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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ALLEN NICHOLS,

Defendant and Appellant.

2d Crim. No. B292682  
(Super. Ct. No. 2018001614)  
(Ventura County)

Appellant Michael Allen Nichols struck and seriously injured his 88-year-old mother, Inez Nichols (Inez), with whom he lived. Appellant was drunk and reacted violently to Inez's demand that he stop smoking in the house.

A jury convicted appellant of battery with serious bodily injury (Pen. Code, § 243, subd. (d); count 1)<sup>1</sup> and elder abuse (§ 368, subd. (b)(1)) with personal infliction of great bodily injury on a person over the age of 70 (§ 12022.7, subd. (c); count 2). The trial court, in the exercise of its discretion, could have imposed a

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<sup>1</sup> All further statutory references are to the Penal Code.

determinate prison term on count 2, but instead, it sentenced appellant to 40 years to life, consisting of 25 years to life under the Three Strikes law (§§ 667, subds. (c) & (e), 1170.12, subds. (a) & (c)), plus an additional five years for the great bodily injury allegation (§ 12022.7, subd. (c)), and two additional five-year terms for the prior serious felony conviction enhancements (§ 667, subd. (a)).<sup>2</sup> Given that appellant is 67 years old, the sentence is equivalent to life without the possibility of parole.

Appellant's prior strike convictions occurred in 1981 and 1987. The first one involved six different robberies in which appellant was armed with a knife. The second conviction involved four more robberies and resulted in a 10-year prison term. Appellant committed the robberies to support his heroin addiction.

Appellant was paroled in 1991 and lived a crime-free life for the next 27 years. He started a family and worked for the same company until his retirement at age 65. Appellant remained clean and sober until 2016, when his son was murdered. He then began drinking alcohol.

Appellant rejected a pretrial plea offer of a 12-year determinate sentence. Prior to sentencing, appellant moved to dismiss the prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). A dismissal of the prior strikes would have allowed the trial court to impose a determinate sentence. Appellant contends the trial court's denial of the motion, which effectively committed him to prison for the rest of his life, constituted an abuse of judicial discretion. He also argues the matter must be remanded for the

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<sup>2</sup> The court stayed the sentence on count 1 pursuant to section 654.

court to consider whether to exercise its discretion, recently granted under Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), to strike one or both of his prior serious felony conviction enhancements.

The Attorney General concedes, and we agree, a remand for resentencing under SB 1393 is warranted. We also conclude that the trial court's comments during the two *Romero* hearings evidence a misunderstanding of its sentencing discretion.<sup>3</sup> The court's repeated, inconsistent and contradictory statements regarding the scope of its discretion require that the matter be returned for reconsideration.

On remand, the trial court shall "consider whether, in light of the nature and circumstances of [appellant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, . . . [appellant] may be deemed outside the . . . spirit [of the Three Strikes law]." (*People v Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)). It also shall consider the "[g]eneral objectives in sentencing" set forth in rule 4.410 of the California Rules of Court (See *People v Clancey* (2013) 56 Cal.4th 562, 581 (*Clancey*); see also § 1170, subd. (a)(1).) As our Supreme Court has stated, "a defendant's sentence is . . . a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*People v. Garcia* (1999) 20 Cal.4th 490, 500 (*Garcia*)).

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<sup>3</sup> The trial court held two hearings on the *Romero* motion. The record did not include the reporter's transcript of the first hearing. At our request, the trial court augmented the record with that transcript.

## FACTS

Appellant went through a divorce in 2015 and moved into Inez's mobile home. On January 15, 2018, appellant and Inez started arguing about his smoking in the house. Both had been drinking alcohol. A neighbor, Stacey Prieto, heard Inez screaming. Prieto knocked on the door, and appellant answered. He said nothing was wrong. Inez, however, was crying hysterically and asked Prieto to call 911.

Inez, who was bleeding and appeared to be in pain, told Prieto that appellant had thrown her across the room. Appellant instructed Prieto to call 911 and then sat on the outside steps.

Officers with the Ventura Police Department responded. Prieto told Corporal Todd Hourigan what had happened. Hourigan observed that appellant was extremely intoxicated. Appellant told Hourigan to "fuck off" and refused to take his hands out of his pockets. Hourigan took appellant to the ground and handcuffed him. The encounter was captured on Hourigan's body camera and shown to the jury.

Officer Robert Dietz transported appellant to the police station. Appellant was wearing a spit mask because he had spit on Hourigan and other officers. Appellant never said he was attacked by his mother.

Hourigan interviewed Inez at the hospital. The recorded interview was played for the jury. Inez told Hourigan that appellant was drunk and that she had asked him to leave. Appellant refused and "started getting rough" with her. He pushed Inez and she fell to the ground in the kitchen. Inez said she "zoomed across the room." This was the only time appellant had used physical force on her.

