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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.

KEVIN STEVEN DIAZ,

Defendant and Appellant.

B239373

(Los Angeles County
Super. Ct. No. YA077285)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Rita L. Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Kevin Steven Diaz appeals from the judgment entered after a jury convicted him of assault with a firearm and assault by means likely to produce great bodily injury. Pursuant to the Three Strikes law, the trial court sentenced Diaz to a term of 64 years to life in prison. Diaz's sole contention on appeal is that the trial court abused its discretion by denying his *Romero* motion.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Raul Hermosillo joined the Krazy Crowd criminal street gang when he was a teenager, and was a member for four or five years. In 2008, after he was arrested, other gang members labeled him a "snitch." Disillusioned, he decided to leave the gang when he was released from jail. Thereafter, gang members with whom he previously had associated harassed him, beat him, and, on two occasions, stabbed him. Appellant Diaz and codefendant Selvin Salazar were Krazy Crowd gang members.²

On January 29, 2010, at approximately 10:00 p.m., Diaz, Salazar, Joseph Luna, Hector Aguilar, and other gang members were drinking in front of their apartment building on Osage Avenue in Lennox. Hermosillo and his pregnant girlfriend walked past the apartment building on their way to the market. Diaz, Salazar, Luna, Aguilar, and two other men approached Hermosillo. Luna made threatening statements, and the other gang members surrounded the couple. Hermosillo grabbed his girlfriend and told the gang members, " 'I'm just going to the store, stop fucking with me.' "

When Hermosillo and his girlfriend walked past the apartment building again on their way home from the market, Diaz, Salazar, and Luna emerged from behind a stairway and approached them. Luna hit Hermosillo in the back of the head, and Salazar also swung at him. Hermosillo fell to the ground. While he was on the ground, Luna and Salazar punched and kicked him. Diaz called Hermosillo a "bitch," lifted his shirt, and pulled a pistol from his waistband. Hermosillo testified that he believed Diaz was going

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

² Salazar is not a party to this appeal.

to aim the gun at him, but a truck drove up, almost striking Diaz.³ Diaz fired the pistol at the truck instead. After Diaz fired the shot, Salazar, Diaz, and Luna ran to the rear of the apartment building.

2. Procedure.

Diaz was charged with attempted murder of the driver of the truck in count 1 (Pen. Code, §§ 664, 187, subd. (a)),⁴ shooting at an occupied motor vehicle in count 2 (§ 246), assault with a firearm on Hermosillo in count 3 (§ 245, subd. (a)(2)), and assault by means of force likely to produce great bodily injury on Hermosillo in count 4 (§ 245, former subd. (a)(1)). The jury acquitted him of attempted murder and shooting at an occupied motor vehicle but convicted him of the assaults in counts 3 and 4. The jury found the assaults were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)) and Diaz personally used a firearm in the commission of the assault with a firearm (§ 12022.5). Diaz admitted suffering prior sustained juvenile petitions for carjacking and robbery, serious or violent felonies. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

The trial court denied Diaz's *Romero* motion and motion for a new trial. After finding various factors in aggravation, the court sentenced him to 64 years to life in prison, configured as follows. On count 3, the trial court imposed a term of 25 years to life pursuant to the Three Strikes law, plus 10 years for the gang enhancement. On count 4, it imposed a consecutive term of 25 years to life pursuant to the Three Strikes law, plus 4 years for the gang enhancement. The court stayed the firearm enhancement. It imposed a restitution fine, a suspended parole restitution fine, a criminal conviction assessment, and a court operations assessment. Diaz appeals.

³ Elsa Rodriguez, who was married to Luis Mungia, a member of a rival gang, testified that she was the driver of the truck. She observed five to seven youths hitting and kicking someone on the ground. She thought her nephew might have been the victim, so she drove toward the group. As she approached, Diaz shot at the truck, shattering the window. Hermosillo testified that Mungia, not Rodriguez, was driving the truck when Diaz shot at it.

⁴ All further undesignated statutory references are to the Penal Code.

DISCUSSION

The trial court did not abuse its discretion by denying Diaz's Romero motion.

