Filed 1/28/16 P. v. Garcia CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DAVID GARCIA, Defendant and Appellant.	B262262 (Los Angeles County Super. Ct. No. GA093567)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed.

Gusdorff Law, Janet Gusdorff, 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, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant David Garcia (defendant) on a charge alleging he robbed a 7-Eleven employee. He confessed to the crime in a recorded interview with police investigators, and the People presented additional circumstantial evidence of guilt at trial. We consider defendant's claim that the trial court erred by refusing his request to close part of the trial to the public. We are also asked to decide whether the trial court abused its discretion when it allowed the jury to hear certain statements defendant made during his recorded interview, and when it denied defendant's *Romero*[1] motion at sentencing.

I

Michael Milkoff worked the graveyard shift at a 7-Eleven in Alhambra, California. No one disputes that someone robbed the 7-Eleven at about four in the morning on June 6, 2014, while Milkoff was on duty. The robber, who wore a beanie-style cap and had his shirt pulled up to cover the lower half of his face, said that he "[was] strapped" or "had a gun" and needed at least $50. Milkoff, fearing he would be hurt if he did not comply, gave the robber approximately $60-70.

The only issue at trial was identity, that is, whether defendant was the robber. To prove that he was, the prosecution presented defendant's audio-recorded confession to committing the robbery, Milkoff's identification of defendant in a six-pack photographic line-up, surveillance video of the robbery that the prosecution argued helped identify defendant even though his face was partially covered (because it depicted his height and "distinctive nose" among other things), and testimony from a bystander who saw the robber ride off on a BMX bike and from a police officer who apprehended defendant three days later riding a BMX bike.

---

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

The jury convicted defendant on the sole charge against him, second-degree robbery in violation of Penal Code section 211.[2] The trial court sentenced him to a total term of nine years in state prison, consisting of the low term of two years on the robbery conviction, doubled pursuant to section 1170.12, and with a five-year consecutive term pursuant to section 667, subdivision (a).

II

On appeal, defendant does not argue his confession was involuntary nor does he challenge the sufficiency of the evidence at trial. Instead, he challenges three rulings made by the trial court, two during trial, and one at sentencing. First, defendant contends the trial court should have granted his request to close the courtroom and seal the transcript of proceedings to avoid any disclosure of the fact that he offered to cooperate with the police when they interviewed him; he claims the trial court's refusal to do so played a role in his decision not to testify and violated his federal constitutional rights. Defendant also argues the trial court should have redacted more of his recorded interview than it did because two of his statements that remained would have indicated to the jury that he had a prior conviction. Finally, defendant contends the trial court abused its discretion when it declined to grant his *Romero* motion to strike his 2005 robbery conviction, which added two years to his sentence. Below, we summarize the procedural background relevant to each claim and explain why defendant's contentions do not warrant reversal.

A

1

During his recorded interview with police investigators, defendant admitted he robbed the 7-Eleven to obtain money to support his girlfriend and her children.

---

[2] Undesignated statutory references that follow are to the Penal Code.

Defendant also told the police he would be willing to cooperate as an informant and provide information concerning alleged illegal gambling activity; he specifically mentioned an establishment at the back of "Rick's" on Main Street that he claimed had three illegal slot machines. Defendant also claimed he could provide information about illegal drug distribution activity.

Prior to the start of trial, counsel for defendant asked the trial court to close the courtroom to the public during the examination of the police investigator who would testify concerning defendant's recorded interview. Defense counsel explained that he wanted to try to establish defendant falsely confessed so the police would agree to use him as an informant, but counsel had concerns that raising defendant's offer to cooperate with the police would "jeopardiz[e] his safety because one of the individuals . . . who he identified is currently in custody." In response, the trial court asked whether closure was necessary if defense counsel elicited testimony without using names of specific people. Defense counsel agreed that he did not intend to use the names of any individuals but he argued the mere "fact that [defendant] . . . 'snitched' on other people, that alone would be enough to place his safety in jeopardy."

