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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT TRUJILLO,

Defendant and Appellant.

B281815

(Los Angeles County  
Super. Ct. No. KA113510)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Christine M. Aros, 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, Kenneth C. Byrne and Nicholas J. Webster,  
Deputy Attorneys General, for Plaintiff and Respondent.

Robert Trujillo stole a candy bar and a bottle of water from a convenience store and pushed the store manager several times to get away from her after she followed him outside and told him he had to pay for the items. A jury convicted Trujillo of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)),<sup>1</sup> and he admitted at a bifurcated proceeding that he had suffered a prior serious felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i); 1170.12) and section 667, subdivision (a), and had served two prior separate prison terms for felonies. He was sentenced to a state prison term of 11 years.

On appeal Trujillo asks this court to reverse his conviction by rejecting Supreme Court authority holding a defendant who uses force or fear in an attempt to escape with property taken by larceny has committed robbery (commonly referred to as an “*Estes* robbery”).<sup>2</sup> He also contends the trial court abused its

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<sup>1</sup> Statutory references are to this code.

<sup>2</sup> In *People v. Estes* (1983) 147 Cal.App.3d 23 a store security guard confronted the defendant in the parking lot after seeing him shoplift some clothing. Rather than surrender the items, the defendant drew a knife, swung it at the guard and threatened to kill him, which prompted the guard’s retreat. On appeal the defendant challenged his robbery conviction on the ground “the merchandise was not taken from the ‘immediate presence’ of the security guard.” (*Id.* at p. 27.) The *Estes* court rejected that argument, explaining, “The evidence establishes that the appellant forcibly resisted the security guard’s efforts to retake the property and used that force to remove the items from the guard’s immediate presence. By preventing the guard from regaining control over the merchandise, defendant is held to have taken the property as if the guard had actual possession of the goods in the first instance.” (*Ibid.*) The court concluded, “[A]

discretion in denying his request to dismiss his prior strike conviction for attempted robbery and by imposing the middle term, rather than the lower term, when sentencing him. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Evidence at Trial*

Trujillo entered the convenience store at a gas station in Pomona during the afternoon of September 18, 2016. Qi Qi, the gas station and store manager, saw Trujillo pick up a candy bar and put it in his pocket. When Trujillo picked up a second candy bar, Qi told him that he had to pay for the items. Trujillo put the second candy bar down, went to the back of the store and took a bottled water from the refrigerator case. He then walked out of the store without paying for either item.

Qi followed Trujillo outside and again told him he had to pay for items he had taken from the store. Trujillo pushed Qi away with his right hand and then pushed her again with both hands. Trujillo attempted to walk away, but Qi cut in front of him to stop him from leaving. Qi grabbed Trujillo's shirt, which ripped as he pulled away. Trujillo again slapped her with his hands, pulled away and was able to free himself from Qi. Qi testified she believed Trujillo was trying to hurt her.

One of the station's employees called the police emergency number and reported the incident. The responding police officer reported that Qi was visibly shaken and had tears in her eyes.

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robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*Id.* at pp. 27-28.)

Trujillo was arrested later that day in a nearby park. After being advised of his right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), Trujillo admitted he had taken a candy bar from the store but insisted he did not intend to steal it. He explained he did not give the candy bar back when asked because he was scared, did not know what to do and did not know if Qi was going to hurt him. He denied he had pushed Qi, saying he only hit her arm when she tried to grab the candy bar.

Trujillo did not testify or present any witnesses in his defense.

## 2. *The Request To Dismiss the Prior Strike Conviction*

The jury found Trujillo guilty of robbery. Prior to the bifurcated bench trial on the prior conviction allegations, defense counsel filed a written request that the court exercise its discretion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and section 1385 to dismiss Trujillo's prior strike conviction (a 2015 conviction for attempted robbery).

In the moving papers counsel argued Trujillo had used minimal force and Qi had not been injured during the robbery, which had involved only two candy bars and a drink, and explained the prior serious felony conviction, like the current offense, was an *Estes*-type robbery involving a slight use of force.<sup>3</sup>

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<sup>3</sup> Defense counsel reminded the court the People had offered prior to trial that Trujillo plead guilty to grand theft (§ 487, subd. (c)), rather than robbery, with a proposed disposition of 32 months in state prison (the lower term of 16 months doubled) and suggested that proposal "appropriately gauged the severity of the conduct involved in the instant case." Trujillo rejected that

Defense counsel acknowledged Trujillo had a history of theft-related convictions, but claimed he had a drug problem and requested leniency with an order that Trujillo participate in a drug treatment program. Alternatively, counsel asked the court to impose the lower term of two years for the robbery and dismiss the two prior separate prison term enhancements, which would result in a nine-year sentence (two years doubled plus five years for a serious felony under section 667, subdivision (a)).