Inez's arm was injured and she suffered bruises and a hip fracture. An orthopedic surgeon inserted three screws to stabilize

the fracture. Before the incident, Inez was able to live independently. She gardened and walked her dog every day. Afterwards, Inez could not live on her own and had to move into a senior living facility. She developed a severe infection from the fractured hip and required 24-hour nursing care. The infection significantly worsened her dementia.

Inez had difficulty testifying at trial. She identified appellant as her son, but did not recall that he was living with her in January 2018. She did remember being “slammed into the wall,” but could not recall how it happened. She did not know if someone pushed her, but she did remember Prieto helping her.

Appellant testified that he and Inez frequently argued about his smoking. At the time of the incident, Inez accused appellant of smoking in his room, and he said he was smoking outside. Inez yelled at appellant and told him to get out of the house. Appellant followed her into her bedroom. He testified that Inez grabbed a golf putter and again told him to get out. Inez then swung the putter at him. Appellant seized the putter, and Inez fell to the floor. Inez cried out in pain and appellant helped her to her bed.

After Prieto arrived, Inez walked into the kitchen. Appellant said he thought Inez was hurt so Prieto “checked her out.” Appellant waited outside.

Appellant testified he was “very sorry” this happened. He loves his mother and did not intend to hurt her. Appellant regretted his behavior toward the police officers and admitted he was “pretty drunk.”

## DISCUSSION

### *Remand for Resentencing Under SB 1393*

At the time appellant was sentenced, trial courts could not strike or dismiss the five-year enhancements proven under

section 667, subdivision (a). (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) SB 1393 removed this prohibition by amending sections 667, subdivision (a) and 1385, subdivision (b) to give trial courts discretion to strike or dismiss prior serious felony conviction enhancements in “furtherance of justice.” (Stats. 2018, ch. 1013, §§ 1-2, pp. 6672-6676.) We agree with the parties that this new law applies retroactively to appellant and that a remand for resentencing is required. (See *People v. Zamora* (2019) 35 Cal.App.5th 200, 208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

*Remand for Reconsideration of Romero Motion*

Appellant argues the trial court abused its discretion by denying his *Romero* motion to dismiss the prior strike convictions for sentencing purposes. He contends the remoteness of the prior strike convictions, his exemplary employment history and his decades of living a crime-free life take his case outside the spirit of the Three Strikes law. He claims he is not the type of “‘revolving door’ career criminal to whom the Three Strikes law is addressed.” (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.)

“As the Supreme Court explained in *Romero*, section 1385 permits a trial court to strike an allegation of a prior felony conviction in cases brought under the Three Strikes law, in the interests of justice.” (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1213, citing *Romero, supra*, 13 Cal.4th at pp. 529-530.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation . . . 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, 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.” (*Williams, supra*, 17 Cal.4th at p. 161.)

We review the trial court’s ruling on a *Romero* motion under the “deferential abuse of discretion” standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a *Romero* decision, we will not reverse unless the appellant shows the decision was “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony*, at p. 377.)

Here, the trial court considered appellant’s motion to dismiss the prior strikes, the People’s opposition, the evidence adduced at trial and the probation report. The court stated it understood “the bounds of any discretion I might have,” but emphasized “it’s not my role here or at any other time to decide what I think should be done necessarily about anything, because any personal views I may have or about whether I think the punishment is inordinate or anything else – because the People of the State of California decided that for purposes of the sections that are involved here that under . . . section 667(e)(2)(A)(ii), without going into the details of the statute, that this defendant’s exposure is imprisonment in the state prison for 25 years to life.”

The trial court stated it was “fully prepared to deny [the] *Romero* motion,” but noted that appellant’s brother, Mark Nichols (Mark), had told the probation officer that appellant “is not a ‘bad man, but he has some demons.’” Mark believed appellant was “‘drunk or on drugs’ and pushed their mother. He is ‘sure’ [appellant] did not ‘mean it.’” Mark said he would “‘hate to see’ [appellant] be sentenced to ‘many years in prison.’”

The trial court reiterated the *Romero* motion “is likely to be denied,” but afforded the parties “an opportunity to examine [Mark] on the record and decide whether that has any impact on

the Court's discretion." The court "thought that it would be incumbent upon me as a judge to hear this information and to make a full and complete record so that if there needs to be further litigation about it that can occur . . . ."

At the next hearing, the trial court again stated that "the People of the State of California decided that if a defendant has two or more prior serious and/or violent felony convictions . . . that has been pled and proved, the term for the current felony shall be an indeterminate term of life imprisonment . . . ." The court noted: "I didn't make the law. And I think sometimes the law is in some circumstances – could be described by people as being somewhat Draconian."