The trial court stated it would have difficulty justifying closing the courtroom under the circumstances and wondered whether there were alternatives that would avoid the issue: "I think we can try—like I said, we can maybe not disclose the names, that certainly is helpful. But who knows, as far as the public might be concerned, who knows whether he gave real names or whether it was actually real situations. That might not even be relevant and maybe that's one way to avoid that as well." The prosecutor stated it would be extremely hard to separate the names from the other portions of the recorded interview, which he planned to play in full for the jury, but he said he would not object if the court were to close the courtroom during the interviewing officer's testimony. The trial court stated it would take the issue under submission so it could review the transcript of the defendant's interview with the police.

After jury selection, and having had the opportunity to review the transcript, the trial court heard further argument on defendant's request to close the courtroom to the public. The court stated it continued to have concerns with the request, explaining that it did not think there would be anyone in the courtroom that would care about the information defendant provided or that would pose a threat to defendant: "[I]t's not like he is going to provide information against the mafia or the Mexican Mafia or anybody else. We're talking about somebody who was involved maybe in illegal gambling here in Alhambra, and I just don't think that is necessarily the kind of information that necessarily would cause the defendant to be in fear of his safety based on that information."

The court gave defense counsel an opportunity to argue the issue further, and counsel continued to contend the courtroom should be closed when the recorded interview was played for the jury and when the interviewing investigator testified. Defense counsel stated the person defendant identified during the police interview was facing criminal prosecution in the same courthouse, but counsel agreed he could not make representations about any specific danger to defendant. Defense counsel conceded there was no allegation of mafia involvement but argued any person who "snitches" on anyone else could be subject to retaliation in prison.

The trial court stated it continued to doubt that closing the courtroom would be proper "because this is a public trial and the public actually has a right to be here during the trial." The court stated the public's right to attend the trial was "paramount," and the court opined that "unless we're talking about courtroom security issues where there may be persons present that might cause a disruption or something like that, I don't think I'm free to just close the doors and not allow the public in." Continuing to believe, however, that the issue might resolve itself if no one who would pose any threat to defendant was present in court at the relevant time, the trial court deferred ruling on the request until the interviewing investigator testified.

When that time came, defense counsel did not object or renew his request to close the courtroom. The interviewing investigator, Officer Huezo, testified on direct examination concerning his interview of defendant and the prosecutor played the full recorded interview (with certain redactions, see *post*, at pages 14 and 15) for the jury. On cross-examination, defense counsel questioned Officer Huezo about defendant's statements during the interview offering to cooperate with the police.

At the close of the prosecution's case, the issue of closing the courtroom resurfaced. The trial court inquired as to whether defendant intended to testify. Defense counsel informed the court that defendant was not inclined to testify for "several reasons," and one of the reasons was because there were approximately ten people in the courtroom at the time and he did not want to be "subject to cross-examination on that," i.e., his interview statements offering to cooperate with the police. Defense counsel asked the court to close the courtroom through closing argument.

The trial court denied the defense's request to close the courtroom, supplementing its prior views on the issue with the following: "I don't know who is out there [in the courtroom gallery]. I think we have very few people here that are on other cases that are on calendar. I don't know. There may be people waiting for custodies. I don't know the custody situation. Again, this is a public trial. I can't really close the courtroom, and I can't really do that without violating the public's right to be present during the trial." After ruling, the trial court gave defense counsel additional time to confer with defendant concerning whether he wished to testify. Defendant opted not to testify and rested his case without presenting any evidence.

2

Defendant cites *People v. Cummings* (1993) 4 Cal.4th 1233 for the proposition that a court may exercise its discretion to exclude members of the public from trial if necessary to preserve a defendant's right to a fair trial. We accordingly review for abuse of that discretion defendant's contention that the trial court should have closed the courtroom for

part of the trial in this case. (See *Tribune Newspapers West, Inc. v. Superior Court* (1985) 172 Cal.App.3d 443, 451-452.) An abuse of discretion may be found when the ruling in question falls outside the bounds of reason. (*People v. Johnson* (2015) 61 Cal.4th 734, 750.)

