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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. WESLEY RANDLE, Defendant and Appellant.	B229329 (Los Angeles County Super. Ct. No. BA372255)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Judge. Affirmed in part, reversed in part.

Corona & Peabody, and Jennifer Peabody, 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, Kenneth C. Byrne and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Wesley Randle of assault with a deadly weapon (§ 245, subd. (a)(1))[1] and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) based upon a single act: he intentionally threw a hatchet at Taphanita Robinson. Defendant contends, and the Attorney General concedes, that he cannot be properly convicted of both offenses. We therefore reverse his conviction of assault by means of force likely to produce great bodily injury. Defendant also contends that the trial court abused its discretion in denying his *Romero*[2] motion to strike his two prior convictions, and that his "Three Strikes" sentence of 35 years to life violates the federal constitutional prohibition on cruel and unusual punishment. We are not persuaded and therefore affirm the judgment, including the sentence, entered on his conviction of assault with a deadly weapon.

STATEMENT OF FACTS

During the morning of June 7, 2010, Taphanita Robinson went to visit her cousin Paris Lee at his apartment. Defendant lived in an apartment above Lee's. When Robinson arrived, she saw that defendant was arguing with Lee and Lee's boyfriend Dwight Hayes. The three men were on the stairwell. Robinson attempted to separate Lee from the argument. Defendant walked upstairs to his apartment as he and Lee continued to yell at each other. Defendant entered his apartment but then quickly reappeared carrying a hatchet. He looked down below and raised the hatchet. Defendant looked "dead" at Robinson, called her a "bitch," and threw the hatchet at her. The hatchet hit Robinson on her arm, causing serious injuries.

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[1] All undesignated statutory references are to the Penal Code.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

Defendant did not testify at trial but, relying upon the testimony of several witnesses, his attorney suggested that defendant had acted in self-defense. First, he relied upon Lee's testimony that on June 6—the day *before* the assault—Lee and he had argued, "were up in each other's face and kind of nudging each other." Next, he noted that defendant's roommate Kevin Buckley testified that the night *before* the assault, Lee came to their apartment and asked for defendant but defendant was not then at home. Lastly, he relied upon the testimony of defendant's sister Leona Randle Moses that on July 31 (*eight weeks after the assault*), Lee threatened her twice while she was at her brother's apartment.

The pattern instructions explaining self-defense were submitted to the jury and defense counsel relied upon them in closing argument. The prosecutor's rebuttal argument urged that credible evidence did not support a claim of self-defense.

After deliberating 50 minutes, the jury convicted defendant of both counts.

Following return of the jury's verdict, defendant admitted the prior Three Strikes convictions alleged in the amended information: a 1990 conviction for robbery (§ 211) and a 1993 conviction for assault with a deadly weapon (§ 245, subd. (a)(1)).

After denying defendant's *Romero* motion, the trial court sentenced defendant to a term of 25 years to life on each of the two convictions but, pursuant to section 654, stayed service of sentence on the second count (assault by means of force likely to produce great bodily injury). The court added a five-year term for each of the two prior serious felony convictions, resulting in a sentence of 35 years to life. (§ 667, subd. (a)(1).)

DISCUSSION

A. DEFENDANT'S CONVICTION OF TWO CRIMES

Defendant contends that his conviction for assault by means of force likely to produce great bodily injury must be reversed because a single assault cannot be fragmented into two assaults, one with a deadly weapon and another by means of force likely to produce great bodily injury. Defendant is correct, a conclusion the Attorney General concedes.

In 2010, section 245, subdivision (a)(1) provided, in pertinent part: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison." The section spoke in the alternative, encompassing two forms of prohibited conduct – assault with a deadly weapon other than a firearm *or* assault by means of force likely to produce great bodily injury. However, the section "defines only one offense." (*People v. McGee* (1993) 15 Cal.App.4th 107, 110.) Indeed, "'[t]he offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon.'" (*Ibid*., citing *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5.)

Here, defendant's attack on Robinson constituted both an assault with a deadly weapon and an assault by means of force likely to produce great bodily injury. However, because the attack arose from one single act – the throwing of the hatchet – defendant cannot be convicted of two separate offenses. (See *In re Mosley, supra*, 1 Cal.3d at p. 919, fn. 5, *People v. McGee, supra*, 15 Cal.App.4th at p. 110.) We therefore reverse defendant's conviction for assault by means of force likely to produce great bodily injury (count 2). (See *People v. Bevan* (1989) 208 Cal.App.3d 393, 399.)