1. Additional facts.

Prior to sentencing, Diaz moved to strike his two prior conviction allegations under section 1385, arguing that they were suffered when he was 17 years old; both convictions arose from a single incident; he had no prior strike convictions as an adult; he was 22 years old at the time of sentencing; no one was seriously hurt in the assaults; and the charged offenses were unsophisticated, and of the sort “that occur across the country among teenagers and young people all the time.” The People countered that Diaz had a significant criminal history, his strike priors were violent and serious, and he was an adult at the time he assaulted Hermosillo. Therefore, he did not fall outside the spirit of the Three Strikes law.

After considering the parties' arguments, the trial court denied the motion. It pointed out that Diaz's conduct in the prior strikes—a carjacking at gunpoint and a robbery—was not trivial. Diaz's subsequent involvement in another shooting was “exactly what the Three-Strikes law was intended to stop and protect the public from.” The court reasoned: “There's really no grounds for granting the *Romero* motion[.] Even given the age of 17 years, 8 months, which is almost 18; and the number of crimes occurring prior to that[;] and the limited amount of time between the '07 strikes and . . . the type of conduct found in the current case, there's no reason to strike the strikes. If I did strike the strikes, I think the Court of Appeal would overturn me. There's no reason to strike the strikes.”

2. Discussion.

Diaz contends the trial court's ruling was an abuse of discretion. We disagree.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385; *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 504.) A court's refusal to strike a prior conviction allegation is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) The party seeking reversal must “ ‘clearly show that the sentencing decision was irrational or

arbitrary.’ ” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) It is not enough that reasonable people might disagree about whether to strike a prior conviction. (*Carmony*, at p. 378.) Only extraordinary circumstances justify a 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 convictions, the relevant factors a court must consider 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; *People v. Lee* (2008) 161 Cal.App.4th 124, 127-128.) 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.” (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378; *In re Large* (2007) 41 Cal.4th 538, 551.)

The record before us reveals no basis to conclude Diaz falls outside the spirit of the Three Strikes law. Despite his age, Diaz has already amassed a substantial criminal history. In 2002, he was arrested for assault with a deadly weapon and battery; the probation report does not indicate a disposition in the case. In 2003, he suffered a sustained juvenile petition for petty theft and was placed home on probation. In 2004, he had a sustained juvenile petition for vandalism and was again placed home on probation. In 2005, he had a sustained juvenile petition for taking a vehicle without the owner’s consent, and was placed home on probation. In 2007, he suffered sustained juvenile petitions for possession of narcotics and taking a vehicle without the owner’s consent, as well as for the “strike” crimes of robbery and carjacking. He was, once again, placed home on probation. In 2008, as an adult, he was convicted of possession of narcotics and placed on probation pursuant to the provisions of Proposition 36. Also in 2008, he was

convicted of being a felon in possession of a firearm, was placed on probation, and ordered to serve time in jail. In 2010, when he was 20 years old, he committed the instant crimes. He was on probation at the time. When the probation report was prepared, another case was pending against him for possession of ammunition. The probation report indicated that for the nine months preceding the crimes, Diaz was unemployed and had been supported by his mother and girlfriend.

The record shows that in the 2007 offenses, Diaz, Salazar, Luna, and other men accosted two victims at a Metro Park and Ride station and surrounded them. Diaz pointed a gun at the driver and forced him out of his car. One of the assailants robbed the second victim. The men then drove off in the victims' vehicle. The next day, police observed Diaz and Salazar in the stolen car. Diaz, the driver, led an officer on a high speed chase and ultimately crashed the stolen vehicle, causing at least \$5,000 in damage.⁵

Thus, less than three years after suffering the 2007 sustained petition and being given the benefit of probation, Diaz was still an active gang member and continued to commit crimes with the same group of gang associates who had participated with him in the 2007 offenses. Diaz's offenses had increased in seriousness since 2003, escalating from petty theft and vandalism to violent crimes involving use of a weapon, and showed no sign of abating. He failed to benefit from prior grants of probation and attempts at rehabilitation. As the probation report explained: "The . . . defendant is a documented member of a criminal street gang His prior criminal history reflects serious

⁵ A police report regarding the 2007 carjacking indicates that Diaz and his compatriots were suspected of carjacking another victim at knifepoint a week before the "strike" crimes, at or near the same Metro station. The victim in that case identified Diaz, Salazar, and Luna as being among the assailants, and identified Diaz as the robber who threatened him with the knife. The men robbed the victim of his wallet, forced him to reveal his PIN number, and then took his car. A juvenile petition related to these offenses was apparently filed against Diaz, but was not sustained.