"The right to a public trial is deeply rooted in the history and jurisprudence of our nation. The origins of the right trace back to the Magna Carta and the Bible. As a result of our history, we distrust secret inquisitions and Star Chamber proceedings. Accordingly, in criminal cases, both the United States and the California Constitutions guarantee the right to a public trial. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) . . . [¶] . . . [¶] The right to an open public trial is not the right of only the criminal defendant, but is rather a shared right of the accused and the public, the common concern being the assurance of fairness." (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 551-552 (*Esquibel*); see also *People v. Cummings, supra,* 4 Cal.4th at pp. 1298-1299 [right to public trial not that of the defendant alone; there is a First Amendment right of access to judicial proceedings].) The constitutional guarantee of a public trial creates a "presumption of openness" that forbids excluding the public unless such an exclusion is shown to be necessary to protect a "higher value," including a defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. (*People v. Woodward* (1992) 4 Cal.4th 376, 383; see also *Waller v. Georgia* (1984) 467 U.S. 39, 45 (*Waller*); *Press-Enterprise Co. v. Superior Court of California, Riverside County* (1984) 464 U.S. 501, 509 ["Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness"].) "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (*Waller, supra,* at p. 48; see also *People v. Ayala* (2000) 24 Cal.4th 243, 294, fn. 4.)

As we have already described, defendant failed to object or renew his request to close the courtroom at the time Officer Huezo testified and the recording of defendant's

police interview was played for the jury. The trial court had previously indicated that the issue of excluding the public from trial might resolve itself if no one was present in the courtroom gallery when the officer testified and the recording was played, and there is no indication in the record that anyone was in fact present at that time. In the absence of any such indication or a contemporaneous objection, we hold there is no basis for reversal on the ground that the court did not close the courtroom at the time when the officer testified. (See *People v. Cash* (1959) 52 Cal.2d 841, 847 [no facts shown by the record to indicate the trial was not public and "[i]n the absence of any definite showing that the public was excluded, we must presume, in support of the judgment, that no error was committed in this regard [citation]"].)

The same cannot be said once the prosecution had rested, for at that point defense counsel did renew his request to exclude the public and state for the record that there were a small number of people in the courtroom. Defense counsel further stated the presence of spectators was "one of" the reasons why defendant was not inclined to testify in his own defense. We therefore address defendant's argument that the trial court's refusal to close the courtroom deprived him of a fair trial because it impacted his decision to testify.[3]

---

[3] Defendant claims on appeal that the denial of his request to exclude spectators after the prosecution rested violated his Fifth, Sixth, and Fourteenth Amendment rights. Respondent argues defendant forfeited his federal constitutional claims other than his due process claim because his attorney failed to object in constitutional terms during the proceedings below. Defense counsel did, however, object on the ground that failing to close the courtroom would abridge his right to a fair trial. We believe this objection, along with the entirety of defense counsel's colloquy with the court, was sufficient to apprise the court of the nature of the objection such that we do not hold forfeiture applies to his claim that the trial court erred in declining to close the courtroom during his testimony and closing argument. (See *People v. Partida* (2005) 37 Cal.4th 428, 431; *People v. Yeoman* (2003) 31 Cal.4th 93, 117 ["As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved. . . . "].) As our opinion makes clear, however, we also hold defendant has shown neither constitutional error nor prejudice on the merits.

Defendant argues the trial court necessarily abused its discretion because the court, as defendant reads the record, applied the wrong legal standard in ruling on his request to close the courtroom. Defendant points to the trial court's description of the public's right to attend trial as "paramount" and "absolute," which he views as an indication that the court believed it lacked authority to exclude spectators from a trial absent evidence they were disrupting the proceedings. Viewed in context and in their entirety, however, we do not understand the court's comments as an indication it incorrectly believed it had no discretion to grant defendant the relief he sought.

When defendant first requested closure of the courtroom, the trial court did not reject the request out of hand but instead took the matter under submission so it could review the transcript of the recording and see for itself what statements the defendant made when offering to cooperate with the police. The court also considered whether there was an alternative to closure by asking if avoiding any reference to the names of particular people would solve the problem. After reviewing the transcript, the court further opined that defendant was merely providing information about claimed illegal gambling in Alhambra, which was not the type of crime that would cause the defendant to be in fear of his safety. In light of these comments, we view the court's reference to the "paramount" public right to be present at trial not as evidence that the court believed it lacked discretion to close the courtroom but rather as an expression, perhaps imprecise, of its view that the right to a public trial outweighed the showing made by defendant to justify closure. Indeed, although neither counsel nor the court cited *Waller* when discussing the issue, the court's comments reveal it was considering the factors the *Waller* decision identified as relevant: the trial court considered whether defendant's interests were likely to be prejudiced by declining to close the courtroom, the court suggested a potential alternative to closure, and the court acted to ensure any closure would be no more broad than necessary by

waiting to see whether spectators would be present at the relevant time.[4] (*Waller, supra*, 467 U.S. at p. 48 [listing four factors quoted *ante*, at p. 10].)