B. SENTENCING

Defendant contends that the trial court abused its discretion in denying his *Romero* motion to strike his two prior convictions. In addition, for the first time on appeal, defendant contends that his sentence violates the federal prohibition on cruel and unusual punishment.

1. *Factual Background*

a. *The Probation Report*

Defendant's probation report recites a lengthy criminal history dating back to 1982.

The juvenile court twice sustained petitions filed against him: in 1982, for attempted burglary (§ 664/459) and in 1985 for the unlawful taking of a vehicle (Veh. Code, § 10851). The second petition resulted in defendant being sent to the California Youth Authority.

In 1988, defendant suffered his first felony conviction – taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)) – and was sentenced to a 16-month term in state prison. In 1990, defendant was convicted of the first of his two Three Strikes priors – robbery (§ 211) – and was sentenced to a 2-year term. In 1993, defendant was convicted of the second of his Three Strikes priors – assault with a firearm (§ 245, subd. (a)(2)) – and was sentenced to a 2-year term. In July 1994, defendant's parole was violated. In 1995, defendant was convicted of driving without a license (Veh. Code, § 12500, subd. (a)). In 1996, defendant was convicted of burglary (§ 459) and sentenced to a 2-year term. In 1998, defendant was again convicted of burglary (§ 459) and this time sentenced to a 4-year term. From 2003 through 2006, defendant had multiple parole violations. In 2008, defendant was convicted of selling pirated DVDs (§ 653w, subd. (a)) and placed on a 4-year probationary term. In 2010, defendant's probation was revoked.

b. *Defendant's Romero Motion*

Prior to the sentencing hearing, defense counsel filed a 21-page motion requesting the trial court to strike defendant's two prior strike convictions. Counsel argued that defendant fell outside the spirit of the Three Strikes law because the two strikes were committed when defendant was younger during "a very rough period in his life" and that "his criminal behavior tapered off as he got older" and, with the exception of this case, "became more financial crime." As for the present assault conviction, counsel conceded it was violent but argued that defendant had been provoked and that Robinson's injuries were not severe. Without any significant evidentiary support, defense counsel claimed that defendant was physically abused and sexually molested as a child, suffers from depression, has attempted suicide on several occasions, and was diagnosed in 1997 with HIV. Counsel argued that, taken together, these circumstances warranted striking defendant's two prior convictions.

The prosecutor's formal opposition argued that the trial court should deny the *Romero* motion or, alternatively, strike only one conviction and sentence defendant to a 21-year term.

At the hearing on the motion, defense counsel noted (correctly) that prior to trial, the prosecutor had offered a plea disposition that included a nine-year sentence.

c. *The Trial Court's Ruling*

The trial court ruled:

> "The court has considered the following: the nature and circumstances of the defendant's present felonies and prior serious and/or violent convictions.

"The length of time. And the defendant's conduct between the commission of the prior strikes and the current crime, whether the prior offenses involved violence or the use of a weapon.

"The nature and circumstances of the prior strikes.

"The defendant has suffered two prior strikes, TA022744, a 1993 matter, for 245(a)(1), assault with deadly weapon, person, convicted on or about February 25, 1993. This is a two-year prison. However, the court notes [defendant] was violated on this same case on July 22, 1994. . . .

"A second conviction, 1990 matter, TA005313, is a 211, conviction date on or about April 24, 1990, two years state prison. Paroled on May 18, 1991, which is one year, 24 days.

"The court has also reviewed the defendant's entire past criminal record which also reveals a sustained petition for attempted burglary in 1982, a 1996 conviction for burglary, a two-year state prison term; 1998 conviction for burglary, and apparently in this matter [defendant] was paroled and he was in turn, he was violated at some point during the period of that parole period.

"The court finds that, number 1, that the prior offenses involved violence.

"Number 2. That the prior offenses did not occur in a single [aberrant] period.

"And number 3. That the defendant has a long criminal history in which violence was a factor.

