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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH DOUGLAS MITCHELL, Defendant and Appellant.	B266080 (Los Angeles County Super. Ct. No. BA433381)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edmund Willcox Clarke, Jr., Judge. Affirmed.

Katja M. Grosch, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

The Los Angeles County District Attorney charged Joseph Douglas Mitchell (Mitchell) with sale of a controlled substance in violation of Health and Safety Code section 11352, subdivision (a). The information alleged that Mitchell suffered 12 prior convictions within the meaning of Penal Code section 667.5, subdivision (b),[1] three prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a), and two prior convictions within the meaning of sections 667, subdivision (b) and 1170.12, subdivision (b).

A jury found Mitchell guilty, and also found the prior conviction allegations to be true.

The trial court sentenced Mitchell to the mid-term of four years, doubled to eight years pursuant to sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (e),[2] plus three years for a prior drug conviction under Health and Safety Code section 11370.2, for a total of 11 years.

On appeal, Mitchell argues: (1) the prosecutor engaged in prejudicial misconduct in her closing argument when she testified to facts outside the record and vouched for the police investigators, thereby violating Mitchell's rights to due process and a fair trial; and (2) the trial court abused its discretion under *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*) when it refused to strike two prior strikes from a 1993 case, thereby violating Mitchell's rights under the Eighth and Fourteenth Amendments to the United States Constitution. Last, Mitchell asks us to conduct an independent review of the police personnel records he sought to discover below, and to reverse the judgment if we find any material that was improperly withheld.

We find no error and affirm.

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

[2] The minute order indicates the trial court imposed sentence pursuant to section 1170.12, subdivisions (a) through (d), but the trial court orally pronounced that it was section 1170.12, subdivisions (a) through (e).

FACTS

Prosecution Evidence

On January 30, 2015, Los Angeles Police Officer Angelica Gutierrez was assigned to the Gang and Narcotics Division, Narcotics Abatement Unit. While working as an undercover buyer, she walked down a street in Los Angeles and saw Mitchell. He summoned her over to where he was sitting, and she asked where she could purchase $20 worth of narcotics. He said, "Yeah, come here. I have it." She walked over to him and saw he was holding a small piece of white plastic in his hand. At that point, she asked, "Can I get a 20?" He replied, "Yeah, I have the good stuff." Then he looked at her and said, "You're not a cop, are you?" or "You're not the police, are you?" She said no and gave him 20 dollars. He took the money and placed a small white rock in her hand. Los Angeles Police Officer Jay Mims, who was also working undercover, observed the transaction between Officer Gutierrez and Mitchell. Once Officer Gutierrez walked away, a third police officer arrested Mitchell.

The parties stipulated that the rock Mitchell sold to Officer Gutierrez was tested and proven to be cocaine base.

Defense Evidence

Mitchell did not present any evidence.

DISCUSSION

I. No Prosecutorial Misconduct.

Mitchell argues that the prosecutor committed misconduct during her closing argument by testifying as to "the appropriateness of certain types of evidence that were not presented in the People's case," and by referring to DNA and fingerprint evidence even though there was no such evidence in the record. In addition, Mitchell argues that the prosecutor improperly vouched for government witnesses. As a consequence, Mitchell posits that he was denied his right to due process. Upon review, we perceive no basis to conclude that the prosecutor violated her ethical and constitutional duty to preserve Mitchell's due process rights.

A. Relevant Facts.

The prosecutor submitted a closing argument to the jury.

During her closing argument, the defense attorney acknowledged the stipulation that the "item that was recovered was in fact cocaine base[,]" but then said, "[w]e do not agree, however, that it was recovered from [Mitchell] and that he was the one who had it. [¶] Now, you heard from Officer Gutierrez and Officer Mims who both said that there were other people in and around and near those tents where [Mitchell] was seated on January 30th, 2015. Is it reasonable that the wrong person was arrested that night? Yes. [¶] . . . Officer Gutierrez testified to you that there were a lot of officers working on this whole operation that night. . . . With all of these officers, no one bothered to videotape anything. . . . [The officer was] wearing a one-way wire transmitter. . . . With all of these officers, not one thing is recorded. [¶] Now, if you are doing legitimate police work, this type of operation, and you stand by your work product, . . . what do you have to hide? Why not have it documented in some fashion when you know that in all odds they are going to be filing a case [of] some variety?

