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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.

JOHNNIE ANTHONY ECHOLS,

Defendant and Appellant.

B268020

(Los Angeles County  
Super. Ct. No. YA091440)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed and remanded.

Joy A. Maulitz, 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, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

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In a two-count amended information filed by the Los Angeles County District Attorney's Office, defendant and appellant Johnnie Anthony Echols was charged with driving under the influence of a drug causing injury to Paulo Rojas (Rojas) (Veh. Code, § 23153, subd. (e); count 1) and reckless driving on a highway causing injury to Rojas (Veh. Code, §§ 23103, subd. (a), 23105; count 2). As to both counts, it was further alleged that defendant personally inflicted great bodily injury upon Rojas (Pen. Code, § 12022.7, subd. (a)), and personally inflicted great bodily injury causing Rojas to be comatose (Pen. Code, § 12022.7, subd. (b)). The amended information further alleged that defendant had suffered two prior serious felony convictions (Pen. Code, §§ 667, subds. (a)(1) & (b)-(j), 1170.12, subds. (a)-(d)), and that he had served six prior prison terms (Pen. Code, § 667.5, subd. (b)).

Defendant waived his right to counsel and represented himself at trial. The jury found defendant guilty as charged and found true the great bodily injury allegations. Following a bifurcated jury trial on the prior conviction allegations, the jury found all of the allegations true.

Defendant was sentenced to an aggregate term of 40 years to life in state prison. The trial court also imposed various fines and fees.

This timely appeal ensued. On appeal, defendant raises three arguments: (1) The trial court deprived defendant of his constitutional rights by striking his testimony; (2) Defendant was denied effective assistance of counsel at the sentencing hearing; and (3) There was insufficient evidence to support the finding that the prior conviction for negligent discharge of a firearm was a strike because no evidence showed that defendant personally used a firearm.

We agree with defendant that the matter needs to be retried on the allegation that his 1990 conviction for discharging a firearm with gross negligence constitutes a qualifying strike. In all other respects, we affirm.

### **FACTUAL BACKGROUND**

In the early morning hours on October 19, 2014, defendant drove his PT Cruiser at a high rate of speed through a red light.<sup>1</sup> In the intersection, defendant struck a Toyota Corolla driven by Rojas. The collision immediately rendered Rojas unconscious for several days, caused bleeding in his brain, and broke both of his legs. Furthermore, Rojas required intubation at the hospital to protect his ability to breathe.

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<sup>1</sup> The circumstances of the collision were demonstrated at trial through video evidence of the collision and detailed evidence from experts regarding the traffic signals, the speed of defendant's vehicle, and defendant's impairment.

Shortly after the collision, defendant told an investigating officer that he had used crack cocaine earlier in the day. Defendant further asked the officer to get his crack pipe from his car because the effects of his earlier cocaine use were wearing off. Blood tests showed that defendant had recently ingested cocaine and methamphetamine.

## **DISCUSSION**

### *I. The trial court did not err in striking defendant's testimony*

Defendant contends that the trial court deprived him of his constitutional rights by striking his testimony.

#### A. Relevant Facts

Prior to jury selection, the prosecution moved to admit defendant's six prior convictions, including a 1982 kidnapping conviction, for impeachment purposes in the event that defendant chose to testify at trial. Defendant indicated that he would probably "admit that [he did] have priors," and he "wouldn't go into the context of them." The trial court responded that defendant "wouldn't be able to" discuss the context of the prior convictions. The trial court ruled that all of the prior convictions could be admitted for impeachment purposes because each conviction involved a crime of moral turpitude and the convictions spanned a period of 15 years. The trial court specifically informed defendant: "In the event that you elect to testify, you can be impeached with the" six prior convictions.

On direct examination in the defense case, defendant testified. In particular, he testified that about 36 hours before the incident, defendant met a young woman who bought drugs and asked him to “try it.” He declined and told her to get out of his car.

After some cross-examination questions, the prosecutor indicated that he was going to ask defendant about his criminal history. Defendant objected, and the trial court overruled the objection. The prosecutor then asked defendant if he had been convicted of kidnapping. Defendant indicated that he was not going to answer the question, and the trial court ordered him to answer the question. When defendant attempted to object, the trial court instructed him to testify or he was “done testifying.” Defendant replied, “I was done testifying when I was through.”

The prosecutor then noted that he had a right to impeach defendant, and the trial court agreed.

Later, outside the presence of the jury, the trial court explained to defendant that the prosecutor was allowed to impeach his testimony with his prior felony convictions. After some discussion, the trial court informed defendant that it would “order the jury to disregard everything [he] said during [his] direct examination, and then Mr.—the D.A. [would] not be able to cross-examine [him]. Is that what you want to do?” Defendant replied, “Okay.”

When the jury returned, the trial court advised the jury as follows: “All right. Folks, I’m going to admonish you that you are to disregard the testimony that the defendant has given when he testified on direct examination. That is being stricken. You are not to consider it for any purpose. [¶] Did everyone understand that?”