"The nature of the new offense. Any offenses are violent in nature. And the current offenses are serious felonies.

"Number 3. The current offenses are the same type of crimes that the defendant has committed in the past.

"Number 4. Defendant did not cooperate with law enforcement.

"Number 5. The current crimes involved a direct victim.

"Defendant's background, character and prospects. Age. It's a long history of criminal activity. The first recorded contact with the legal court system was at about age 17.

"Prospects for the defendant's stable life. After review of the defendant's total record, the court concludes that the likelihood of the defendant reoffending is extremely high.

"Factors in aggravation.

"Number 1. The crimes involved violence and the threat of great bodily harm.

"Number 2. The defendant used a weapon during the commission of the crime.

"Facts relating to the defendant. Number 1. The defendant has engaged in violent conduct which indicates a serious danger to society.

"Number 2. The defendant's prior convictions, sustained juvenile petitions, are numerous and increasing in seriousness.

"Number 3. The defendant has been incarcerated in state prison.

"Number 4. The defendant's performance on probation or parole was unsatisfactory.

"Number 5. The defendant was on probation at the time of the commission of the present offense.

"Circumstances in mitigation. The court finds none.

"Thus this court finds that after having considered all of the defendant's circumstances, the prior convictions are not stricken, that *the mandated punishment under the Three Strikes law will not cause a*

severe unreasonable and disproportionate determinate to the defendant, when taken into consideration with the factors previously mentioned.

"... the court then does not find that the defendant may be deemed outside of the spirit of the Three Strikes law in whole or in part and hence should be treated as though he had not been previously convicted of one or more serious and/or violent felonies. That will be the court's finding in this matter." (Italics added.)

2. *Discussion – Denial of the Romero Motion*

A trial court's decision not to strike a prior conviction pursuant to section 1385, subdivision (a), is reviewed for abuse of discretion. (*People v. Superior Court* (*Romero*), *supra,* 13 Cal.4th at p. 531.) In that regard, we may not substitute our judgment for that of the trial court. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) We will affirm the trial court's ruling as long as the record shows the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law. (*Id.* at p. 378.) The defendant has the burden of demonstrating an abuse of discretion. (*Id.* at pp. 376-377.)

There is a "'strong presumption' [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation." (*In re Large* (2007) 41 Cal.4th 538, 551.) Indeed, "[b]ecause 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." (*People v. Carmony, supra,* 33 Cal.4th at p. 378.)

In this appeal, defendant argues that the trial court abused its discretion in refusing to strike either Three Strikes conviction because the assault "was situational in nature," "not indicative of a predisposition toward violent criminal behavior" but instead "the result of provocation by intoxicated neighbors who were intent on instigating [him] into a violent confrontation." He claims that "the unique circumstances of this offense do not support a finding that [he] is a violent or dangerous individual who will likely recidivate in a similar manner." As he did in the trial court, he attempts to minimize the significance of his two Three Strike convictions and argues that his "background and prospects support a finding that [he] falls outside the scheme of the three strikes law."[3]

We are not persuaded. The trial court heard all of the evidence at trial, reviewed the probation report and defendant's written motion, and entertained oral argument on the *Romero* motion. It rejected all of defendant's arguments that he reiterates on appeal. Viewing defendant's lengthy criminal history, his

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[3] We question whether defendant adequately established his claims about his personal background and health status. Defendant offered no evidence to support these claims. Defendant did not testify at trial; none of his defense witnesses testified about these circumstances; and no declaration attesting to any of these facts was attached to his *Romero* motion. The only reference in the probation report to any of these claims is a brief mention that in an earlier closed probation report, defendant had stated he had "HIV since 1997." Other than that one reference, the claims about defendant's personal background and mental health are simply statements made by defense counsel in the body of the *Romero* motion. But counsel's unsworn statements do not constitute evidence. (*People v. Wallace* (2004) 33 Cal.4th 738, 754, fn. 3.) Given that it is the defendant's burden to provide the trial court with evidence to support his *Romero* motion (*People v. Lee* (2008) 161 Cal.App.4th 124, 129), we could, but do not, conclude that defendant's failure to present competent evidence constitutes a forfeiture of the right to complain that the court's denial of *Romero* relief failed to adequately take into account that evidence. (*Id*. at p. 131.) Instead, we assume that the trial court considered the claims and found them wanting. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 ["The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary."].) That ruling was not an abuse of discretion.