We further find no fault in the result the trial court reached in exercising its discretion. Defendant's proffered justification for excluding the public from part of the trial was too generalized and speculative to establish his interests were *likely* to be prejudiced unless the courtroom was closed. Without more (and there was no more), the crime about which defendant provided some information to the police—illegal gambling or operation of slot machines—is not among the type of serious or violent offenses that could in many instances suggest a heightened danger to a police tipster. Further, defendant himself did not articulate any safety concern or relay any particularized facts to suggest why he would be in danger; rather he relied solely on his attorney's generalized and speculative assertion that anyone in custody who provides information to the police could be subject to reprisals. (Cf. *Guzman v. Scully* (2nd Cir. 1996) 80 F.3d 772, 775 [decision to close trial violated defendant's rights where "the trial court relied on the unsubstantiated statements of the prosecutor, rather than conducting an inquiry of the prosecution witness on whose behalf the closure request was made"].) Defendant's request that the court exclude anyone from being present was also quite broad, rather than being narrowly focused on specifically identified spectators. Indeed, accepting defendant's argument that the trial court was obligated to close the courtroom in this case would require the trial courts of this state to close the courtroom in virtually any case where an informant or cooperating witness testifies because such witnesses would always

---

[4] The fourth factor identified in *Waller*, that a trial court "must make findings adequate to support the closure," applies, if at all, with reduced force in this case. Because the constitutional guarantee of a public trial creates a "presumption of openness" (*People v. Woodward, supra*, 4 Cal.4th at p. 383), detailed findings are not necessary in cases like this one where a court's ruling accords with that presumption. In any event, we find the court's comments on the record sufficient to permit review, particularly because defendant's justification for closure consisted of generalized assertions rather than specific factual contentions that the court would have been required to resolve.

be subject to some speculative threat of harm. We see no basis in law for a holding with such sweeping implications. (See *Esquibel, supra*, 166 Cal.App.4th at pp. 552-553 [issue of whether public trial rights have been violated cannot be determined in the abstract, but only by reference to the facts of a particular case].)

Our Supreme Court's decision in *People v. Alfaro* (2007) 41 Cal.4th 1277 demonstrates the trial court did not err in this case. In *Alfaro*, the defendant argued the trial judge erroneously denied her request to exclude the public from the guilt phase proceedings of her death penalty trial so she could testify regarding the actions of another "male Hispanic" she claimed was involved in the charged murder without fearing for her safety. (*Id.* at p. 1307.) Alfaro submitted a declaration in support of her request to close the proceedings in which she stated she believed her family would be harmed if she were to testify in public and identify the "male Hispanic," because he was still at large in the community. (*Id.* at pp. 1307-1308.) The trial court rejected Alfaro's request to close the courtroom and seal the transcript of her testimony, and she chose not to testify.

On appeal, Alfaro argued the failure to close the proceedings prevented her from testifying and prejudiced her defense. (*Id.* at p. 1308.) Our Supreme Court rejected her contention and affirmed the trial court's decision not to close the guilt phase proceedings. The Supreme Court acknowledged a trial court may in unusual circumstances exercise its discretion to close portions of a criminal trial to the public. (*Id.* at p. 1308.) The court held, however, that the defendant failed to establish the trial court's ruling denied her the right to a fair trial. (*Id.* at p. 1309.) The Supreme Court reasoned that defendant's showing in support of closure was insufficient because "[s]he admitted that she had not been threatened to refrain from testifying, and that the only actual 'threats' were those allegedly made by the unidentified man on the day of the murder and several days thereafter, a time (as the trial court noted) one and a half years earlier." (*Ibid.*) The Supreme Court concluded that defendant was aware of her right to testify and willingly chose not to exercise that right. (*Ibid.*)

As in *Alfaro*, no one threatened defendant to refrain from testifying; indeed, there is no suggestion in this case that anyone threatened defendant for any reason. Moreover, the showing defendant made here in support of the request to exclude the public from part of the trial is even weaker than the showing our Supreme Court found insufficient in *Alfaro*. Unlike the defendant in that case, defendant never personally submitted a declaration explaining the basis of any fear for his safety. Furthermore, had defendant testified and been asked about his offer to cooperate with police, his testimony would have touched on information concerning illegal gambling, not murder (a crime much more likely to give rise to safety concerns) as in *Alfaro*.

