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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KELIN HARRIS,

Defendant and Appellant.

B280335

Los Angeles County
Super. Ct. No. MA067489

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed in part, vacated in part, and remanded for resentencing.

Marta I. Stanton, 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, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Kelin Harris challenges his sentence on the ground the trial court misunderstood and abused its discretion by failing to dismiss his strike priors. We conclude the court neither misunderstood nor abused its discretion. We also conclude, however, that the matter should be remanded for the court to exercise its discretion on whether to strike the imposed firearm enhancements under newly enacted Senate Bill No. 620 (2017–2018 Reg. Sess.).

FACTUAL AND PROCEDURAL BACKGROUND¹

On November 20, 2015, around 4:00 p.m., defendant entered the lobby of the Oxford Inn in Lancaster. He was wearing a hat, a wig, sunglasses, and a gray sweater. When defendant first walked in, he looked at brochures and magazines. Later, he approached the front desk and confronted two clerks, Brent Bates and Katie Wagner. Defendant pointed a gun at Bates and demanded money. With his hands up, Bates ran into General Manager Vincent Magallanes’s office to tell him they were being robbed. After Bates retreated, defendant pointed the gun at Wagner and told her to empty the drawer. Meanwhile, Magallanes called 911. When defendant pulled the gun away, Wagner ran to the back office. Bates then saw defendant walk out of the hotel and, shortly thereafter, Bates saw a truck quickly drive away from the hotel. Bates was shaken, scared, and

¹ We recite only those facts relevant to defendant’s appeal. (See *People v. Garcia* (2002) 97 Cal.App.4th 847, 850.)

appeared out of breath during the incident. Wagner was trembling and also appeared scared.

A hotel surveillance video captured the incident and was played for the jury. Bates and Wagner testified that defendant was the individual in the video. Another witness who had spoken to defendant the same day, Zun Lorthridge, identified defendant in a photograph taken from the surveillance video.

On November 25, 2015, Los Angeles Sheriff's Department Deputy Cody Larocco responded to a service call for robbery at the Red Roof Inn in Palmdale. Before Larocco got to the location, he received a description of an individual matching defendant's appearance. After he arrived, Larocco made contact with defendant and handcuffed him and placed him in the patrol car. Although Larocco told defendant to put his feet inside the patrol car, defendant refused to do so. After other deputies arrived, they placed a restraint on defendant's ankles. Defendant then lunged his head out of the patrol car door which prevented Larocco from closing the door. After defendant refused to comply with Larocco's orders to put his head inside the car, Larocco pepper sprayed him. The deputies were then able to close the patrol car door.

Defendant was charged with and brought to trial for these offenses. In November 2016, a jury convicted defendant of two counts of attempted robbery (Pen. Code,² § 213, subd. (b); counts 1 and 2), and one count of resisting a peace officer (§ 148, subd. (a)(1); count 3.) The jury also found true the allegations that defendant personally used a firearm in the commission of the

² All undesignated statutory references are to the Penal Code.

attempted robberies. (§ 12022.53, subd. (b).)³ Defendant waived jury trial on the prior-conviction allegations and in a bifurcated trial, the court found defendant had suffered two prior strike convictions for serious or violent felonies (§ 667, subds. (b)–(i)), one prior serious felony (§ 667, subd. (a)(1)), and one prior conviction for which he had served a prior prison term (§ 667.5, subd. (b)). The prior strikes were for assault with a deadly weapon (§ 245) and second degree robbery (§ 211) convictions in, respectively, 2006 and 2005.

After denying defendant’s motion to dismiss his prior strikes under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the court sentenced him to an aggregate term of 25 years plus 50 years to life in state prison. For count 1, the court sentenced defendant to 15 years plus 25 years to life—a third-strike term of 25 years to life, plus 10 years for the firearm enhancement (§ 12022.53, subd. (b)) and five years for the serious-felony prior (§ 667, subd. (a)(1)). For count 2, the court sentenced defendant to 10 years plus 25 years to life, to run consecutively—a third-strike term of 25 years to life plus 10 years for the firearm enhancement (§ 12022.53, subd. (b)). For count 3, the court sentenced defendant to 364 days in county jail to run concurrently with the sentence in count 1. The court

