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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.

ARMANDO ARROYO,

Defendant and Appellant.

B284022

(Los Angeles County
Super. Ct. No. KA112058)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stacy Wiese, Judge. Affirmed in part, vacated in part, and remanded with directions.

Deborah L. Hawkins, 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, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

Armando Arroyo (defendant) was convicted of kidnapping and raping his stepdaughter and then securing her silence by threatening to kill his stepdaughter's younger half siblings. For his crimes, he was sentenced to 70 years to life in prison. On appeal, he argues that the trial court (1) abused its discretion in denying his motion to dismiss his prior strike conviction under our "Three Strikes" law (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(j)),¹ and (2) imposed the wrong sentence on his conviction for dissuading his victim from reporting a crime in March 2016. We reject his first argument but accept his second. Accordingly, we affirm his convictions but remand to the trial court with directions to impose a 16-month sentence on the March 2016 dissuasion count.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Sara Doe (Sara) was six years old when her mother moved in with defendant. Over the next 14 years, defendant raised Sara as his stepdaughter and fathered two children with Sara's mother. Defendant got physically violent with Sara's mother on one occasion.

In 2014, Sara's mother stopped dating defendant and moved out. Sara nevertheless continued to live with defendant and her two younger half siblings because defendant said he would otherwise cut off her access to the half siblings. Almost instantly, Sara took over the household duties her mother used to perform.

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

Within two months of her mother leaving, defendant started acting differently toward Sara. Defendant complimented Sara on her legs. Then he started a daily routine of asking her to have sex with him, explaining that “men have necessities.” Sara consistently and repeatedly said “no,” and defendant would get upset.

In early November 2015, defendant told Sara he would drive her to work after dropping off Sara’s half siblings at a soccer game. After dropping off the kids, however, defendant drove Sara around for 20 to 25 minutes before stopping on a dead-end street and asking her to look in the trunk of his car, where a handgun was in plain view. Defendant told her, “If [you] don’t do what [I] sa[y], [I] [will] kill [you].” Defendant then ordered Sara back into the car, pulled her head into his lap, and drove her to a motel. Defendant rented a room for two hours. He had Sara enter the room and removed her clothing. As she sobbed, defendant repeatedly told her to “shut up.” Defendant then took off his pants and climbed atop her. He inserted his penis into her vagina “more than five times” over the course of 20 minutes, holding her down by keeping a firm grip on the hair on the back of her head, until he ultimately ejaculated on her stomach. After he finished, Sara pushed him off and went to the bathroom. She was bleeding profusely from her vagina. Sara put on her clothes, and when she emerged from the bathroom, defendant told her, “Let’s go,” and started driving her to work. On the way, he told Sara that he would kill her mother if Sara told anyone.

For the next several months, Sara told no one about the incident because she was scared defendant would kill her mother or her two younger half siblings—in part because defendant on a

near daily basis repeated his threats to harm them if Sara spoke up. In March 2016, defendant brandished his handgun in front of Sara and threatened to kill her after he saw her talking with two of her coworkers in a car outside her workplace. The next morning, defendant told Sara to come into his bedroom, but she said she had to go to the bathroom and fled from the house to a nearby school. Sara called her two older stepsiblings, and once they picked up the two younger half siblings from school, Sara told them—and the police—what happened.

At the urging of the police, Sara called defendant twice. On those recorded calls, defendant promised “never again” to take her to “the place where [he] took [her] the first time,” never to “force [her] to do anything like the first time,” and “never” to “touch [her].” Defendant also encouraged Sara to change her story to the police, urging her, “say that you were confused.”

II. Procedural Background

The People charged defendant with (1) kidnapping to commit rape (§ 209, subd. (b)(1)), (2) forcible rape (§ 261, subd. (a)(2)), (3) dissuading a witness from reporting a crime by an express or implied threat of force (§ 136.1, subd. (c)(1)) for threatening to harm Sara’s mother and half siblings immediately after the rape, and (4) dissuading a witness from reporting to the police (§ 136.1, subd. (b)(1)) during the March 2016 recorded phone calls.² The People further alleged, under our One Strike law (§ 667.61) that (1) defendant kidnapped Sara and that his movement of her substantially increased the risk of harm to her (§ 667.61, subs. (a) & (d)(2)), and (2) defendant kidnapped Sara

² The People originally charged the March 2016 dissuasion count as involving the use of force, but subsequently amended the count to drop the use of force allegation.

(§ 667.61, subds. (a) & (e)(1)). The People additionally alleged that defendant's 2000 assault with a deadly weapon conviction constituted a strike under our Three Strikes law as well as a prior serious felony under section 667, subdivision (a)(1).

After defendant rejected the People's offer of an 18-year prison sentence, the matter proceeded to trial. Defendant took the stand and testified that Sara had consented to the sex. The jury found defendant guilty of all charged crimes and found all sentencing enhancements to be true. Defendant subsequently admitted his prior strike.

Defendant moved the trial court to dismiss his prior strike on the basis of his "hard" and "terrible" childhood in Mexico with an "abusive" and "controlling" father who inflicted domestic violence upon his mother; defendant's lack of formal education; the age of his 2000 prior strike conviction; his successful completion of probation on that strike without any further negative interaction with law enforcement in the intervening years; and the fact that defendant would be in prison for more than 36 years (and thus would not be released until he is 86) even if the strike were dismissed. After considering the People's opposing papers and entertaining argument from the parties, the trial court denied the motion. The court acknowledged its authority to dismiss a strike if a "defendant falls outside the spirit of the law . . . based upon his character and circumstances of the case." The court noted that defendant was "not educated" and had "worked very hard," that defendant had successfully completed probation from the 2000 strike offense, and that he had no further interactions with law enforcement since then, but concluded that these factors did not outweigh the "horrendous" nature of the charged crimes. The court's minute order stated

that the denial was “based on the circumstances of the defendant’s prior conviction and the current case.”