Defendant relies on this court's decisions in *Esquibel* and *People v. Pena* (2012) 207 Cal.App.4th 944 (*Pena*), but those cases are inapposite and only highlight the absence of any valid predicate for closing the courtroom in this case. The defendant in *Esquibel* was convicted on four counts of attempted murder for shooting at adults and children in a public park, and the jury further found that defendant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (*Esquibel*, *supra*, 166 Cal.App.4th at p. 544.) The trial court excluded two trial spectators who were friends of the defendant during the testimony of a seven-year-old witness based on his mother's concern the friends were possible gang members and would recognize her son in the neighborhood and retaliate against him given the "gang implications" of the case. (*Id.* at 554.) The Court of Appeal held the exclusion of defendant's friends (while allowing other members of his family to remain present) did not violate defendant's constitutional right to a public trial. (*Id.* at p. 554.)

Defendant argues that there were no specific threats to the safety of the child witness in *Esquibel*, so there need have been no specific threats against defendant to justify closure of the courtroom during his testimony. This argument overlooks key differences between *Esquibel* and this case. First, defendant here sought exclusion of the public at large, not select trial spectators that were identified as posing a heightened risk of jeopardizing his safety. (Compare *Esquibel*, *supra*, 166 Cal.App.4th at p. 554 ["[W]e conclude that this

exclusion was not a violation of appellant's constitutional right to an open trial. There was no order excluding the press or the public in general. Except for these two spectators, no one else connected with appellant was excluded from the courtroom and the exclusion was only during the testimony of the single witness"].) And second, defendant's possible answers to questions about whether he offered to cooperate with police on uncovering illegal gambling, or even unnamed persons claimed to be involved in drug distribution, are by their nature nature significantly less likely to give rise to concerns about possible retaliation than testimony of a witness about an attempted gang murder in his neighborhood.

Pena is not persuasive authority here for similar reasons. That case involved two defendants convicted of an attempted gang murder. (*Pena, supra*, 207 Cal.App.4th at p. 946.) Moreover, the trial court excluded members of the defendants' family from trial only after two jurors reported that the family members were following them around the courthouse and the prosecutor also reported intimidating behavior from the defendant's mother. (*Id.* at p. 948.) That sort of specific showing was absent in this case where defendant relied only on his attorney's generalized assertions of possible harm from "snitching."

We are convinced, in any event, that defendant suffered no prejudice from the trial court's denial of his request to close the courtroom. Defendant and the Attorney General agree we should assess harmlessness under the *Chapman v. California* (1967) 386 U.S. 18 standard, and we conclude beyond a reasonable doubt that granting defendant's request to close the courtroom would not have affected the outcome at trial. First, defense counsel stated his client did not want to testify for "several reasons," only one of which was the presence of spectators in the courtroom. We therefore cannot assume that defendant would have testified but for the trial court's ruling.[5] But even if the record did demonstrate defendant would have testified if the courtroom were closed, we can say

---

[5] We note in this same vein that counsel made no offer of proof as to what defendant would have testified to after the trial court ruled it would not close the courtroom.

beyond a reasonable doubt that his testimony would not have changed the outcome of the trial. The evidence against defendant was strong, and included his audiotaped confession to committing the crime. (See *Alfaro, supra*, 41 Cal.4th at p. 1309 ["[I]n view of the admission in evidence of defendant's lengthy and detailed videotaped confession, it is not reasonably probable that her testimony regarding the involvement of the second man in the murder would have changed the outcome of the guilt phase"].)

B

1

During his recorded interview with the police, defendant made a number of statements indicating he had some familiarity with the criminal justice system. Some of his statements went beyond that and suggested or outright acknowledged that he had suffered a prior conviction for robbery. Before the presentation of evidence at trial, the court heard argument from counsel regarding the portions of the recording and transcript that should be excluded as unduly prejudicial under Evidence Code section 352.

