'any proven expenses to the county established by the evidence, such as investigator's fees and expenses, expert witness fees or expenses, long distance telephone expenses, etc.'" (*People v. Viray*, *supra*, 134 Cal.App.4th at p. 1217.)

Rulings on motions to strike prior convictions are reviewed under the deferential abuse of discretion standard. Under that standard, an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where 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. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.)

Here, the trial court explained its ruling as follows: "The crimes in this case were dangerous. [Appellant] is a dangerous, violent serial criminal whose crimes have demonstrated an escalating level of violence." The court added: "I'm also mindful that [appellant] had been on parole for a series of similar but less violent crimes for only a few weeks. And I think the significant thing is that he had been advised that future criminal conduct would lead to a life sentence at the time of the commission of these offenses. And I would decline to exercise my discretion to strike the strike allegation."

In detailing the increasing violence of appellant's crimes, the court pointed out that in appellant's past robberies he had been unarmed. In the current series of robberies, appellant started out unarmed, then carried a toy gun, then brandished a real gun and then began discharging the gun. The court also pointed out that appellant had no insight into his conduct and did not accept responsibility for it. Further, although appellant was previously advised that he faced a lengthy prison term if convicted again, this prospect did not deter him from committing the current offenses.

Appellant contends that the trial court failed to consider his drug addiction and its effect on his criminality. The trial court explicitly acknowledged that appellant blamed his crimes on his drug addiction. The court found, however, that appellant had begun committing robberies before the date he claimed to have started using cocaine.[6]

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[6] When asked how long he had been using crack cocaine, appellant testified: "Since the day I was released from prison, April 15." To clarify, the prosecutor asked, "What year?" Appellant replied, "2009." Appellant's prior convictions were for robberies committed in 2004.

Appellant proffered no evidence that he had ever sought treatment for his problem. Drug addiction is not necessarily a mitigating factor when a criminal defendant "seems unwilling to pursue treatment." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.)

The trial court's comments indicate that it properly considered the nature and circumstances of appellant's current and prior convictions and the particulars of his background, character and prospects, and reached an impartial decision. (*People v. Williams* (1998) 17 Cal.4th 148, 161-164.) Appellant's past convictions were serious felonies and were committed recently. His current crimes were numerous, serious and involved the use and discharge of a firearm. They were committed only weeks after appellant was released from prison. As the court's analysis shows, appellant "is the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320.) The trial court acted well within its discretion in deciding that appellant did not fall outside the spirit of the "Three Strikes" law.

To the extent that appellant contends that the trial court was unaware that it had discretion to strike appellant's prior convictions on all but one count, and to sentence him to 25 years to life on that count alone, we do not agree. We see nothing in the record to indicate that the trial court lacked such awareness.

"The general rule is that a trial court is presumed to have been aware of and followed the applicable law." (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) It has been more than a decade since the California Supreme Court made it clear that a trial court has discretion to strike prior convictions on a count-by-count basis. (See *People v. Garcia* (1999) 20 Cal.4th 490.)

Appellant points to nothing in the record to suggest that the court misunderstood its discretion. In the absence of such an affirmative indication in the record that the trial court was unaware of its discretion to strike, relief on appeal is not appropriate. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 945-947.)

3. Cruel and unusual punishment

Appellant contends that his sentence of 278 years to life, plus a determinate term of 145 years, constitutes cruel and unusual punishment in violation of the state and federal Constitutions. Respondent contends that appellant has forfeited this claim by failing to object in the trial court. We agree that appellant has forfeited this claim.

The issue of whether appellant's sentence is cruel and unusual punishment is a fact intensive one, and is based on the nature and facts of the crime and offender. (See *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) It is waived if not raised in the trial court. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; see generally *People v. Scott* (1994) 9 Cal.4th 331, 356.)

Appellant contends that his claims involve pure questions of law and so may be considered in the absence of an objection. One aspect of his claim does fall into this category and we will consider it.

Appellant contends that no person could serve a sentence of 278 years to life and that such an impossible sentence is unconstitutional. Appellant relies on Justice Mosk's concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585 to support his contention.

We respectfully disagree with that opinion. A sentence which exceeds any human's life span is not by its nature cruel and unusual punishment. Such a sentence is essentially a sentence of life without the possibility of parole. Life without the possibility of parole is a long recognized sentence in California. It may or may not constitute cruel and unusual punishment under the facts of a case.

To the extent that appellant contends that a life sentence with no realistic possibility of parole is always cruel and unusual punishment for any crime less than murder, we do not agree. It may or may not constitute cruel and unusual punishment under the facts of a case and cannot be resolved as a matter of law. (See, e.g., *Lockyer v. Andrade* (2003) 538 U.S. 63, 72-77 [50 years to life Three Strikes sentence for two counts of petty theft with a prior theft-related conviction did not contradict or unreasonably apply clearly established federal law and thus was not the "extraordinary" case under the "gross disportionality" principle which violates the Eighth Amendment];

In re Lynch (1972) 8 Cal.3d 410, 425-427 [disportionality test under California law requires consideration of nature of offense and offender and comparison of challenged punishment with punishment for more serious crimes in California and same offense in other jurisdictions].)

4. Abstract of judgment

Appellant contends that the minute order and abstract of judgment do not accurately reflect the trial court's oral pronouncement of judgment and must be corrected. Respondent agrees that the abstract of judgment must be corrected, but contends that the minute order does not require correction. We agree with respondent.

The trial court imposed a 25 year to life sentence for count 1 and a 25 year to life sentence for count 2. The trial court stated: "Count 1 is consecutive to all other terms. Count 2 is concurrent to all other terms." The minute order for the sentencing hearing states: "Term imposed in Count 1 to run concurrently with term imposed in Count 2, and to run consecutively to all other counts." The abstract of judgment shows that count 1 is ordered to run concurrently with all other terms and count 2 is ordered to run consecutively with all other terms.

The abstract of judgment is clearly wrong and must be corrected to reflect the trial court's oral pronouncement of sentence. The minute order, however, is simply a clearer statement of the trial court's oral pronouncement. The trial court stated that "And based on these factors, as to counts 1 and 2, I am going to sentence concurrently." After stating that it was imposing a sentence of 25 years to life on count 1, the court stated: "I'm going to run that concurrent to count 2 for all the reasons I stated earlier." The trial court clearly intended count 1 to run consecutively to all counts other than count 2.

Disposition

The order directing appellant to pay attorney's fees is reversed and the matter is remanded for a hearing on attorney's fees, as set forth in more detail in the opinion. The abstract of judgment is ordered corrected to show that counts 1 and 2 are concurrent to each other, count 1 is consecutive to all counts except count 2 and count 2 is concurrent to all other counts. The judgment is affirmed in all other respects.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.