The trial court then asked to hear from Mark, who gave an impact statement. Mark said, "[W]hat [my brother] did was wrong. He has demons in his past. He's not a bad man. And I think what he did in 1983, which is 35 years ago, he served time. He shouldn't be punished for that. . . . There is a lot worse people in your system that should be in prison than him, in my eyes. . . . My mom's okay. And we're getting through it."

Mark confirmed his mother is "in a care home," has dementia and "doesn't understand everything that's going on." He said "she probably doesn't even remember what happened," but noted that she loves appellant.

Acknowledging that it "rarely [has] conversations like this," the trial court informed Mark of its duty to enforce the law even if it does not "always agree with it." The court admitted "[t]his might be one of those cases," but said, "I'm supposed to do what I'm elected to do. I was elected to be here, not appointed." The court also observed that "the last time I gave somebody a 25-to-life sentence was, you know, in a murder case [or] sexual assault cases. Those are often much more serious."



The trial court asked Mark if he had any questions. Mark responded: “I don’t. I mean, [my brother is] a father, a grandfather. He doesn’t have a lot out there. Immediate family, that’s it. I would like you to see in your heart to do the best for him or whatever the law says.”

The trial court incorrectly stated it had previously denied the *Romero* motion, but invited further argument from counsel. The prosecutor emphasized appellant’s pretrial decision to reject the 12-year plea offer notwithstanding his exposure to a 40-years-to-life sentence.

The trial court sentenced appellant to 25 years to life on count 2, plus five years for the great bodily injury enhancement. When the prosecutor reminded the court of the two prior serious felony conviction enhancements, it stated: “[T]hat’s why this becomes relatively absurd. This is a 68-year-old man. The facts are clear. The law is clear too. But this just becomes, you know, a difficult situation. This is the kind of a problem that creates the legislation that we talked about. This is exactly it. I’m trying to be careful here, but I’m also trying to be honest. Everybody in this courthouse knows that I’m honest. I just tell it like it is. I don’t feel sorry for this guy one bit. That’s not my job. But I can see the absurdity in this. We’re talking about somebody of this age when these events happened, when 12 years would be enough. And you [referring to the prosecutor] make the comment that had [appellant] not gone to trial, he would have been [sentenced to] 12 years. So he’s being punished for going to trial essentially.”

As stated in *Carmony*, reversal of a decision on a *Romero* motion is justified if the trial court was unaware of its discretion to dismiss a prior strike, refused to do so for impermissible reasons, or “the sentencing norms . . . produce an “arbitrary,

capricious or patently absurd” result’ under the specific facts of a particular case.” (*Carmony, supra*, 33 Cal.4th at p. 378; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) But where the court, aware of its discretion, “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.” (*Carmony*, at p. 378.)

Here, the trial court acknowledged that application of the sentencing norms resulted in an “absurd” sentence, but suggested it had no discretion to impose a non-absurd one. This is not true. The length of the sentence is “a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.” (*Garcia, supra*, 20 Cal.4th at p. 500; accord *People v. Ortega* (2000) 84 Cal.App.4th 659, 668; *People v. Gaston* (1999) 74 Cal.App.4th 310, 315; see also *Clancey, supra*, 56 Cal.4th at p. 581 [“[W]hen substantial doubt exists as to the fairness of the disposition to the People or to the defendant, an indicated sentence will not promote the goals of fairness and efficiency”].)

On this record, we cannot conclude the trial court properly exercised its discretion in ruling on the *Romero* motion. The court’s comments undercut its determination that appellant falls within the spirit of the Three Strikes law. There is no indication that its decision was “an individualized one based on the particular aspects of the current offenses for which the defendant has been convicted and on the defendant’s own history and personal circumstances.” (*People v. McGlothlin* (1998) 67 Cal.App.4th 468, 474.) This approach, which must be followed on remand, “allows the court to perform its obligation to tailor a given sentence to suit the individual defendant.” (*Ibid.*)

## DISPOSITION

Appellant's sentence is vacated and the matter remanded to the trial court to conduct a new *Romero* hearing and to decide whether to exercise its new statutory authority to strike one or both of the five-year prior serious felony conviction enhancements imposed under section 667, subdivision (a). In all other respects, the judgment is affirmed.

If the trial court decides to strike any of the enhancements and/or to grant the *Romero* motion, appellant shall be resentenced and an amended abstract of judgment shall be prepared and forwarded to the Department of Corrections and Rehabilitation. If the court decides not to strike any of the enhancements and denies the *Romero* motion, appellant's original sentence shall remain in effect.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jeffrey G. Bennett, Judge  
Superior Court County of Ventura

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