The prosecutor opposed the *Romero* motion, emphasizing the prior strike conviction had occurred only 15 months earlier and involved the same conduct as the current offense. The prosecutor also pointed out that Trujillo initially had been placed on probation with county jail time for the prior attempted robbery conviction, but Trujillo had several theft charges since then, and his probation was revoked. However, noting that Trujillo faced a maximum term of 17 years, the prosecutor concurred with defense counsel's alternative suggestion of an aggregate state prison term of nine years.

After Trujillo admitted the prior serious felony conviction and two prison priors, the trial court denied the *Romero* motion, highlighting Trujillo's "extensive record, mostly theft-related offenses,"<sup>4</sup> and explaining, "In order for me to strike the strike, I

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offer against the advice of counsel. Trujillo had earlier rejected the People's offer of a 16-month split sentence, eight months in county jail and eight months of mandatory supervision.

<sup>4</sup> Trujillo's probation report reflects a sustained juvenile petition for burglary in December 2004 and adult convictions for taking a vehicle without the owner's consent in September 2006, felony vandalism in December 2006, unlawful possession of a firearm by a felon in February 2008, unlawful possession of a

have to make an affirmative finding that Mr. Trujillo's life, retrospectively and prospectively, are such that he is outside the general spirit of the three strikes law. And I have nothing, absolutely nothing, that shows me that he's making any improvement, that he's done anything to better himself, any efforts that he's made that would convince a reasonable person that he's going to do better in the future than he has in the past." Rejecting in part the recommendation of both the prosecutor and defense counsel, the court sentenced Trujillo to 11 years in state prison: the middle term of three years doubled, plus five years for the prior serious felony conviction enhancement. The court struck the two one-year prior prison sentence enhancements.

### DISCUSSION

1. *Trujillo Was Properly Convicted of Robbery Based on His Use of Force To Retain or Escape with Stolen Property*

Trujillo contends at common law robbery required a finding the defendant had used force or fear before or contemporaneously with the taking of property and insists that Penal Code section 211, enacted in 1872 and defining robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear," is not properly interpreted more broadly to include use of force to retain or escape with stolen property—that is, he argues that *People v. Estes* (1983) 147 Cal.App.3d 23 (*Estes*) was wrongly decided and that he was guilty only of petty theft or shoplifting and simple

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dangerous weapon in February 2009, attempted robbery in March 2015 (the prior serious felony), shoplifting in July 2015 and August 2015, petty theft in August 2015 and shoplifting in November 2015 and December 2015.

assault, not robbery. Trujillo's cramped construction of section 211 is foreclosed by the Supreme Court's decisions in *People v. Gomez* (2008) 43 Cal.4th 249 (*Gomez*) and *People v. Williams* (2013) 57 Cal.4th 776 (*Williams*).

In *Gomez* the Supreme Court considered defendant's conviction for robbery based on evidence he had seized property from the victim's business while the victim was not present. The victim arrived on the scene before defendant departed and followed him as he was leaving. As the victim followed, defendant shot at him. (*Gomez, supra*, 43 Cal.4th at p. 253.) Affirming the robbery conviction, the Court first explained, "[A] taking is not over at the moment of caption; it continues through asportation." (*Id.* at p. 256.) Thus, "a robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away." (*Ibid.*) The Court then held, because robbery is a continuing offense, there is a robbery if the "immediate presence" element, like the "force or fear" element, arises not at caption but during asportation: "If the aggravating factors are in play at any time during the period from caption through asportation, the defendant has engaged in conduct that elevates the crime from simple larceny to robbery." (*Id.* at p. 258.)