Following the jury’s excusal for the day, the prosecutor indicated that he wanted to introduce certified records of defendant’s prior convictions to impeach his credibility. The trial court responded that there was “no testimony” because the “jury [had] been ordered to disregard” it.

Shortly thereafter, defendant indicated that he had been confused about the permissible scope of cross-examination regarding his prior convictions. The trial court explained that the prosecutor’s questions were proper and that defendant’s refusal to answer those questions resulted in the striking of his direct testimony. The trial court further explained that if defendant wished to return to the witness stand and answer the prosecutor’s questions, it would advise the jury that it could consider defendant’s testimony. The trial court allowed defendant to make a final decision the following morning.

The following morning, the trial court asked defendant if he had decided whether to return to the witness stand and subject himself to cross-examination. Defendant indicated that he was

not willing to subject himself to cross-examination on his prior convictions; he reaffirmed that decision upon further inquiry by the trial court.

Standby counsel (Nancy Sperber) noted for the record that she had explained to defendant his available options: (1) If defendant chose not to subject himself to impeachment with his prior convictions, his direct testimony would be stricken and the jury would be instructed not to consider his testimony, or (2) Defendant could testify and the prosecution would be entitled to cross-examine him on the prior convictions. Standby counsel further noted that she had explained to defendant that sitting on the witness stand was not the appropriate time to challenge the validity of his prior convictions and that he could not pick and choose which questions he wanted to answer.

In conclusion, the trial court stated: “If you don’t want to subject yourself to cross-examination, that’s certainly your decision. I just believe you are making a grievous error, but you’re the captain of your ship. You made the decision.”

#### B. The Law

“A criminal defendant’s due process right to defend against the state’s accusations includes the right to testify in his or her own behalf.” (*People v. Brooks* (2017) 2 Cal.5th 674, 702.)

“However, a defendant’s right to take the witness stand to offer his or her account of the events in question coexists with the

prosecutor's right to fairly test that testimony through cross-examination." (*Ibid.*) "Courts have long recognized that when a defendant refuses to answer some or all of a prosecutor's relevant questions during cross-examination, the trial court has discretion to strike the defendant's direct testimony, either in part or in its entirety." (*Ibid.*)

In exercising its discretion to strike the defendant's direct testimony, the trial court "should consider both the motive for the refusal to answer and the materiality of the answer." (*People v. Brooks, supra*, 2 Cal.5th at p. 702.) A reviewing court should apply the same approach when assessing an appellate challenge to the trial court's ruling on a motion to strike the defendant's direct testimony. (*Ibid.*)

### C. Analysis

Here, defendant had an apparent tactical motive for refusing to answer the prosecutor's questions regarding the prior convictions—he wanted to prevent the jury from being exposed to the full impeachment value of his six prior convictions. After the trial court struck defendant's direct testimony because he refused to answer the cross-examination questions regarding his prior kidnapping conviction, the trial court carefully explained to defendant that the prosecutor was entitled to cross-examine him about the specific crimes of which he was convicted and the dates of conviction, and that defendant's refusal to answer those



questions resulted in the striking of his direct testimony. The trial court further explained to defendant that if he wanted to return to the witness stand and answer the prosecutor's questions, the trial court would advise the jury that it could consider his testimony. Standby counsel also explained that she had similarly advised defendant about his options. Given these advisements, defendant apparently decided that there was more utility in refusing to answer the cross-examination questions about his prior convictions than having the jury hear about his six prior convictions. Defendant's "tactical decision did not exempt him from cross-examination." (*People v. Brooks, supra*, 2 Cal.5th at p. 703.)

Defendant's answers to the cross-examination questions were material to his credibility, a central issue at trial. The prosecution presented evidence that defendant had ingested cocaine and methamphetamines prior to the collision. By contrast, defendant testified on direct examination that he had refused his female companion's offer to try her drugs. Thus, the impeachment value of defendant's prior convictions was highly relevant to the jury's assessment of defendant's credibility.

It follows that the trial court did not abuse its discretion in striking defendant's direct testimony. (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 527.)

In urging reversal, defendant argues that less “drastic solution[s]” should have been used, such as an instruction from the trial court that a witness’s failure to answer questions on cross-examination could be considered, or a partial striking of his testimony. While other solutions may have been available, those options do not compel the conclusion that the trial court abused its discretion in electing to strike defendant’s testimony, particularly given the importance of defendant’s credibility on the issues at trial.

Even if the trial court had erred in striking defendant’s testimony (which we do not believe), that error was harmless beyond a reasonable doubt; defendant’s testimony would not have changed the outcome at trial. (*People v. Brooks, supra*, 2 Cal.5th at p. 704.) The prosecution presented overwhelming evidence of defendant’s guilt, including video evidence of the traffic collision, detailed evidence regarding the circumstances of the collision, the results of defendant’s blood tests, which revealed that defendant had recently ingested cocaine and methamphetamine, defendant’s admission to a police officer that he had used crack cocaine earlier in the day, and defendant’s request to the officer to retrieve his crack pipe from the car because the effects of his earlier cocaine use were wearing off. And, the admission of defendant’s six prior convictions as impeachment evidence would have negated any credibility of defendant as a witness. Under

these circumstances, any error was harmless beyond a reasonable doubt.

