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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.

JOSEPH MARCOE,

Defendant and Appellant.

B263564

(Los Angeles County
Super. Ct. No. GA091446)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Teri Schwartz, Judge. Affirmed.

Sarah A. Stockwell, 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, Assistant
Attorney General, Stephanie A. Miyoshi and Allison H. Chung,
Deputy Attorneys General, for Plaintiff and Respondent.

After a jury found defendant and appellant Joseph Marcoe guilty of second degree robbery for taking \$20, he was sentenced to 20 years in prison, based in part on a prior strike. Marcoe contends the trial court abused its discretion by failing to grant his *Romero*¹ motion and his sentence constitutes cruel and unusual punishment. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

On November 7, 2013, Corynne Waken was at her on-campus job at Fuller Seminary. She had a cash box out when Marcoe entered her office. She asked if he needed help, and he said he wanted what she had, meaning the money. Thinking that Marcoe was joking, Waken asked again how she could help him. He repeated his comment and moved closer to Waken. When she told him the money wasn't hers and she couldn't give it him, he got "more aggressive," leaning over Waken's desk and getting so close he almost touched her nose. He yelled at her about the money. Taking an aggressive posture, he said he would "show [her] what I'm going to do," and then he put his hands in his pockets. Believing he had a weapon, Waken gave him \$20 and asked him to leave. Marcoe smiled after he got the money and told Waken it was nice to meet her and he would "see [her] around." He left, but was arrested later that afternoon. He had \$9.26.

Dr. Rose Pitt, a "forensic child and adolescent, adult psychiatrist," testified in Marcoe's defense. After evaluating

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

Marcoe in 2014, she diagnosed him with schizophrenia (dating from the 1980's), undiagnosed attention-deficit/hyperactivity disorder (ADHD), substance abuse, and major depressive disorder. People with these conditions have difficulty “reading” others and recognizing that others perceive their behavior to be threatening or demanding. ADHD also can affect a person’s ability to focus and to pay attention, and it can make a person impulsive and hyperactive. Marcoe also has diabetes, which can cause confusion, irritability and agitation.

II. Procedural background

On April 10, 2015, a jury found Marcoe guilty of second degree robbery. (Pen. Code, § 211.)² Marcoe waived a jury trial on prior conviction allegations, and, after a court trial, he was found to have suffered, under the Three Strikes law and under section 667, subdivision (a)(1), two prior strikes, one in 1982 for first degree burglary (case No. A563362) and a second in 1987 for arson (case No. A573347). The court also found true that defendant had one-year priors (§ 667.5, subd. (b)). The court then granted Marcoe’s *Romero* motion in part by striking the prior in case number A563362.

On April 20, 2015, the trial court sentenced defendant to the midterm of three years for robbery, doubled to six years based on the remaining strike. He was sentenced to a consecutive 10 years for the two 5-year priors (§ 667, subd. (a)(1)) and to a consecutive four years for the one-year priors (§ 667.5, subd. (b)). His total sentence therefore was 20 years in state prison.

² All further undesignated statutory references are to the Penal Code.

DISCUSSION

I. *Romero*

Although the trial court struck one of his priors, Marcoe contends that the court abused its discretion by not striking the second. We disagree.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *Romero*, *supra*, 13 Cal.4th at p. 504.) A court's ruling on a *Romero* motion is reviewed under the deferential abuse of discretion standard; that is, the defendant must show that the sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 375, 378 (*Carmony*).) It is not enough to show that reasonable people might disagree about whether to strike a prior conviction. (*Id.* at p. 378.) The Three Strikes law “not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm . . . [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Ibid.*) Only extraordinary circumstances justify finding that a career criminal is outside the Three Strikes law. (*Ibid.*) Therefore, “the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Ibid.*)

When considering whether to strike prior conviction allegations, the factors a court considers are “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.)

The record here shows that the trial court carefully considered these factors. At Marcoe’s sentencing hearing, the People asked for the maximum sentence of 39 years, based in part on the section 314, subdivision (1) conviction involving Marcoe’s “graphic, inappropriate requests of a” 13-year-old girl, which suggested that Marcoe was “capable because of his mental illness” to potentially kill or rape someone or to sexually batter a child.