³ The jury found defendant not guilty of robbery (§211; count 4), burglary (§ 459; count 5), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 6). These offenses were allegedly committed on a different day and involved a different victim, Ramon Wright.

dismissed the section 667.5, subdivision (b) prior prison term enhancement. This timely appeal followed.⁴

CONTENTIONS

Defendant contends the matter must be remanded for resentencing because the court was unaware of its discretion to dismiss the prior strike convictions as to one of the counts, the court abused its discretion by denying his *Romero* motion, and Senate Bill No. 620 applies retroactively and vests sentencing courts with discretion to strike or dismiss firearm enhancements.

DISCUSSION

1. The court did not abuse its discretion in denying defendant's *Romero* motion.

1.1. Standard of Review

When a prior felony conviction is alleged under the Three Strikes law, a trial court has discretion to dismiss it under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529–530.) The court's discretion, however, is limited. (*Id.* at p. 530.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question 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,

⁴ We deny defendant's petition for a writ of habeas corpus in a separate order filed concurrently with this opinion.

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.)

We review the trial court's decision whether to strike a previous serious or violent felony for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) “[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].” (*Id.* at p. 378.)

1.2. Defendant's Motion

Defendant contends the trial court was unaware of, or abused, its discretion to dismiss either or both of the prior strike allegations as to one count but not as to the other count under *People v. Garcia* (1999) 20 Cal.4th 490 (*Garcia*). In *Garcia*, the Supreme Court concluded trial courts have discretion under section 1385 to dismiss prior strike allegations under the Three Strikes law as to one count but not as to another count. (*Id.* at pp. 503–504.) The record does not support defendant's assertion that the court was unaware of its *Garcia* discretion. Although the court did not expressly refer to its discretion under *Garcia*, we presume it was aware of that discretion absent evidence to the contrary. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496; *People v. Davis* (1996) 50 Cal.App.4th 168, 172 [where record is silent regarding trial court's purported misunderstanding of its § 1385 discretion, appellant's burden is not sustained].) Significantly,

the court reviewed defendant's *Romero* motion and that motion expressly cited *Garcia*. Further, defendant's *Romero* motion emphasized that the court had the right to strike the prior strike allegations as to some counts but impose them as to another count. And the court noted that although it had the authority to strike one of defendant's prior strike convictions, it was "electing" not to exercise that discretion based on a number of factors.

We also conclude the trial court did not err in denying defendant's *Romero* motion in its entirety. The court considered defendant's criminal history, the circumstances and seriousness of his current offenses, the fact that he committed his current offenses while on parole, and the particulars of defendant's background—including his documented history of mental illness—before denying the motion. As the court's analysis shows, defendant "is the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320.) Under these circumstances, the court acted well within its discretion in deciding that defendant did not fall outside the spirit of the Three Strikes law.

2. Remand for a new sentencing hearing is necessary in light of Senate Bill 620.

At the time it sentenced defendant, the trial court had no discretion to strike the firearm enhancements imposed under section 12022.53. (Former § 12022.53, subd. (h).) But Senate Bill 620, which took effect on January 1, 2018, provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h).) In their supplemental letter brief, the People concede Senate Bill 620 applies retroactively to defendant's non-final

judgment but argue remand is unnecessary because the court would not have exercised its discretion to strike the firearm enhancements. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 [remand is unnecessary where the trial court makes clear that had it been aware of its discretion to strike the defendant's prior convictions, it would not have done so].)

Here, “a remand is proper because the record contains no clear indication of an intent by the trial court not to strike [the] firearm enhancements. Although the court imposed a substantial sentence on [defendant], it expressed no intent to impose the maximum sentence.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428.) To the contrary, it imposed the sentence for count 3 concurrently with the sentence for count 1. Thus, nothing in the record rules out the possibility that the court would exercise its discretion to strike the firearm enhancements under section 12022.53, which added 20 years to defendant's sentence. “While we express no opinion on how the court should exercise its discretion on remand, that discretion is for it to exercise in the first instance.” (*McDaniels*, at p. 428.)

DISPOSITION

Defendant's sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to consider whether to strike the firearm enhancements imposed under section 12022.53. In all other respects, the judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.