unsatisfactory performance on parole and probation and the violent and dangerous nature of his assault upon Robinson in light of the well-settled principles of appellate review of a trial court's ruling on a *Romero* motion, we conclude that defendant has failed to establish that the trial court's decision was "so irrational or arbitrary that no reasonable person could agree with it."[4] (*Carmony, supra,* 33 Cal.4th at p. 377.) Indeed, defendant appears to be "an exemplar of the 'revolving door' career criminal to whom the Three Strikes law is addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.)

3. *Discussion – Cruel and Unusual Punishment*

"Cruel and unusual punishment arguments, under the federal or California tests, require examination of the offense and the offender." (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.) This is a fact-based inquiry that must first be litigated in the trial court. Here, defendant's failure to raise this point below constitutes a forfeiture of any right to pursue it on appeal. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) On that basis alone, we can, and do, reject the contention.

Nonetheless, we also consider and reject the contention on the merits for two separate reasons. The first is to forestall any future claim that trial counsel was ineffective for failing it raise it below.[5] (*People v. DeJesus, supra,* 38 Cal.App.4th

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[4] That the prosecutor had offered to dispose of the case by a plea that would have resulted in a nine-year sentence does not change this conclusion. In evaluating the trial court's denial of the *Romero* motion, "'the paramount consideration is not what the prosecution [offered before trial]. Rather, what counts is what the trial court in this case concluded, as expressed by the reasons it stated.' . . . Defendant has failed to demonstrate that the trial court's decision was irrational or arbitrary. The trial court did not abuse its discretion." (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434.)

[5] To prevail upon a claim of ineffective representation, a defendant must establish both that (1) trial counsel's performance was deficient under an objective standard and

at p. 27.) The second is that the trial court's reasons for denying the *Romero* motion—a motion that essentially advanced the same arguments now presented to argue the sentence constitutes cruel and unusual punishment—establish why the sentence does, in fact, pass constitutional muster.

The federal constitutional prohibition on cruel and unusual punishment "contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' [Citations.]" (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*).) This principle prohibits only those sentences that are grossly disproportionate to the crime. (*Id*. at pp. 23-24.) "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 77.) In making that determination, a court looks at the gravity of the offenses compared to the harshness of the penalty, the defendant's criminal history, and the state's legitimate "public-safety interest in incapacitating and deterring recidivist felons." (*Ewing, supra*, 538 U.S. at p. 29.) Under this standard, defendant's sentence clearly passes constitutional muster. Defendant committed a serious crime: assault with a deadly weapon. Furthermore, he has a lengthy criminal history (including convictions for robbery and assault with a deadly weapon) and has failed all attempts at reform. The Three Strikes law under

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(2) there is a reasonable probability that but for that alleged failing, there would have been a more favorable outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) In this case, defendant cannot establish those two elements.

For one thing, trial counsel's failure to raise a "cruel and unusual" objection was not unreasonable given the trial court's unequivocal rejection of her *Romero* motion. She could have rationally concluded that nothing would have been gained by simply recasting the argument in constitutional terms. Trial counsel is not required "to indulge in idle acts to appear competent." (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

For another thing, defendant cannot establish the failure to advance that argument was prejudicial. As we explain, given the trial court's reasons for denying the *Romero* motion, defendant's record, and the facts of the crime, there is no reasonable probability that the court would have reduced the sentence even if defense counsel had explicitly argued that the sentence of 35 years to life was cruel and unusual.

which he was sentenced "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." (*Ewing, supra*, 538 U.S. at p. 30.) In sum, this case does not constitute "'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' [Citation.]" (*Ibid*.) Defendant's argument that his sentence is the functional equivalent of a life sentence because he is suffering from AIDS, "will not even be eligible for parole until he is 71 years old, and likely will not be paroled on the first opportunity" does not change our conclusion. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 396-401.)

DISPOSITION

The conviction on count 2 of the information—assault by means of force likely to produce great bodily injury—is reversed. The trial court is directed to prepare a modified abstract of judgment reflecting this partial reversal and to forward a certified copy of it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.