The trial court then sentenced defendant to prison for 70 years to life. Specifically, the court imposed an indeterminate sentence of 55 years to life for the forcible rape, comprised of a base sentence of 50 years (25 years to life under the One Strike law doubled because of the prior strike), plus five years for the prior serious felony. The court then imposed a consecutive 15-year-prison sentence, comprised of (1) 13 years on the threat-driven dissuasion count (calculated as a base sentence of eight years—four years doubled due to the prior strike—plus five years for the prior serious felony), and (2) two years for the phone call-based dissuasion count (calculated as one year—one-third of the midterm sentence of three years—doubled due to the prior strike).

Defendant filed this timely appeal.

DISCUSSION

I. Denial of Motion to Dismiss Prior Strike Allegation

Defendant argues that the trial court erred in denying his motion to strike (that is, to dismiss) the allegation that his 2000 assault with a deadly weapon conviction constitutes a strike within the meaning of our Three Strikes law. We review a trial court’s denial of such a motion for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*)).

A trial court has the discretion to grant a motion to dismiss a strike allegation. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 162.) In deciding whether to exercise that discretion, the court is to “consider whether, in light of the nature and circumstances of [the defendant’s] 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 [Three Strikes] 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.” (*Carmony, supra*, 33 Cal.4th at p. 377, quoting *Williams*, at p. 161.)

The trial court did not abuse its discretion in denying defendant's motion to dismiss. Critically, the court cited the proper legal standard. Further, the court's application of that standard to the facts before it was not an abuse of discretion. The court acknowledged the factors favoring defendant—namely, his difficult upbringing, the age of his prior strike, his successful completion of probation on that strike, and his crime-free life since then—but found them not to take defendant outside the “spirit” of the Three Strikes law when considered against the circumstances of his sustained, months' long campaign of using threats to harm Sara's mother and younger half siblings in order to secure Sara's lack of active resistance to her kidnapping and rape and thereafter to secure her silence.

Defendant effectively raises two categories of arguments in response. First, he reiterates the various factors counseling in his favor—namely, his upbringing, the age of his prior strike, his successful completion of probation, and his age upon release from custody even if the strike were dismissed. We agree that all of these factors are relevant to the court's determination. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 315 [defendant's “prospects” for committing future crimes include a consideration of the length of the current sentence and his age upon release]; *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1251 [same]; cf. *People v. Strong* (2001) 87 Cal.App.4th 328, 345 [defendant's statistical

likelihood of committing crime based upon his age alone not relevant].) But the trial court recognized as much, too, as it expressly mentioned several of those factors and, in the absence of an indication to the contrary, we must presume it considered the remainder. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) Thus, defendant is in essence asking us to give these factors greater weight than the trial court. But doing so is outside the scope of our limited review. (*Id.* at p. 309 [“we do not reweigh the circumstances of the case to determine whether, in our opinion, the trial court should have . . . exercis[ed] its discretion to strike a prior conviction”].)

Second, defendant seems to suggest that certain factors are entitled to dispositive weight—namely, that (1) the voters, as evinced by measures such as Propositions 47 and 57, are concerned about cutting the costs of incarcerating prisoners, such that it is “patently absurd” to incarcerate defendant for the time required by the Three Strikes law; and (2) the deportation that will follow his release from prison means that he will pose no threat to *California* residents, such that it is an abuse of discretion to incarcerate him for the time required by the Three Strikes law.

We reject both arguments. Although the recent propositions encompass reforms to the criminal justice system aimed in part at reducing the costs of incarceration, our Supreme Court has observed that “the purpose of saving money does not mean we should interpret [those propositions]”—let alone *other* laws—“in every way that might maximize any monetary savings.” (*People v. Morales* (2016) 63 Cal.4th 399, 408.) More to the point, defendant’s argument would apply with equal force in every single case involving the Three Strikes law because

incarcerating prisoners for less time will *always* reduce the cost of incarceration. If it is an abuse of discretion to deny a motion to dismiss a strike in this case, it will be an abuse of discretion in *every* case. We decline to construe the recent propositions in a manner that would, in effect, nullify the Three Strikes law in its entirety. For much the same reason, we decline to adopt defendant's argument that his eventual deportation effectively entitles him to a reduction of his sentence. The logic underlying defendant's argument applies equally to every defendant facing deportation, thus entitling each to a sentencing reduction and rendering the Three Strikes law inapplicable to them. We are particularly reluctant to create such a carveout when the sole basis for doing so is the act of entering or remaining in the country unlawfully.

II. Sentence on Dissuasion Count

Defendant next argues that the trial court erred in imposing a sentence of two years on the March 2016 phone calls-based dissuasion count. According to defendant, that count is a "wobbler" offense, for which the midterm sentence is two years under section 136.1, subdivision (c), such that one-third the midterm sentence is eight months, which comes to 16 months when doubled. Thus, defendant concludes, the trial court erred in imposing a sentence of two years. The People concede that defendant is correct. Because the sentence actually imposed on this count is unauthorized, we may order the trial court to correct it even though there was no objection at the time. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

DISPOSITION

The sentence on count 4 is vacated, and the trial court is ordered to impose a sentence of 16 months on that count.

Otherwise, the judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