II. *Defendant did not receive ineffective assistance of counsel*

Defendant contends that his trial counsel provided constitutionally ineffective assistance at the sentencing hearing because she failed to (1) present a *Romero* motion,<sup>2</sup> and (2) argue that the trial court should exercise its discretion to strike the five-year great bodily enhancement.

A. Relevant Facts

On October 15, 2015, following the trial court's denial of defendant's motions for a new trial and for judgment notwithstanding the verdict, defendant relinquished his right to self-representation and requested the appointment of counsel. The trial court appointed Nancy Sperber, who had been acting as standby counsel, and continued the sentencing hearing to October 27, 2015.

At the sentencing hearing, the prosecutor requested a sentence of 44 years to life. Defense counsel stated that it was her understanding that defendant was supposed to bring, or did bring, a *Romero* motion and that that motion had been heard. When the trial court noted that it did not recall if defendant had

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<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

made a *Romero* motion, the prosecutor clarified that defendant had not brought such a motion.

The trial court then stated: “Based on his criminal history, his present—the present offense and his prospects for the future, there is nothing I can say that indicates to me he falls outside the spirit of the Three Strikes law. [¶] . . . [¶] Motion is denied.”

Defense counsel noted for the record that defendant had just handed her a sentencing memorandum for the prior kidnapping conviction and that he had told her that he had served more than the indicated seven-year term for that offense. Counsel explained that she had informed defendant that he was raising a habeas issue that “was not [her] issue.” Counsel further stated that she would submit on the *Romero* issue, nothing that even though defendant’s prior convictions were old, the trial court could “consider the fact that [defendant] did the time in custody and, then, within a very short time, committed this offense.”

The trial court then stated: “Right and based on him and everything about him, there is nothing I can say that indicates that he falls outside the spirit of the Three Strikes law. [The prosecutor] is correct. This defendant is a career criminal. He hurts people. He injures people. He belongs in prison.”

The trial court sentenced defendant to an aggregate term of 40 years to life in state prison, consisting of a term of 25 years to life on count 1 (driving under the influence of a drug), plus 10

years for two prior serious felony enhancements, plus five years for the great bodily injury enhancement. The trial court struck the four prior prison term enhancements under Penal Code section 1385.

#### B. The Law

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–694; see also Cal. Const., art. I, § 15.) “Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel’s representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) “Moreover, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” [Citation.]’ [Citation.]” (*Ibid.*; see also *Strickland v. Washington, supra*, at pp. 688, 694.)

Notably, “[c]ounsel is not ineffective for failing to make frivolous or futile motions.” (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

C. Analysis

Defense counsel was not ineffective at the sentencing hearing. Regarding her alleged failure to make a *Romero* motion, the trial court seems to have assumed that such a motion was being made because it expressly stated that, based on defendant’s criminal history, there was nothing to indicate that he fell outside the “spirit of the Three Strikes law” and therefore the “[m]otion [was] denied.”

Even if a *Romero* motion had not been expressly made and denied, any such motion would have been futile. The appellate record amply supports the trial court’s determination that defendant was a career criminal. He has numerous prior convictions. In light of his “continuous crime spree” that has “substantially spanned his entire adult life,” the remoteness of the prior strikes was not a mitigating factor. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321.) Thus, it would have been futile for counsel to have made a *Romero* motion and, as set forth above, counsel is not ineffective for failing to make a futile motion. (*People v. Thompson, supra*, 49 Cal.4th at p. 122.)

Defendant further argues that an effective attorney would have argued that the trial court should exercise its discretion to

strike the five-year great bodily injury enhancement. Again, such a motion would have been futile. The imposition of the great bodily enhancement was commensurate with defendant's culpability and the severe injuries that he inflicted upon Rojas. Rojas was immediately rendered unconscious by the collision. He required intubation to protect his ability to breathe. He suffered bleeding in his brain and two broken legs. As a result of these serious injuries, it was "appropriate to increase the punishment by way of an enhancement" under Penal Code section 12022.7, subdivision (b). (*People v. Guzman* (2000) 77 Cal.App.4th 761, 765.)

### III. *Prior Conviction*

Defendant argues that there was insufficient evidence to support the finding that the prior conviction for negligent discharge of a firearm was a strike because no evidence showed that he personally used a firearm. He asks that the matter be remanded for retrial, and the People agree. Because there is no evidence that establishes that defendant personally used a firearm in committing the offense of discharging a firearm with gross negligence, the matter must be remanded for a retrial on the question of whether defendant's 1990 conviction constitutes a qualifying prior strike conviction. (*People v. Golde* (2008) 163 Cal.App.4th 101, 113.)

## DISPOSITION

The matter is remanded for a retrial on the allegation that defendant's 1990 conviction for discharging a firearm with gross negligence constituted a qualifying strike under the Three Strikes law. In all other respects, the judgment is affirmed.

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\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, J.  
CHAVEZ

\_\_\_\_\_, J. \*  
GOODMAN

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\* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.