"Does it make sense that the [police] can afford to send 15 to 20 officers down to the Skid Row area to score one $20 rock of cocaine, but they can't in 2015 be bothered to use any sort of modern technology to memorialize what they've done? This is not credible evidence. [¶] . . . [¶]

"I ask you, ladies and gentlemen, to also consider the absence of evidence in this case. You heard Officer Gutierrez testify that the seller apparently had some sort of white plastic in his hand that she was able to see. Well, where is the white plastic? [Mitchell] is arrested. There is no white plastic on his person. Where is that? Where is the DNA or the fingerprint evidence from the money or from the rock of cocaine that connects [Mitchell] to any of the evidence in this case? These things do not exist. . . .

"So there is no corroborating evidence of the conversation between Officer Gutierrez and the seller, and there is no scientific evidence of any kind that connects [Mitchell] to this case. That, ladies and gentlemen, quite simply is reasonable doubt."

In the rebuttal portion of her closing argument, the prosecutor stated: "DNA, fingerprints, I know we are all inundated by a lot of law shows and they all seem to have DNA and fingerprints. But in this case, DNA, fingerprints, what would that really show you? Officer Gutierrez was there and interacted with the defendant and saw him. Officer Mims was there and saw him and saw the transaction. Oftentimes, DNA and fingerprints, it's the kind of case, like, whodunit. You don't know who committed the crime, so you're looking for fingerprints and you're looking for DNA that connects it to the person."

Defense counsel objected on the ground that the prosecutor was testifying.

In response, the trial court informed the jury that "[t]he attorneys are . . . allowed to respond to the opposing arguments with their view of what is logic[al]. What you heard in the instructions is nothing that the lawyers say is actually evidence to be considered. So consider it a rebuttal to the logic of the argument, but that's not new evidence of any kind."

B. Standard of Review.

"We review [a] trial court's rulings on prosecutorial misconduct for abuse of discretion. [Citation.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 792–793; *People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

If the record or trial court's ruling establishes prosecutorial misconduct, we review independently whether that misconduct "constituted outrageous government conduct in violation of [a] defendant's due process rights[.]" (*People v. Uribe* (2011) 199 Cal.App.4th 836, 860.)

State law error is harmless unless it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836. Federal constitutional error is harmless if, beyond a reasonable doubt, the error did not affect the outcome of the trial. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

C. Substantive Principles.

"'A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] . . . [T]he prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [Citations.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).)

Thus, a prosecutor's argument "'may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'" [citation], and he may "use appropriate epithets warranted by the evidence."' [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567–568.)

"[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics[.]" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.)

What prosecutors cannot do is refer to facts not in evidence when those facts are beyond common knowledge, common experience, history or literature. Our Supreme Court has explained that "that such practice is 'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.]" (*Hill*, *supra*, 17 Cal.4th at pp. 827–828.) We note also that prosecutors may not vouch for a witness's veracity. (*People v. Fierro* (1991) 1 Cal.4th 173, 211.) Moreover, prosecutors are not permitted """to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the

prestige or reputation of their office, in support of it.' [Citation.] Similarly, it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.'" [Citations.]' [Citation.]" (*People v. Mendoza* (2016) 62 Cal.4th 856, 906 (*Mendoza*).)

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.] 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citations.]'" (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

D. Forfeiture.

"[A] defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*People v. Benson* (1990) 52 Cal.3d 754, 794.) In general, a defendant must make a trial court objection to the particular type of misconduct that he or she perceives. (*Hill*, *supra*, 17 Cal.4th at p. 820; *Mendoza*, *supra*, 62 Cal.4th at p. 906.) Consequently, a "defendant's failure to raise a vouching objection at trial forfeits the claim on appeal. [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1166, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).) A defendant is excused from "the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.]" (*Hill*, *supra*, 17 Cal.4th at p. 820.)