The trial court identified several statements made by defendant during the recorded interview that it viewed as problematic because they indicated he suffered a prior conviction. The trial court ordered those statements stricken from the recording and the transcript as unduly prejudicial.

Counsel and the court also discussed two statements made by defendant that remained in the recording and transcript presented to the jury. The first was defendant's statement (Statement One) in the following excerpt of the transcript:

> [Police Detective]: I'm not going to work with somebody I don't trust, I'm not fucking dumb dude.
> [Defendant]: Neither am I dude[,] robbery is 2-4-6 & 7[.] If I tell you that's me and the[n] bam you got a closed case. Then I go away with a strike,

> double it up and that's 4 years of prison. Come on man, I ain't dumb either man.

The prosecution argued this and other similar statements during the interview were relevant because they tended to show defendant's confession was not coerced and that he understood the implications of his admission of guilt. The trial court stated it was inclined to allow the statement to stay in because defendant did not refer to his prior conviction; rather, the statement only indicated familiarity with the sentencing term for robbery, and that was not prejudicial in the court's view. When defense counsel had trouble locating Statement One in the transcript, the trial court read it to him. After the trial court read the statement aloud, defense counsel ruled, "I agree. That is not a mention of a prior conviction." The trial court then ruled it would allow the statement in.[6]

The second statement made by defendant during the recorded interview that the trial court did not exclude (Statement Two) was:

> [Defendant]: I gave you what you wanted, I gave you what you needed [sic] take it to your sergeant and a closed case. (Inaudible), I'll tell you even more. I know a lot of shit about the streets, I've been around a long fuckin' time.

---

[6] Later in the discussion regarding the Evidence Code section 352 objections to the recorded interview, defense counsel used his agreement to allow the jury to hear Statement One as a reason why the court should exclude, over the prosecution's opposition, another statement defendant made about having "a record" since he was 13 years old: "I think [defendant] has articulated sufficient familiarity with the criminal justice system and with robbery, including sentencing ranges. . . . I think that's enough—if the People want to convey the fact that he's familiar with this, I think that is more than sufficient." The trial court agreed with defense counsel and excluded the other statement.

The prosecution argued Statement Two should not be excluded because it did not make any mention of a prior conviction. The trial court agreed, stating it did not have a problem with Statement Two because it could "mean a lot of things."

2

Defendant contends the trial court violated his Fifth, Sixth, and Fourteenth Amendment rights when it declined to exclude Statements One and Two from consideration by the jury.[7] He concedes defense counsel was required to but did not object to the admission of Statement One, but he argues reversal is nevertheless warranted as to both statements because counsel's failure to object to Statement One constitutes ineffective assistance of counsel.

"'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' [Citation.]" (*People v. Johnson, supra*, 60 Cal.4th at pp. 979-980; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*); *People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212 [a reasonable probability is a probability sufficient to undermine confidence in the outcome].) """[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. '"'

---

[7] Defendant's federal constitutional claims are premised on the same theory of exclusion that he asserted in his objection at trial, namely, that the evidence was more prejudicial than probative under Evidence Code section 352. For that reason, we do not find forfeiture. (*People v. Partida, supra*, 37 Cal.4th at pp. 438-439.) But because we conclude defendant cannot show the trial court abused its discretion in admitting either statement under Evidence Code section 352, his constitutional claims necessarily fail. (*Id.* at p. 439 ["[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"]; see also *People v. Lucas* (1995) 12 Cal.4th 415, 464; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

[Citation.] 'In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [claim of ineffective assistance more appropriately decided in a habeas corpus proceeding].)

We hold there is no basis on this record to find that defense counsel's decision not to object to the admission of Statement One fell below an objective standard of reasonableness. "The decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel. [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.) Defendant argues there could be no conceivable reason for trial counsel's decision not to object, but if anything, the record reveals the opposite: defense counsel could have made the tactical judgment not to object in order to bolster his position when asking the trial court to exclude what he viewed as a more prejudicial statement, which is in fact what occurred—see *ante*, at page 15, fn. 6. Defendant therefore cannot satisfy the first prong of the *Strickland* test on direct appeal.