The trial court agreed that Marcoe’s mental illness was such that if “he is not on medication, he is dangerous.” But the facts of the robbery were “certainly not as egregious as the 314,” and although the court wasn’t suggesting that the People were asking for too much time, the court was considering whether “this crime and this individual, along with his criminal history, is deserving of basically spending the rest of his life in prison.” The court was concerned that “what I’m being asked to do is to take Mr. Marcoe and lock him up for the rest of his life because we don’t have any other way of making sure that he takes his medication [without which] he is a risk to the safety of our community.”

The trial court tentatively found that Marcoe was deserving of the high term and of the two 5-year priors, but, assuming that the prior strikes didn’t involve harm to anybody, the court could “make a case” for striking both strikes.³ The court said it was trying to fashion a sentence that would protect society and

³ Defense counsel represented that the 1987 arson was of a storage shed.

punish Marcoe for his criminal conduct but not for his mental illness. Wanting additional time to consider the issues, the court took the matter under submission, although it was “leaning towards striking a second strike and giving him a determinate sentence that will protect society for a significant period of time.”

When the parties returned for the continued sentencing hearing, the trial court’s review of the priors package had changed its mind because Marcoe’s “criminal history is pretty significant and dangerous.” That history showed a pattern of going to prison, release and violating parole. “And he does seem to have a history of victimizing people that are vulnerable.” The court therefore was no longer inclined to strike both strikes; instead, it struck the 1982 burglary and, based on mitigating factors, imposed the midterm. The court said, “I think the defendant was motivated by a desire to just survive on the streets. And I don’t think his intent was to take all the money. I think he really did believe that he was begging for money as opposed to committing a robbery. But that doesn’t rise to a legal defense. So for those reasons, the strike will be stricken.”

The record supports the trial court’s finding that the particulars of Marcoe’s criminal history and of his background, character, and prospects, mitigated against striking the second strike. His criminal history is, as the court said, a ceaseless pattern of committing crimes, going to jail or to prison, release on probation, and violating probation. According to the probation officer’s report, this is his history:

- 1977: A felony burglary (§ 459) allegation was sustained against Marcoe, then a juvenile.
- 1979: Marcoe received jail and probation for a misdemeanor offense.

- 1981: He was sentenced to jail for misdemeanor battery (§ 243, subd. (a)). He was thereafter sentenced to jail and probation for misdemeanor fighting in public (§ 415, subd. (1)) and, a month later, he was sentenced to jail and probation for misdemeanor being under the influence of toluene (§ 381, subd. (a)). About one month later, he was sentenced to jail and probation for a misdemeanor. Three months thereafter, he was sentenced to jail and probation for misdemeanor assault with a deadly weapon “w/o firearm/GBI” (§ 245, subd. (a)(1)).
- 1982: While still on probation, he was sentenced to jail and probation for felony bringing, sending or possessing a deadly weapon in jail (§ 4574, subd. (a)). That same year, he was sentenced to four years in prison for felony burglary (§ 459).
- 1985: He was sentenced to jail for misdemeanor indecent exposure (§ 314, subd. (1)). Also in 1985, he was sentenced to jail and probation for misdemeanor willful cruelty to a child (§ 273a, subd. (a)).
- 1986: Marcoe was sentenced to jail and probation for misdemeanor possession of a substance similar to toluene (§ 381, subd. (b)). In October, he was sentenced to jail and probation for felony burglary (§ 459) and then to jail for use of a controlled substance (Health & Saf. Code, § 11550, subd. (a)).
- 1987: He was sentenced to four years in prison for felony arson (§ 451, subd. (c)).
- 1990: He was convicted of misdemeanor resisting an officer (§ 148, subd. (a)(1)).