Here, defense counsel objected, indicating that the prosecutor was guilty of misconduct by testifying to facts not in evidence. Because the trial court admonished the jury, there was no need for defense counsel to request an admonition. Thus, this particular objection was preserved.

The same cannot be said for the vouching objection, which is being raised for the first time on appeal. That objection is forfeited. In any event, as we discuss below, this objection does not inure to Mitchell's benefit.

E. Analysis.

The prosecutor's statements all fell within ethical bounds. Thus, there was neither state law nor federal law error.

1. *Facts not in Evidence*.

Mitchell contends that the prosecutor committed misconduct by stating: "DNA, fingerprints, I know we are all inundated by a lot of law shows and they all seem to have DNA and fingerprints." This statement was not misconduct. It was based on common knowledge, common experience and literature, which is permissible per the case law discussed in Discussion, Part I.C., *ante*.

Next, Mitchell argues that the following sentences contained facts that were not in evidence: "Officer Gutierrez was there and interacted with [Mitchell] and saw him. Officer Mims was there and saw [Mitchell] and saw the transaction." But these facts were in evidence; both Officer Gutierrez and Officer Mims testified as to what they saw and heard regarding the drug buy.

Crying foul again, Mitchell adverts to this statement: "Oftentimes, DNA and fingerprints, it's the kind of case, like, whodunit. You don't know who committed the crime, so you're looking for fingerprints and you're looking for DNA that connects it to the person." To the degree this statement contained facts not in evidence, it was based on common knowledge and experience.

In his reply brief, Mitchell argues that the prosecutor improperly testified that the record did not contain DNA or fingerprint evidence. But the absence of DNA and fingerprint evidence was part of the record; the fact that the prosecutor did not put on

such evidence established that it was lacking. Therefore, to the degree the prosecutor asserted that DNA and fingerprint evidence was lacking, this was not outside the record, and the prosecutor was not asserting that she knew something to which the jury was not privy. In any event, defense counsel was the first one who said that there was a lack of DNA or fingerprint evidence. The prosecutor cannot be assailed for repeating something first uttered by defense counsel.

2. *Vouching*.

According to Mitchell, the prosecutor should not have said, "But in this case, DNA, fingerprints, what would that really show you?" because it implied that DNA and fingerprint evidence was unnecessary, and that the officers' testimony was enough to support a conviction. This was not impermissible vouching. Rather, it was a fair and necessary rebuttal to defense counsel's tactic of arguing to the jury that if the prosecutor relied solely on eyewitness testimony and did not produce DNA or fingerprint evidence, then the prosecutor could not prove the case beyond a reasonable doubt. Evidence Code section 411 provides: "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." Mitchell does not suggest that additional evidence of the crime or his identity were required by statute. Thus, defense counsel's statement suggested a rule that was contrary to the Evidence Code. The prosecutor's argument must be seen as an attempt by the prosecutor to counter defense counsel's tactic, and to inform the jury that it could convict without scientific evidence. As we have explained, a prosecutor is given wide latitude to attack opposing counsel's tactics. Certainly Mitchell cannot be heard to complain that the prosecutor referred to DNA and fingerprint evidence when it was defense counsel who first proffered the issue to the jury.[3]

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[3] In his reply brief, Mitchell states: "When the prosecutor asserted that the officers' testimony was enough to find appellant guilty in the absence of any other evidence, this constituted improper vouching." If Mitchell was correct, it would mean that a prosecutor could never argue that eyewitness testimony was enough to prove a case beyond a reasonable doubt. In neither his opening or reply brief does Mitchell cite any law to support his position.

Next, Mitchell argues that it was clear misconduct for the prosecutor to say, "Oftentimes, DNA and fingerprints, it's the kind of case, like, whodunit. You don't know who committed the crime, so you're looking for fingerprints and you're looking for DNA that connects it to the person." In Mitchell's view, this was "an example of vouching for the police investigators." He leaves it to us to infer why he thinks this is so. Presumably, he believes that the prosecutor was implying that the police investigators were so trustworthy that there was no need for DNA and fingerprint evidence to establish identity. But charging the prosecutor with misconduct in this instance would be unreasonable. All she did was permissibly try to debunk defense counsel's argument that the jury could not convict because the prosecutor did not present DNA and fingerprint evidence.