We further hold that defendant's claim of ineffective assistance fails in any event because his attorney's decision not to object was not prejudicial. It is not reasonably probable that the trial court would have excluded the statement had defendant objected. Indeed, we know the trial court considered whether the statement should be excluded under Evidence Code section 352 and concluded the probative value of the statement was not substantially outweighed by the probability that admission of the statement would create a substantial danger of undue prejudice. That ruling was not an abuse of discretion;[8] the statement was relevant for the reason given by the prosecution and the passing and nebulous

---

[8] We reject defendant's argument that the de novo standard should apply to review of the trial court's evidentiary ruling. Well established authority confirms the abuse of discretion standard applies. (*People v. Mills* (2010) 48 Cal.4th 158, 195; *People v. Waidla* (2000) 22 Cal.4th 690, 717, 724.)

reference to "going away with a strike" was highly unlikely to have been understood by jurors as a reference to defendant having suffered a prior conviction.

As for Statement Two, its admission into evidence was not an abuse of discretion either. Statement Two in no way suggests that defendant had suffered a prior conviction. It is merely a claim by defendant that he was familiar with wrongdoing engaged in by others, or as he more colorfully put it, he "knew a lot of shit about the streets." That is not evidence the admission of which would pose "an intolerable risk to the fairness of the proceedings or the reliability of the outcome" (*People v. Booker* (2011) 51 Cal.4th 141, 188) because it would evoke an emotional bias or be misused by the jury to prejudge defendant on the basis of extraneous factors. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 534.)

C

"Under section 1385, subdivision (a), a 'judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.' 'In *Romero*, [our Supreme Court] held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, "in furtherance of justice" pursuant to . . . section 1385(a).' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 373.) Defendant made pre-trial and post-trial *Romero* motions to strike his 2005 conviction for robbery. The trial court denied the motions, reasoning that defendant had an extensive criminal history and that the prior conviction defendant wanted stricken was for the same crime, robbery, as the conviction at trial in this case.

When confronted with the question of whether a prior conviction should be stricken pursuant to *Romero*, a trial court must consider whether the defendant falls outside the "spirit" of the Three Strikes sentencing scheme by looking to the nature and circumstances of the present offense of conviction; the nature and circumstances of prior serious or violent felony convictions; and the particulars of the defendant's background, characteristics, and

prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review for abuse of discretion a trial court's decision not to dismiss a prior felony conviction allegation under section 1385. (*People v. Carmony, supra*, 33 Cal.4th at p. 374; *People v. Myers* (1999) 69 Cal.App.4th 305 ["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, even if we might have ruled differently in the first instance"].)

We are satisfied the trial court did not abuse its discretion in denying defendant's *Romero* motion. Defendant has an extensive criminal record, including crimes that post-date his 2005 robbery conviction but precede his commission of the offense of conviction in this case. Defendant suffered a 2008 conviction for possessing a controlled substance and paraphernalia and he was placed on probation. Defendant's probation was thereafter revoked and he was sentenced to two years in prison. In January 2013, defendant was convicted of possessing controlled substance paraphernalia and given probation. Six months later, in June 2013, defendant was convicted of carrying a switchblade knife and again granted probation. In March 2014, defendant was convicted of misdemeanor theft. Roughly three months later—and while still on probation—defendant robbed Milkoff, which is the basis for his conviction in this case. Far from establishing that defendant's robbery conviction ten years ago was an aberration in an otherwise crime-free life, defendant's record reveals he has continued to recidivate, albeit for different crimes, in the period between his first robbery in 2005 and the robbery in this case. The trial court did consider the fact that the offense of conviction in this case was a "low-grade robbery" in terms of the amount stolen, but it found the defendant's commission of another robbery and his criminal history "does not bode well and does not warrant a striking of the prior [robbery conviction]." That was a proper exercise of its discretion, not an abuse of it.[9]

---

[9] Defendant argues it was unreasonable for the trial court to refuse to strike his 2005 robbery conviction because it produced a "patently absurd result," namely two additional years in prison for the strike conviction, which along with the five-year section 667, subdivision (a)(1) enhancement, resulted in a term 3.5 times longer than his actual base

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.*

---

sentence. The argument is not persuasive. "The well-recognized purpose of the three strikes law is to provide increased punishment for current offenders who have previously committed violent or serious crimes and have therefore not been rehabilitated or deterred from further criminal activity as a result of their prior imprisonment." (*People v. Leng* (1999) 71 Cal.App.4th 1, 14.)

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