- 1992: He was sentenced to jail and probation for misdemeanor battery (§ 242).
- 1993: He was sentenced to two years in prison for felony indecent exposure after an illegal entry (§ 314, subd. (2)). That same year he was sentenced to jail and probation for misdemeanor annoying or molesting children (§ 647.6, subd. (a)).
- 2002: He was sentenced to six years in prison for felony assault with a deadly weapon (§ 245, subd. (a)(1)).
- 2006: He was sentenced to jail for misdemeanor sexual battery (§ 243.4, subd. (e)(1)).
- 2011: He was sentenced to jail and probation for misdemeanor disorderly conduct (§ 647, subd. (f)).
- 2012: He was sentenced to jail and probation for misdemeanor sex registration violation (§ 290.011, subd. (c)). That same year he was sentenced to three years in prison for carrying a concealed dirk or dagger (§ 21310).

Nor can we agree that the trial court failed to consider Marcoe's mental illness. It is clear that the trial court considered it to be a mitigating factor. (See generally *People v. Carrasco* (2008) 163 Cal.App.4th 978, 993-994.) Marcoe's mental illness was the primary reason for striking the burglary conviction and for imposing the midterm. We therefore see no abuse of discretion in the court's refusal to strike the second prior.

II. Cruel and unusual punishment

Marcoe's related contention is that his age (54 at the time of sentencing), diabetes and mental illness renders his sentence cruel and/or unusual under our federal and state Constitutions.⁴

A punishment for a term of years violates the federal Constitution only if it is "grossly disproportionate" to the severity of the crime. (U.S. Const., 8th Amend.; *Graham v. Florida* (2010) 560 U.S. 48, 59-60; *Ewing v. California* (2003) 538 U.S. 11, 23; *People v. Johnson* (2010) 183 Cal.App.4th 253, 296; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.) A punishment violates the California Constitution if, "although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; see also *People v. Dillon* (1983) 34 Cal.3d 441, 478.) "To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], so that the punishment ' " 'shocks the conscience and

⁴ Defendant did not object to his sentence on this ground in the trial court. In light of his ineffective assistance of counsel claim, we address the issue.

offends fundamental notions of human dignity’ ” ’ [citation], the court must invalidate the sentence as unconstitutional.” (*People v. Lucero* (2000) 23 Cal.4th 692, 739-740; accord, *People v. Mendoza* (2016) 62 Cal.4th 856.) A defendant must overcome a considerable burden to show a sentence is disproportionate to his or her level of culpability, and findings of disproportionality have occurred “ ‘with exquisite rarity in the case law.’ ” (*People v. Em* (2009) 171 Cal.App.4th 964, 972.)

California courts routinely uphold against constitutional challenge three strikes sentences harsher than the one imposed here for nonviolent offenses. (See, e.g., *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [theft of pants].) The United States Supreme Court has also upheld the imposition of a three strikes sentence when the current offense is nonviolent and relatively minor. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 70-77; *Ewing v. California, supra*, 538 U.S. at pp. 28-31.) Such a sentence does not constitute cruel and unusual punishment. (See, e.g., *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415-1416, disapproved on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8.)

Here, although Marcoe’s crime was not as egregious as some of his prior crimes, neither was it minor. Rather, the victim, Waken, testified that Marcoe was aggressive, both verbally and physically. He got so close to her that he almost touched her nose. When she refused to give him money, he put his hands in his pockets and warned her that he would “ ‘show [her] what I’m going to do.’ ” This, understandably, led Waken to believe that Marcoe had a weapon. And although the trial court believed that Marcoe thought he was merely panhandling, albeit

aggressively, that is certainly not how the terrified victim saw it. Marcoe's conduct was also consistent with his prior conduct.

Finally, imposition of the death penalty on a mentally ill defendant does not violate the federal or state Constitutions. (*People v. Mendoza, supra*, 62 Cal.4th at pp. 908-912; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1252 ["while it may be that mentally ill offenders who are utterly unable to control their behavior lack the extreme culpability associated with capital punishment, there is likely little consensus on which individuals fall within that category or precisely where the line of impairment should be drawn. Thus, we are not prepared to say that executing a mentally ill murderer would not serve societal goals of retribution and deterrence"], overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) We therefore do not agree, under this authority, that Marcoe's sentence of 20 years, notwithstanding his mental illness, is unconstitutional.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

EDMON, P. J.

GOSWAMI, J.*

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