Even if the prosecutor suggested that the officers were trustworthy, the prosecutor did not suggest personal knowledge on the topic, and there would be no misconduct. As explained by our Supreme Court, "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971, overruled on other grounds in *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

II. No Abuse of Discretion Under *Romero*.

Mitchell argues that the trial court should have stricken his two three strikes priors under *Romero*. Because we conclude that the trial court ruled within the bounds of reason, we find no basis to reverse.

A. Relevant Facts.

The felony complaint alleged, inter alia, that Mitchell was convicted of robbery and assault with a deadly weapon in a 1993 case.

Mitchell filed a motion a strike the prior convictions alleged under the "Three Strikes" law. He argued that the priors should be stricken because the current offense was not violent; the current offense was relatively minor; he was eligible to be sentenced

to 26 years in state prison even if the priors were stricken; the prior convictions arose from one case that occurred in 1993; and since 1993, all of his priors have been for narcotics-related offenses.

The prosecutor opposed. She pointed out that in 1993, in case no. BA065976, Mitchell was convicted of robbery and assault with a deadly weapon, and that from 1994 to 2011, he was convicted of six violations of Health and Safety Code section 11350 and two violations of Health and Safety Code section 11352. Mitchell was sentenced to state prison on multiple occasions, and since 1994 he has not spent more than a year out of prison. According to the prosecutor, Mitchell is the type of recidivist offender targeted by the Three Strikes law, and dismissal of the strike priors would not be in the furtherance of justice.

At the hearing, the trial court stated: "I have reviewed the motion and the People's opposition, and I will point out the obvious that this court is not being asked to use this conviction as a third strike but rather to use the prior strike to double the penalty that [Mitchell] would receive. And in order to strike a strike, my view is that I would have to view the resultant, doubling of the penalty, as an unjust sentence, not just a sentence that I disagree with, but actually an unjust sentence." The trial court said it was not inclined to find that a double sentence would be unjust. Subsequently, it stated: "The motion to strike any of the prior convictions is denied. I feel that doubling of the sentence is warranted based on [Mitchell's] recidivist history and basically unchecked pattern of felony behavior."

In its verdict, the jury found the following true:

In 1993, Mitchell was convicted of robbery and assault with a deadly weapon. He was convicted of violating Health and Safety Code section 11352 (transportation or sale, etc., of a controlled substance) in 1992, twice in 1994 and 2011. In addition, he was convicted of violating Health and Safety Code section 11352 (possession of a controlled substance) in 1990, 1999, 2001, 2003, 2006, 2008. Finally, the jury found that Mitchell served separate terms in state prison commencing in 1990, 1992, 1994, 1999, 2001, 2003,

2006, 2008 and 2011, committed offenses after serving those terms, and did not remain free of prison custody for five years.

B. Standard of Review.

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation . . . is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).)

C. Substantive Principles.

In *Romero*, our Supreme Court held that a trial court may strike an allegation under the Three Strikes law in the furtherance of justice. (*Romero*, *supra*, 13 Cal.4th at pp. 529–530.) A trial court must "consider whether, in light of the nature and circumstances of his 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] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*Carmony*, *supra*, 33 Cal.4th at p. 378.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor

warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376–377.)

D. Analysis.

Mitchell argues, "Considering all the facts, [he] clearly fell outside the spirit of the Three Strikes scheme insofar as the scheme provided for [his] sentence to be doubled in this case." This argument is premised on the following: he was in his early 20's when he committed the robbery and assault with a deadly weapon; since then, he has been convicted only of drug offenses, the vast majority of which were either misdemeanors or will be reduced to misdemeanors under Proposition 47; and his conduct since 1993 was unquestionably caused by drug addiction.