convictions for weapons, property crimes, drugs and carjacking. In the instant matter, the defendant has engaged in dangerous and violent behavior. . . . Clearly, the defendant has demonstrated he is a threat to others if he remains in the community. [¶] The defendant appears highly dangerous and his criminal activities are increasing in seriousness. He has responded unfavorably to community based supervision[.]” In short, Diaz’s criminal history demonstrates he 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; *People v. Pearson* (2008) 165 Cal.App.4th 740, 749.)

Diaz’s arguments to the contrary are not persuasive. He urges that the trial court failed to properly consider and balance all the relevant factors when it denied his motion. He faults the court for relying “solely” upon his prior criminal history, purportedly ignoring the fact the jury acquitted him of attempted murder, and overlooking the fact that although “there was a potential for serious violence” in the current crimes, “there was none.” He argues that he falls outside the Three Strikes law’s spirit because “he does not have a history of violence, his crimes were almost exclusively committed when he was a minor and none of his priors or the current offense resulted in serious injury to anyone.”

The record does not suggest the trial court failed to consider any relevant factors. We presume the trial court considered all the relevant factors in the absence of an affirmative record to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Here, the court heard considerable argument from the parties and had before it the probation report and the parties’ sentencing memoranda. The court expressly considered Diaz’s age, the violent character and magnitude of the current and prior strike offenses, the time between the crimes, and public safety. The court was clearly aware that the prior strikes arose from a single incident and that Diaz was acquitted of murder in the current case. Contrary to Diaz’s argument, he does have a history of violence: he committed a carjacking and robbery using a weapon, and used a gun in the current assault. His crimes began when he was a juvenile, but have continued into his adulthood. That no serious injury was inflicted in the current crime appears due to the fortuitous appearance of the

truck on the crime scene rather than any forbearance on Diaz's part. Both the current crimes and strike priors involved violent, dangerous conduct which could easily have resulted in injury to the victims. (See generally *People v. Calderon* (2013) 214 Cal.App.4th 656, 665.)

Moreover, Diaz failed to present to the trial court any additional information regarding his background, character, or prospects. In light of this failure, he cannot complain that the court relied primarily on his criminal record and the facts of the current and prior crimes. (*People v. Lee, supra*, 161 Cal.App.4th at pp. 128-129.) What information the record does contain on these points tends to paint a dismal picture, as we have explained. Diaz is an entrenched gang member with a continuing penchant for committing crimes. (See *Lee*, at p. 131.)

Diaz emphasizes that he was a juvenile when he committed the strike priors. But this circumstance is not, by itself, enough to demonstrate leniency was appropriate. The Three Strikes scheme expressly includes sustained petitions and adjudications as strikes. (§ 667, subd. (d)(3).) Diaz's citation to *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455], is unavailing. *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (132 S.Ct. at p. 2469; see also *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 2026, 2033]; *People v. Caballero* (2012) 55 Cal.4th 262, 267-269.) But Diaz was not a juvenile when he committed the instant crimes, and thus *Miller* has no application here.

Diaz's citation to *People v. Bishop* (1997) 56 Cal.App.4th 1245, does not assist him either. In *Bishop*, the trial court struck two prior felony convictions in the interest of justice, and the Court of Appeal affirmed. (*Id.* at pp. 1247-1248.) However, a comparison of *Bishop* and the instant case "is of little assistance to the defendant upon appeal. The *Bishop* holding does not establish that had the trial court denied Bishop's motion such a decision would have been arbitrary or irrational. [Citation.] Rather, the holding only establishes that the trial court did not abuse its discretion in striking the two prior felony convictions." (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434.) Finally, Diaz's reliance on other cases in which Three Strikes sentencing was held proper

is not persuasive. That other defendants' crimes and circumstances were more egregious or more extensive than Diaz's did not compel the trial court to grant his *Romero* motion; each case must be considered on its own facts. "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" (*People v. Myers, supra*, 69 Cal.App.4th at p. 310; *People v. Cole* (2001) 88 Cal.App.4th 850, 874.) Such is the case here.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.