In its analysis the Supreme Court expressly noted its approval of the *Estes* court's "discussion regarding the temporal aspect of the force and fear element of robbery" (*Gomez, supra*, 43 Cal.4th at p. 260), and stated, "Our holding that the crime of robbery occurs when property is forcefully retained in the victim's presence, even when the victim was not present at its initial caption, is completely consistent with the Legislature's decision to treat robbery as an aggravated larceny." (*Id.* at p. 264.) The

Court added, “[T]he central element of the crime of robbery [is] the force or fear applied to the individual victim in order to deprive him of his property.’ That deprivation of property occurs whether a perpetrator relies on force or fear to gain possession or to maintain possession against a victim who encounters him for the first time as he carries away the loot.” (*Id.* at p. 265.)

The Supreme Court again expressly approved the *Estes* court’s construction of section 211 in *Williams, supra*, 57 Cal.4th 776, which reversed this court’s affirmance of the robbery conviction of an individual who had shoved a security guard as he was walking away from a store after committing theft by false pretenses. (*Id.* at p. 779.) The Court explained that larceny requires asportation, a carrying away of stolen property. “Because larceny is a continuing offense, a defendant who uses force or fear in an attempt to escape with property taken by larceny has committed robbery.” (*Id.* at p. 787, citing *Gomez, supra*, 43 Cal.4th at pp. 259-260, and *Estes, supra*, 147 Cal.App.3d at pp. 27-28.) Theft by false pretenses, in contrast, has no requirement of asportation. “The crime of theft by false pretenses ends at the moment title to the property is acquired and thus cannot become robbery by the defendant’s later use of force or fear.” (*Williams*, at p. 787.)

Because Trujillo used force against Qi to retain the items he had taken from the store she managed (a theft by larceny), he was properly convicted of robbery.

## 2. *Denial of Trujillo’s Request To Dismiss His Prior Strike Conviction Was Within the Trial Court’s Discretion*

Section 1385, subdivision (a), vests the court with discretion to dismiss a qualifying strike conviction “in furtherance of justice.” (*People v. Superior Court (Romero)*,



*supra*, 13 Cal.4th at p. 530; *People v. Williams* (1998) 17 Cal.4th 148, 158.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . 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 [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.” (*Williams*, at p. 161.)

We review the trial court’s decision not to dismiss a prior strike allegation under section 1385 for abuse of discretion. (*In re Large* (2007) 41 Cal.4th 538, 550.) “‘[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.’” (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) “[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] . . . [¶] . . . ‘[I]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. . . . Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], 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.” (*Id.* at p. 378.)

As the prosecutor argued and the trial court explained in denying the request to dismiss Trujillo’s prior strike conviction, his attempted robbery conviction was in 2015, only 15 months prior to his current robbery conviction; in the intervening period he had five additional convictions for theft-related offenses. Trujillo also had several felony convictions prior to the 2015 strike conviction. In addition, Trujillo was on parole when he robbed Qi’s store in September 2016. Based on Trujillo’s recidivism and the absence of any evidence past probationary periods or incarceration had deterred his on-going criminal behavior, the trial court’s denial of the motion conformed to the spirit of the three strikes law and was neither irrational nor arbitrary.

3. *The Trial Court Properly Exercised Its Discretion When It Imposed the Middle Term for Second Degree Robbery*

Section 1170, subdivision (b), directs the trial court in deciding which of the three authorized terms of imprisonment to impose for an offense to “select the term which, in the court’s discretion, best serves the interests of justice.” California Rules of Court, rule 4.420(b), in turn, authorizes the trial court to “consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” In the absence of a showing that the sentencing decision was irrational or arbitrary, ““the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will

not be set aside on review.”” (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.)

Here, although both the prosecutor and defense counsel recommended the trial court impose the lower term of two years for robbery if it declined to dismiss Trujillo’s prior strike, the court elected to use the three-year middle term, resulting in an 11-year aggregate sentence, rather than the nine-year sentence suggested by the lawyers. While arguably harsh given the minimal monetary value of the items stolen and the fact the victim was not seriously injured, a single factor in aggravation will support imposition of an upper term. (See *People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) The trial court identified several such factors: Trujillo’s numerous prior convictions (Cal. Rules of Court, rule 4.421(b)(2)); his prior incarceration (*id.*, rule 4.421(b)(3)) and his active parole status when the current offense was committed (*id.*, rule 4.421(b)(4)). However, rather than impose the upper term, the trial court selected the middle term and also struck the two prior prison term enhancements. The decision to do so was neither arbitrary nor irrational.

**DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.\*

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