We cannot second guess the trial court's ruling. Mitchell was convicted of drug offenses in 1990, 1992, 1994, 1999, 2001, 2003, 2006, 2008 and 2011, and he served multiple prison terms. The Health and Safety Code section 11352 convictions are ineligible to be reduced to misdemeanors under Proposition 47 (§ 1170.18, subd. (a).) The particulars of Mitchell's background, character and prospects demonstrate that he is a repeat offender, and it was not arbitrary or irrational for the trial court to conclude that Mitchell is a recidivist. Whether to consider Mitchell's apparent drug addiction as a factor suggesting the lenity of striking a strike was for the trial court, not the reviewing court, to determine.

III. No Constitutional Violation.

The Eighth Amendment of the United States Constitution bans cruel and unusual punishment. (*Robinson v. California* (1962) 370 U.S. 660.) So does California Constitution, article 1, section 17. (*Mendoza, supra,* 62 Cal.4th at p. 911.) In particular, they prohibit the imposition of a penalty that is disproportionate to a defendant's personal responsibility and moral guilt. (*Ibid*.) Mitchell argues that his sentence offends the foregoing principles.

Because Mitchell did not raise the issue below, it has been forfeited. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993 (*Russell*).) Even if it was not forfeited, his sentence withstands scrutiny.

"A sentence violates the federal Constitution if it is 'grossly disproportionate' to the severity of the crime. [Citation.]" (*Russell, supra,* 187 Cal.App.4th at p. 993.) A sentence violates the state prohibition against cruel and unusual punishment [citation] if '"it is so disproportionate to the crime for which it is inflicted that it shocks the conscience."' [Citations.]" (*Ibid*.) "The three techniques often suggested for determining if punishment is cruel and unusual are (1) the nature of the offense and the offender with regard to the degree of danger present to society, (2) comparison of the challenged punishment with the punishment prescribed for more serious crimes in the jurisdiction, and (3) comparison of the challenged punishment with punishment for the same offense in other jurisdictions. [Citation.]" (*Ibid*.)

In *Lockyer v. Andrade* (2003) 538 U.S. 63, the Supreme Court concluded that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case." (*Id*. at p. 77.) Moreover, with respect to noncapital sentences, this principle is "narrow." (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*).) Outside the context of capital punishment, "successful challenges to the proportionality of particular sentences have been exceedingly rare.' [Citation.]" (*Id*. at p. 26.)

Apropos to this case, the *Ewing* court explained that "[w]hen the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eight Amendment prohibits California from making that choice. To the contrary, our cases establish that 'States have a valid interest in deterring and segregating habitual criminals.' [Citations.] Recidivism has long been recognized as a legitimate basis for increased punishment. [Citations.]" (*Ewing, supra*, 538 U.S. at p. 25.)

Given that Mitchell committed two prior violent or serious crimes, and then engaged in a life of unchecked crime, which led to multiple convictions and prison

sentences, his sentence was not grossly disproportionate to his current crime and history of ongoing criminal behavior, nor does it shock the conscience. It bears mentioning that Mitchell does not suggest that a comparison to punishment for recidivists in this state, or punishment for recidivists in other jurisdictions, establishes that his punishment was grossly disproportionate.[4]

IV. No *Pitchess* Error.

Mitchell filed a motion for disclosure of law enforcement personnel files pertaining to Officers Gutierrez and Mims. The trial court conducted an in camera hearing to determine whether there were complaints against these officers for falsifying police reports.[5] The inquiry was limited to the five years preceding January 30, 2015. After reviewing the records in camera, the trial court determined that they did not contain discoverable material.

Unsatisfied with the trial court's ruling, Mitchell requests that we independently review the sealed transcript of the in camera hearing. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229–1232.) Our inquiry is limited to determining whether the trial court abused its discretion when ruling. (*Id.* at p. 1228.)

After reviewing the sealed transcript of the in camera hearing, we conclude that the trial court ruled within the bounds of its discretion.

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[4] In his reply brief, Mitchell argues that he received ineffective assistance of counsel when defense counsel failed to object that the sentence amounted to cruel and unusual punishment. Because we conclude that the sentence was lawful, the ineffective assistance of counsel issue is moot.

[5] The *Pitchess* motion requested complaints covering a wide variety of topics, discipline imposed on the officers, and any material which was exculpatory or impeaching within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83. On appeal, Mitchell does not argue that the trial court improperly limited the inquiry to complaints about falsified police reports.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